

REMINGTON'S
COMPILED STATUTES
OF WASHINGTON
ANNOTATED

(Cite REM. COMP. STAT.)

SHOWING ALL
STATUTES IN FORCE TO AND INCLUDING THE SESSION LAWS OF 1921
FULLY ANNOTATED TO THE DECISIONS IN THREE TERRITORIAL
AND ONE HUNDRED AND THIRTEEN VOLUMES OF WASHING-
TON STATE REPORTS AND TO THE NOTES IN THE
PRINCIPAL SERIES OF ANNOTATED REPORTS

BY

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IN THREE VOLUMES

VOLUME I
PROCEDURE AND PENAL LAWS

SAN FRANCISCO
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TYPOGRAPHERS AND STEREOTYPERS

PREFACE.

This work revises Remington and Ballinger's Annotated Codes and Statutes of Washington published in 1910, and the Supplementary Pony Code known as Remington's 1915 Code. It embraces all laws of a general nature now in force, including those passed at the regular biennial Session of 1921.

In this state, the well-known policy of the courts to sustain the most general titles to acts has minimized the importance of legislative titles and has encouraged the legislature to embrace in one act various matters but slightly related—matters which naturally fall under different familiar legal titles, or different chapters of a given title. To republish these disarranged acts as they appear in the session laws is to offer a mere "reprint," and not a book of "compiled statutes."

On the other hand, the legislature, from the first Territorial Session in 1854 to the present time, following the universal system so familiar to all lawyers, has, from time to time, enacted Codes of Procedure (Civil, Probate, Justice and Criminal) constituting logically and harmoniously arranged "compiled laws." To disarrange the subject matter contained in such practice acts and to mix and confuse it with laws of a general nature, the various parts of which are already confused and disarranged, upon any alphabetical or other arbitrary classification, can result only in confusion worse confounded.

The primary aim, therefore, of this compilation has been to arrange systematically all those acts and parts of acts which the legislature has not properly arranged, and to leave undisturbed all those more general acts which the legislature has harmoniously arranged to the entire satisfaction of the profession and the public.

It is, therefore, obvious that the laws of the state must be generally divided, as they have ever been in all other states, into two parts. The first part, embraced in Volume I of this work, includes the Codes of Procedure: Civil, Probate, Justice and Criminal; and the logical and systematic arrangement of those acts made by the legislature, now familiar and acceptable to all, cannot be improved upon or safely departed from.

This has enabled me, in Volume I of this work, to make use, for the most part, of the section numbers employed in Remington and Ballinger's Annotated Codes and Statutes (1910) and Remington's 1915 Code. The advantage of so doing will be apparent from the perusal of the latest sixty-odd volumes of our State Reports. The pages of these volumes are replete with citations to these practice Codes, as heretofore compiled in my former works; and by retaining the same section numbers, so far as possible, the future citations of the practice acts of this state will continue, and tie to, the past citations, from Volume 57, Washington Reports, down to date.

It should be carefully noted, in this connection, that this does not apply to the new Probate Code, which the legislature completely rewrote in 1917, condensing into 223 sections the subject matter contained in some 380 sections of the old Probate Code. This new Probate Code is inserted in this work in place of sections 1371 to 1692 of the old Probate Code, which, together with sections 1278 to 1340 of the old Probate Code, were repealed, and are dropped out of this work. This leaves the chapters on Descent and Distribution, sections 1341 to 1370, as they were before, and gives to Volume I of this work (the practice acts) the same section numbers as before, with the exception of the Probate Code and a few other scattering sections of no moment.

The appendix to Remington and Ballinger's Code (sections 2722 to 2991), relating to prosecutions under former laws, has, by lapse of time, lost further significance; and, together with all other repealed laws has been dropped out.

The second part of this work, embraced in Volume II and III, constitutes all the laws of a general nature outside of the four general practice acts. The reception accorded my former compilations of these general laws leaves open to me no other course than to adopt the classification which has proved so satisfactory to the bar and to the public, and which is now more or less familiar to all.

Recognizing some of the difficulties at the time I made my first compilation of the laws of the state, I conceived the idea of minimizing the inconvenience of turning from one part of the work to another distant part in the search for a given statute by the employment of the most general titles possible, with a full preliminary table of contents thereof. In my judgment the greatest mistake a compiler can make is to employ many specific heads, little known or used, such as are, properly, chapters or subdivisions of related matters; for this only serves to scatter, to all the letters of the alphabet, under new, unfamiliar heads, subject matter which every lawyer recognizes as belonging to some well-known legal topic to which he should always be able to turn without disappointment. The few familiar heads necessary can be easily memorized. The prefixed table of contents of each title shows at a glance what the title contains, and the exact location of the particular part desired; and it is only in this way that closely related subjects may be brought together for quick and ready reference from one part to another.

Continuing the consecutive numbering through to the end of the work, the General Laws, Volume II, starts with section 2723, and all the numbers are new, with the exception of those of the Negotiable Instrument Act, which I was able so to place as to use the old numbers of the former Codes, consistently cited in the State Reports since Volume 57 Washington. In the case of all other sections formerly embraced in Remington and Ballinger's, or Remington's, Codes, the old numbers of these compilations appear in brackets in the section headlines. An asterisk indicates that the section has since been amended. This will be a convenience in the use of the Washington State Reports, Volume 57 to date, which cites those statutes by such bracketed numbers; and the use of this Code will be greatly facilitated by bearing these bracketed numbers in mind, wherever they have heretofore been cited in the Re-

ports. This is the only object of inserting the numbers in brackets, which are not for reference.

It is one of the functions of the compiler to notice the titles of the acts, to place his matter accordingly, and call attention to any defects. This I have attempted to do in the customary manner. The title of an act, in the rare cases in which it is material, can be learned from the historical references given; and ordinarily has no more, oftentimes less, to do with the construction of the act than the legislative debates and records or other extraneous proceedings, which, of course, cannot be inserted in compiled laws.

Statute law always presents many perplexing problems touching conflicting, superseded, obsolete and repealed provisions, requiring the greatest care and some legal learning on the part of the compiler. Where the validity of a statute or any part thereof is in doubt, it has been retained. When a law has been expressly repealed, or held by the Supreme Court to be impliedly repealed, it has been omitted. Many laws have been, in part, impliedly repealed; in which case such part has been dropped out, with explanatory footnotes appended. For example, note the many sections of the attachment law, impliedly repealed in part by the chapter on Garnishments, which construction has now, after many years, been confirmed by the Supreme Court since this part went to press.

The peculiar situation in this state, where an act passed by the legislature is subjected to a referendum and suspended until after an election which is pending when a Code is published, leaves no other course to the compiler than to include both the old and the new suspended law, either one of which may be the choice of the people. This course has been adopted in a way that cannot mislead.

All these, and the other ordinary problems of a compiler, I have, kind friends lead me to believe, successfully met in my other works; and they have given me no anxiety or new concern. But there has been one new problem of the most serious nature; and time alone can tell whether I have successfully met it. This relates to the annotations.

To annotate completely these compiled statutes with full references from the syllabi of 116 Volumes of Washington Reports would have added at least two volumes to the work, and nearly doubled its cost. Either these compiled laws had to assume the bulk of a five or six volume work, or the annotations had to be greatly reduced in form. I confidently believe and trust that my solution of this problem will meet the needs and receive the favor of the profession in particular, and the public in general.

Nearly all lawyers in active practice own, and all of them have access to, my Digest of Washington Reports, including all decisions down to Volume 103 Washington. Full annotations in this work would have been but a repetition of the matter in the Digest, and it is very doubtful to my mind whether the same could have been published in the shape of annotations to a Code in the available form in which the Digest presents it.

My aim has been to refer, under each section, to all cases bearing thereon, and also to the particular place in the Digest where the deci-

sions in the cited cases are more fully set out. In addition, all citations of the section are given. Owners of the Digest have this additional aid in its use, and they may save themselves the trouble of examining each case cited in these compiled statutes by readily referring to the Digest paragraph setting out the point at greater length. Those who have no access to the Digest still have the citations to the cases in point. The annotations under each section are carefully classified, with black letter catchwords, plainly indicating the purport of the cases. This applies particularly to mere applications of the statute. In addition, it has been my aim to set out more fully the principal and more important direct constructions of the statutes, and cases determining the validity thereof; and this is particularly true of all the later decisions not included in the Digest, commencing with 104 Washington. I am convinced, from some slight experience and practice in its use, that the plan adopted will prove entirely satisfactory and that it is the only one, under the circumstances, entitled to consideration.

I desire to call attention to a most valuable feature that has not heretofore been included in any Code or Compiled Statutes in this state. The annotations include references, most carefully prepared, to the invaluable series of notes in the selected series of American Reports, including the American State Reports, Annotated Cases, Lawyers Reports Annotated, and American Law Reports. The practitioner will find these of the greatest value.

The practice acts require an independent index, which is in the first volume. No pains have been spared to make this the best index of these practice acts that has ever been offered. At the end of the third volume is a consolidated index of the entire work which has been prepared with the greatest care. The alphabetical arrangement of the General Laws in Volumes II and III, together with an intelligent use of the elaborate table of contents preceding each title, will almost dispense with the use of an index of the general laws in Volumes II and III. The experience of many able lawyers with my former work in such use is ample proof of this fact. This classification, with the numerous cross-reference heads pointing the way, and the sectional cross-reference tables, will be material aids in the use of the Codes, index and annotations.

Accordingly, after three years of strenuous labor, it is with pleasure and confidence that I now offer this work to the indulgent consideration of the profession and the public.

Tacoma, Washington, April, 1922.

ARTHUR REMINGTON. .

PREFACE TO REMINGTON AND BALLINGER'S ANNOTATED CODES AND STATUTES, 1910

This work revises "Ballinger's Annotated Codes and Statutes of the State of Washington," published in 1897. The added laws embrace acts passed at six regular biennial sessions of the legislature, 1899 to 1909, inclusive, and the extraordinary sessions of the years 1901 and 1909, as well as a few earlier enactments that have been discovered to be in force. The new annotations cover the decisions reported in Washington Reports, volumes 16 to 52, inclusive.

The Codes of Procedure (Civil, Probate, Justice and Criminal) in the first volume follow the order of arrangement of the earlier work; except that the chapters relating to Wills, and Descent and Distribution, have been taken from the General Statutes and inserted in the Probate Code, and the schedule of taxable fees of officers and witnesses has been inserted in the chapter on Costs. No other material changes have been made in this volume, except that the preliminary matter, constitutions, and constitutional index have been placed in front to avoid confusion with the index and tables.

Modern methods, and the vast increase in general legislation, require an alphabetical arrangement for the general statutes embraced in the second volume. It has been impossible to achieve an entirely satisfactory plan. Any alphabetical classification is more or less arbitrary, and should be familiarized by users of the book. Accordingly, the heads used are as few and as general as possible. Cross-reference heads are employed to point the way, but this feature has not been extended to take the place of an index. Each general title is preceded by a complete table of contents, and subdivided when necessary. One who bears these simple points in mind will avoid the principal difficulties encountered in the use of a new classification.

Judge Ballinger's invaluable historical references at the end of each section are preserved and the same system adopted for the subsequent enactments, except that the Ballinger Code numbers appear in parentheses immediately after the current code section numbers; an asterisk indicating a later enactment or amendment. His cross-references have also been adopted, amplified, and the system extended to the new enactments.

But few liberties have been taken with Judge Ballinger's annotations to the first fifteen volumes of Washington Reports, but the necessity for more condensation, in the work on the subsequent thirty-seven volumes, has been recognized, and is obvious from these covers. Much has necessarily been sacrificed to brevity, and it has been exceedingly difficult—I will say impossible—to decide where to draw the line to one's entire satisfaction. All citations of current laws, from the earliest times to date, have been briefly noted, at the expense of great labor; this being the first attempt that has been made to reduce to the same terms the ever-varying citations of early acts, re-enactments and compilations.

It has been deemed advisable to print in the form of an appendix, with a separate index immediately following, all the old criminal laws governing prosecutions for crimes committed prior to June 9, 1909. For convenience in reference, the consecutive numbering of sections has been carried through this appendix. The tables of sectional cross-references to earlier compilations and session laws hardly need explanation. The tables for the session laws include only the acts passed since the publication of Ballinger's Code.

Mr. E. G. Kreider's work on the indexes speaks for itself. My thanks are due to him for other valuable assistance, and also to Mr. W. L. Sachse, and Mr. Robert M. Davis, of the Tacoma Bar, Mr. George R. Biddle of the Seattle Bar, and others.

I cannot take leave of this work without acknowledging my renewed appreciation of Judge Ballinger's original compilation of the laws of the Territory and State. It has been my happy purpose to see that none of its value should be lost, and it is with pleasure and confidence that I place it all anew before an appreciative and indulgent profession and the less discriminating general public.

Olympia, Wash., January, 1910.

ARTHUR REMINGTON.

TABLE OF CONTENTS—VOL. I

	PAGE
DECLARATION OF INDEPENDENCE.....	1
CONSTITUTION OF UNITED STATES.....	4
AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.....	13
TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.....	18
ORGANIC ACT OF THE TERRITORY OF WASHINGTON.....	21
ENABLING ACT.....	30
CONSTITUTION OF THE STATE OF WASHINGTON.....	41
AMENDMENTS TO THE STATE CONSTITUTION.....	122
INDEX TO THE STATE CONSTITUTION.....	137

CODES OF PROCEDURE.

TITLE I.—COURTS.

	SECTION
Chapter I. The Supreme Court.....	1
II. Superior Courts	15
III. Justices' Courts	43
IV. Magistrates	50
V. Powers and General Provisions.....	52
VI. County Clerks—Clerk of Superior Court.....	70
VII. Referees and Court Commissioners	82
VIII. Jurors	89
IX. Attorney General and Prosecuting Attorneys.....	112
X. Attorneys and Counselors at Law.....	118

TITLE II.—PROCEDURE IN COURTS OF RECORD.

Chapter I. Rules of Decision and Construction.....	143
II. Forms of Actions.....	153
III. Limitation of Actions.....	155
IV. Parties to Actions	179
V. Venue of Actions.....	204
VI. Manner of Commencing Actions.....	220
VII. Pleadings	255
VIII. Verification of Pleadings.....	281
IX. General Rules of Pleading.....	284
X. Mistakes and Amendments.....	299

TITLE III.—ISSUES, TRIAL AND JUDGMENT.

Chapter I. Issues in Civil Actions.....	309
II. Trial of Civil Actions.....	322

	SECTION
III. The Verdict.....	362
IV. Trial by the Court	367
V. Trial by Referees	369
VI. Agreed Cases.....	378
VII. Exceptions	381
VIII. New Trials	398
IX. Judgments in General.....	404
X. Judgment of Nonsuit	408
XI. Judgment by Default	411
XII. Judgment by Confession	413
XIII. Arbitration and Judgment Thereon.....	420
XIV. Manner of Taking and Entering Judgments.....	431
XV. Judgment Liens.....	444
XVI. Revival of Judgments.....	459
XVII. Vacation and Modification of Judgments.....	464
XVIII. Costs and Disbursements.....	474
 TITLE IV.—THE ENFORCEMENT OF JUDGMENTS.	
Chapter I. Executions	510
II. The Stay of Executions.....	522
III. Homesteads and Exemptions.....	528
IV. Adverse Claims to Property Levied Upon.....	573
V. Sale of Property Under Execution and Redemption.	578
VI. Commissioners to Convey Real Estate.....	605
VII. Proceedings Supplemental to Execution.....	613
 TITLE V.—PROVISIONAL REMEDIES.	
Chapter I. Attachments	647
II. Garnishments	680
III. Claim and Delivery (Replevin).....	707
IV. Injunctions	718
V. Receivers	740
VI. Deposits in Court	745
VII. Arrest and Bail.....	748
VIII. Ne Exeat	778
 TITLE VI.—ACTIONS IN PARTICULAR CASES.	
Chapter I. Actions for Possession of and Quieting Title to Real Property	785
II. Forceful Entry and Detainer.....	810
III. Partition	838
IV. Actions Against the State.....	886
V. Eminent Domain	891
VI. Waste, Trespass and Nuisance.....	937
VII. Establishment of Boundaries of Lands.....	947
VIII. Actions by and Against Public Corporations.....	950
IX. Actions on Official Bonds, Fines and Forfeitures...	958

	SECTION
X. Actions by and Against Executors and Administrators	967
XI. Protection of Sureties.....	974
XII. Divorce and Alimony.....	982
XIII. Change of Name.....	993
TITLE VII.—SPECIAL PROCEEDINGS.	
Chapter I. Certiorari, Mandamus and Prohibition.....	999
II. Information in the Nature of Quo Warranto.....	1034
III. Contempts and Their Punishment.....	1049
IV. Habeas Corpus	1063
V. Assignments for the Benefit of Creditors.....	1086
TITLE VIII.—LIENS AND THEIR ENFORCEMENT.	
Chapter I. The Foreclosure of Chattel Mortgages.....	1104
II. Foreclosure of Mortgages on Real Estate.....	1116
III. Liens of Mechanics and Materialmen.....	1129
IV. Liens of Employees.....	1149
V. Liens on Chattels.....	1154
VI. Security for Labor, etc., on Public Works.....	1159
VII. Liens upon Logs and Other Timber.....	1162
VIII. Liens on Steamers, Boats, etc.....	1182
IX. Liens on Farm Products.....	1188
X. Liens for Storage and Advance Charges.....	1191
XI. Liens for Keeping Livestock.....	1197
XII. Liens of Innkeepers and Their Liability.....	1201
XIII. Liens for Rent.....	1203-1
XIV. Preference Rights of Employees.....	1204
XV. The Construction of Statutes Relating to Liens.....	1208
TITLE IX.—EVIDENCE.	
Chapter I. The Competency of Witnesses.....	1210
II. The Manner of Compelling the Attendance of Witnesses	1215
III. The Examination of Parties.....	1225
IV. Depositions	1231
V. Perpetuation of Testimony.....	1249
VI. Documentary Evidence.....	1254
VII. Oaths and Affirmations.....	1264
VIII. The Restoration of Lost Records.....	1270
TITLE X.—PROBATE LAW AND PROCEDURE.	
Chapter I. Descent	1341
II. Distribution	1364
III. Probate Code	1371
IV. Validity of Sales of Estates.....	1693
V. Adoption of Children.....	1696

	SECTION
VI. Protection of Orphan, Homeless or Neglected Children	1700
VII. Habitual Drunkards	1708
VIII. Estates of Absentees	1751-1
TITLE XI.—APPEALS TO THE SUPREME COURT	1716
TITLE XII.—ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS AND BEFORE MAGISTRATES.	
Chapter I. Commencement of Civil Actions in Justice's Court ..	1755
I-A. Small Claims Department in Justice's Court	1771-1
II. Pleadings in Civil Actions in Justice's Court	1778
III. Arrest and Bail in Justice's Court	1790
IV. Replevin in Justice's Court	1796
V. Garnishee Process by Officers	1807
VI. Writs of Garnishment by Justices	1823
VII. Trial of Civil Actions in Justice's Court	1847
VIII. Judgments in Civil Actions in Justice's Court	1857
IX. Fees and Compensation of Justices of the Peace	1864
X. Executions and Proceedings Thereon	1867
XI. Forms in Civil Actions in Justice's Court	1890
XII. Proceedings for Contempt Before Justices of the Peace	1891
XIII. Witnesses and Depositions	1898
XIV. Appeals from Justice's Court	1910
TITLE XIII.—PROCEDURE IN CRIMINAL ACTIONS.	
Chapter I. Practice in Criminal Actions in Justice's Court	1925
II. Forms in Criminal Actions in Justice's Court	1935
III. Proceedings to Prevent the Commission of Crime ...	1936
IV. Examination of Persons Charged with Crime Before Magistrates	1949
V. Proceedings Against Vagrants	1967
V-A. Bastardy Proceedings	1970
VI. Juvenile Offenders—Commitment to State Training School	1980
VII. Delinquent Children and Juvenile Courts	1987-1
VII-A. Custody and Treatment of Delinquent and Diseased Women	1988
VIII. Limitation of Criminal Actions and Repeals	2005
IX. Parties to Criminal Actions	2007
X. Venue of Criminal Actions	2012
XI. Forms of Criminal Actions	2022
XII. Indictments and Proceedings by Information	2025
XIII. Findings and Presentment of Indictments	2042
XIV. Requisites of Indictments and Informations	2054
XV. Proceedings Before Arraignment	2077
XVI. Arraignment, Pleadings and Proceedings Thereon ...	2093

	SECTION
XVII. Trials and Verdicts in Criminal Actions.....	2134
XVIII. New Trial and Arrest of Judgment.....	2181
XIX. Judgment and the Enforcement Thereof.....	2187
XX. Costs in Criminal Cases.....	2225
XXI. Forfeiture of Recognizances in Criminal Actions....	2231
XXII. Search-warrants	2237
XXIII. Proceedings Relating to Fugitives from Justice....	2241
XXIV. Rewards for the Apprehension of Fugitives.....	2247

TITLE XIV.—CRIMINAL LAW.

Chapter I. General Provisions	2253
II. Rights of Accused.....	2305
III. Crimes Against the Sovereignty of the State.....	2317
IV. Crimes by or Against Public Officers.....	2320
V. Crimes Against the Person.....	2385
VI. Crimes Against Morality, Decency, etc.....	2435
VII. Crimes Against Public Health and Safety.....	2500
VIII. Crimes Against the Public Peace.....	2546
IX. Crimes Against Property	2569
X. Miscellaneous Crimes	2668
XI. Crimes Under Acts not Repealed by the Penal Code of 1909	2697

VOL. II.—GENERAL STATUTES.

TITLE XVI.—AGRICULTURE.

	SECTION
Chapter I. Department of Agriculture	2723
II. Bureau of Farm Development.....	2732
III. State Fair	2736
IV. Southwest Washington Fair.....	2745
V. County Fairs	2750
VI. Marshals of Fairs.....	2754
VII. Noxious Weeds	2756
VIII. Protection of Trees and Plants.....	2780
IX. Extermination of Rodents	2788
X. Agricultural and Vegetable Seeds.....	2810
XI. Fertilizers	2829
XII. Horticulture.....	2839
XIII. Marketing of Farm Products.....	2875
XIV. Washington Crop Credit Act.....	2910
XV. Land Development	2946
XVI. Reclamation of Agricultural Lands.....	3004
XVII. Land Settlement.....	3018
XVIII. State Control of Blasting Powder.....	3028

TITLE XVII.—ANIMALS.

Chapter I. Regulation of Livestock Industry.....	3036
II. Marks and Brands.....	3051
III. Liens for Service of Sires.....	3056
IV. Stock Running at Large.....	3068
V. Damages by Domestic Animals and Dogs.....	3090
VI. Diseased and Infected Stock.....	3110
VII. Sheep Inspection and Diseased Sheep.....	3131
VIII. Estrays	3154
IX. Apiaries and Their Inspection.....	3170
X. Prevention of Cruelty to Animals.....	3184

TITLE XVIII.—BANKS AND BANKING AND TRUST COMPANIES.

Chapter I. State Banking Law.....	3208
II. Guaranty of Bank Deposits.....	3293
III. Mutual Savings Banks.....	3313

TITLE XIX.—BILLS AND NOTES.

Chapter I. Negotiable Instruments.....	3392
II. Bills of Lading and Receipts by Warehousemen, etc.	3587
III. Bills of Lading by Carriers.....	3647

TITLE XX.—BOUNTIES	3702
--------------------------	------

TITLE XXI.—BUILDING AND LOAN ASSOCIATIONS.	SECTION
Chapter I. Incorporation and Powers.....	3716
II. Conversion of Building, Loan and Savings Associations into Mutual Savings Banks.....	3749
TITLE XXII.—CEMETERIES AND CEMETERY ASSOCIATIONS	3758
TITLE XXIII.—CHATTEL MORTGAGES AND CONDITIONAL SALES.	
Chapter I. Chattel Mortgages	3779
II. Conditional Sales	3790
TITLE XXIV.—CONGRESSIONAL DISTRICTS AND ELECTIONS	3792
TITLE XXV.—CORPORATIONS.	
Chapter I. Organization and Management Generally.....	3803
II. Foreign Corporations.....	3852
III. Education, Religious, Social and Charitable Corporations and Associations.....	3863
IV. Corporations not Formed for Profit.....	3888
V. Patrons of Husbandry.....	3901
VI. Co-operative Associations	3904
TITLE XXVI.—COUNTIES.	
Chapter I. Boundaries of Counties.....	3924
II. Change of Boundaries.....	3964
III. General Rights, Duties and Powers.....	3982
IV. Removal of County Seats.....	3998
V. Sale or Disposal of County Property.....	4007
VI. County Officers, Terms of Office, Courtrooms, etc....	4028
VII. County Commissioners	4036
VIII. County Blanks and Printing.....	4078
IX. County Auditors	4083
X. County Treasurers	4106
XI. Prosecuting Attorneys.....	4127
XII. County Assessors	4140
XIII. County Engineers	4143
XIV. Sheriffs	4155
XV. Coroners and Inquests.....	4176
XVI. Salaries of County Officers, Costs and Fees.....	4200
TITLE XXVII.—DIKES AND DRAINS.	
Chapter I. Diking Districts	4236
II. Drainage Districts	4298
III. Reorganization of Diking or Drainage Districts....	4347
IV. Diking and Drainage Districts in Two or More Counties	4361
V. Private Ditches	4394
VI. Drainage and Diking Improvement Systems.....	4405

	SECTION
VII. Excess Costs, Refunding Bonds, Reassessments and Abandoned Ditches	4460
VIII. Assessments on State Lands.....	4478
IX. Payment of Expenses Heretofore Incurred in Con- struction of Ditches, etc.....	4483
 TITLE XXVIII.—EDUCATION.	
Chapter I. School System and State Officers.....	4518
II. Courses of Instruction in State University, State College and Normal Schools.....	4532
III. University of Washington.....	4544
IV. State College of Washington.....	4567
V. Normal Schools	4604
VI. Washington State Training School.....	4624
VII. State School for Girls	4631
VIII. State School for the Deaf and the Blind.....	4644
IX. State Custodial School.....	4655
X. General Provisions Relating to Common School Sys- tem	4680
XI. School Districts, Classification and Powers.....	4694
XII. High School and Non-high School Districts.....	4710
XIII. New Districts, and Alteration of Boundaries.....	4721
XIV. Consolidated and Joint Districts.....	4734
XV. Union High School Districts.....	4754
XVI. Discontinuance and Alteration of Districts.....	4764
XVII. County Superintendents	4767
XVIII. District Officers—General Provisions.....	4775
XIX. Directors of Districts of the First Class.....	4790
XX. Directors of Districts of the Second Class.....	4811
XXI. Directors of Districts of the Third Class.....	4823
XXII. Extending Use of School Buildings.....	4837
XXIII. District Clerk.....	4841
XXIV. Teachers	4844
XXV. School District Finances.....	4857
XXVI. County Boards of Education.....	4868
XXVII. Apportionments	4871
XXVIII. Institutes	4884
XXIX. Text-books and Instruction.....	4893
XXX. Vocational Training and Compulsory Attendance...	4906
XXXI. County Circulating Libraries.....	4926
XXXII. School Revenues	4932
XXXIII. Bonds	4941
XXXIV. Validation of Indebtedness and Bonds Therefor....	4956
XXXV. Certification of Teachers.....	4966
XXXVI. Teachers' Retirement Fund.....	4995
XXXVII. General Elections.....	5021
XXXVIII. Special Meetings	5028

	SECTION
XXXIX. Elections in Districts of the First Class.....	5031
XL. Penalties	5043
XLI. Appeals	5064
XLII. Compulsory Education	5072
XLIII. Grammar School Examinations.....	5089
XLIV. High School Extension Examinations.....	5093
XLV. Kindergartens	5096
XLVI. Prohibiting Sale of Intoxicating Liquors.....	5100
XLVII. Designation and Intent of Act.....	5104
XLVIII. Fire Drills in Schools.....	5106
 TITLE XXIX.—ELECTIONS.	
Chapter I. Qualifications of Electors.....	5110
II. Registration of Voters.....	5114
III. Time and Manner of Holding Elections.....	5138
IV. Nominations and Primary Elections.....	5167
V. Party Conventions	5214
VI. Minor Party and Special Primary Elections.....	5225
VII. Primary Elections for Delegates to Conventions in Cities and Towns.....	5250
VIII. Ballots	5269
IX. Voting Machines	5300
X. Opening Polls and Voting.....	5319
XI. Counting Ballots and Declaring Result.....	5333
XII. The Recall	5350
XIII. Contesting Elections	5366
XIV. Offenses Against the Suffrage.....	5383
XV. Initiative and Referendum.....	5397
TITLE XXX.—ELECTRIC LIGHT AND POWER COMPANIES..	5430
TITLE XXXI.—FENCES	5441
TITLE XXXII.—FERRIES	5462
 TITLE XXXIII.—FINANCE.	
Chapter I. State Fiscal Agent.....	5484
II. State Fiscal Agency in New York.....	5488
II-A. Registration of Municipal Bonds.....	5494
III. Deficiencies in Public Institutions.....	5497
IV. State Funds	5501
V. General Fund and Disbursements Therefrom.....	5509
VI. State Educational Funds.....	5518
VII. Investment of State Educational Funds.....	5537
VIII. Bonding University Lands	5546
IX. State Depositaries	5548
X. County Depositaries	5562
XI. City Depositaries	5568
XII. Bonds for County Purposes.....	5575

	SECTION
XIII. County Road and Bridge Bonds.....	5584
XIV. Bonds to Refund County or City Indebtedness....	5599
XV. Limitations on Indebtedness of Taxing Districts....	5605
XVI. Validating Indebtedness in Counties, Cities and Towns	5609
XVII. Funding Indebtedness in Counties, Cities and Towns	5617
XVIII. Funds for Current Expenses in Counties, Cities, Towns and School Districts.....	5624
XIX. Funds and Tax Levies in Certain Cities.....	5635
TITLE XXXIV.—FIRES	5647
TITLE XXXV.—FISH AND OYSTERS.	
Chapter I. Fisheries Code	5655
II. State Oyster Commission and Oyster Land Reserves.	5775
TITLE XXXVI.—FORESTS AND FOREST FIRES.	
Chapter I. Fires	5781
II. Reforestration and Preservation of Timber.....	5812
TITLE XXXVII.—FRAUDS.	
Chapter I. Statute of Frauds.....	5824
II. Bulk Sales Law.....	5832
III. Trading Stamps	5837
IV. Miscellaneous Frauds	5841
V. Auctioneers	5848
VI. Gambling Losses and Contracts.....	5851
TITLE XXXVIII.—GAME.	
Chapter I. State Game-warden and Deputies.	5854
II. Game Preserves, Islands, etc.....	5862
III. Game Farms for Propagation and Sale.....	5876
IV. Other Than Game Birds Protected.....	5887
V. Prohibited Purposes, Appliances, and Methods of Hunting	5895
VI. Open Season, Bag Limit, Prohibited Places, Posses- sion, Sales, etc.....	5903
VII. Game Fish	5918
VIII. Game Code of 1913.....	5931
TITLE XXXIX.—GEOLOGICAL SURVEY	
TITLE XL.—HEALTH.	
Chapter I. State Board of Health and Sanitary Provisions....	6001
II. Vital Statistics	6011
III. Dead Bodies and Public Morgues.....	6040
IV. Quarantines at Seaports, Pesthouses, etc.....	6047
V. City Boards of Health.....	6085
VI. County and City Boards of Health.....	6091

	SECTION
VII. Control and Treatment of Venereal Diseases.....	6100
VIII. Tuberculosis in Cities of the First and Second Class.	6109
IX. County Tuberculosis Hospitals.....	6114
X. Plumbing in Cities of the First Class.....	6129
XI. Sale of Shoddy	6132
XII. Adulteration of Foods, Drinks and Drugs.....	6137
XIII. Manufacture and Sale of Dairy Products.....	6164
XIV. Sale of Milk in Cities of the First Class.....	6267
XV. Regulation and Conduct of Bakeries.....	6285
 TITLE XLI.—HIGHWAYS.	
Chapter I. The Law of Travel.....	6295
II. Automobiles and Motor Vehicles.....	6312
III. Licensing of Operators of Motor Vehicles.....	6363
IV. Transportation by Motor Vehicles.....	6382
V. Control and Management of County Roads.....	6398
VI. Levy and Collection of Road Taxes.....	6413
VII. Purchase of Quarries for County Road Building...	6423
VIII. Acceptance of Rights of Way	6426
IX. Franchises and Rights in Highways.....	6428
X. Laying Out and Opening County Roads.....	6447
XI. Roads by User.....	6494
XII. Legalizing of County Roads.....	6496
XIII. Vacation of County Roads.....	6503
XIV. Bridges on County Roads and Navigable Streams...	6511
XV. Bridges on Interstate or Intercommunity Roads....	6524
XVI. Turnpike Roads	6555
XVII. Toll Roads	6571
XVIII. Roads Owned by Private Corporations.....	6585
XIX. Roads Improved or Paved at Expense of Land Benefited	6598
XX. Boulevards, Highways, Cycle Paths, etc., at Expense of Land Benefited.....	6647
XXI. Changing and Improving Roads at Expense of Land Benefited	6672
XXII. Independent Highway Districts for Trunk-line High- ways	6699
XXIII. Metropolitan Park Districts.....	6720
XXIV. Arterial Streets	6742
XXV. Private Ways of Necessity.....	6746
XXVI. State Highway Commissioner and Board.....	6759
XXVII. Permanent Highways	6773
XXVIII. Classification and Enumeration of Primary High- ways	6790
XXIX. State Roads	6807
XXX. Highway Funds and Revenue.....	6817

	SECTION
XXXI. Construction and Maintenance of State Roads.....	6827
XXXII. Acquisition of Quarries and Road Material.....	6852
TITLE XLI-A.—HOTELS	6860
TITLE XLII.—HUSBAND AND WIFE.....	6890
TITLE XLIII.—INSANE.	
Chapter I. Establishment of Hospitals for Insane.....	6913
II. Government of Hospitals for Insane.....	6921
III. Acceptance of Donations to Hospitals for the In-	
sane	6926
IV. Commitment of Patients.....	6930
V. Treatment of Patients.....	6954
VI. Custody and Release of the Criminal Insane Com-	
mitted to Prison.....	6969
TITLE XLIV.—INSPECTION.	
Chapter I. Inspection and Grading of Agricultural Seed	
Crops	6975
II. Inspection of Grain and Hay and Regulation of	
Warehouses	6978
III. Concentrated Commercial Feeding Stuffs.....	7016
IV. Hop Inspection	7028
TITLE XLV.—INSURANCE CODE.....	7032
TITLE XLVI.—INTEREST	7299
TITLE XLVII.—INTOXICATING LIQUORS.	
Chapter I. Prohibition and Regulation.....	7306
II. Civil Remedies Against Liquor Dealers.....	7348
TITLE XLVIII.—IRRIGATION AND WATER RIGHTS.	
Chapter I. Water Code	7351
II. Artesian Wells	7404
III. Use of State Waters.....	7408
IV. Irrigation Districts	7417
V. Distribution of Water for Irrigation Purposes.....	7506
VI. Disorganization of Districts by Directors.....	7526
VII. Dissolution of Districts by County Commissioners..	7531

VOL. III.—GENERAL STATUTES--CONT'D.

	SECTION
TITLE XLIX.—JUSTICES OF THE PEACE AND CONSTABLES.	
Chapter I. Election, Qualifications and Duties of Justices of the Peace	7544
II. Election, Qualifications and Duties of Constables...	7555
III. Justices and Constables in Cities and Towns.....	7562
IV. Disposition of Fees and Fines.....	7577
TITLE L.—LABOR LAW.	
• Chapter I. Bureau of Labor.....	7586
II. Wages and Employment.....	7594
III. Female and Child Labor.....	7615
IV. Hours of Labor.....	7642
V. Health and Safety of Employees in Factories, etc...	7658
VI. Arbitration of Disputes.....	7667
VII. Workmen's Compensation Act.....	7673
TITLE LI.—LANDS OF THE STATE.	
Chapter I. Board of State Land Commissioners.....	7797
II. Appeals from Board of State Land Commissioners..	7808
III. Commissioner of Public Lands.....	7815
IV. Selection of Lieu Lands.....	7824
V. Confirmation of Old Titles to School and University Lands	7828
VI. Classification and Selection.....	7833
VII. Appraisal and Sale of Granted Lands.....	7852
VIII. Leasing of School and Granted Lands.....	7880
IX. Capitol Land Grant.....	7896
X. Reclamation of Arid Lands Under the Carey Act...	7922
XI. Reclamation of Granted Lands, in General.....	7946
XII. Tide and Shore Lands.....	7961
XIII. Harbor Lines and Areas, Sales and Leases Thereof	7994
XIV. Leasing Mineral Lands.....	8018
XV. Leasing Petroleum and Natural Gas Lands.....	8028
XVI. Acquisition of Oyster Lands.....	8040
XVII. Sale of Artificial Oyster Beds to Occupiers.....	8052
XVIII. Leasing of Lands for Deep Water Oyster Culture..	8058
XIX. Sale of Jefferson County Oyster Land Reserves....	8069
XX. Trespass on Public Lands.....	8073
XXI. Right to Overflow State Lands for Certain Pur- poses	8078
XXII. Right of Way Over Public Lands.....	8081

	SECTION
XXIII. Rights Ceded the United States.....	8108
XXIV. Local Assessments Against State Lands.....	8125
TITLE LII.—LEGISLATURE.	
Chapter I. Apportionment	8137
II. Expenses	8147
III. Vacancies	8154
IV. Evidence for Contest of Election of Legislator.....	8162
V. Sessions	8177
VI. Testimony and Claims Before.....	8178
VII. Session Laws	8196
VIII. State Board to Promote Uniformity of Legislation..	8204
TITLE LIII.—LIBRARIES, MUSEUMS AND HISTORICAL SOCIETY.	
Chapter I. State Libraries	8208
II. Public Libraries and Museums.....	8226
III. County Law Libraries	8247
IV. University Museum	8255
V. State Historical Society.....	8259
TITLE LIV.—LICENSES.	
Chapter I. Certified Public Accountants.....	8266
II. Architects	8270
III. Barbers	8277
IV. Billiards, Pool and Bowling.....	8289
V. Dogs	8304
VI. Electricians	8307
VII. Embalmers	8313
VIII. Oils	8327
IX. Peddlers	8341
X. Trading Stamps	8359
TITLE LV.—LOGS AND LOGGING.	
Chapter I. State Log-scaler.....	8363
II. Lumber and Shingle Weighers.....	8372
III. Marking and Driving.....	8381
IV. Toll Logging Roads.....	8395
V. Boom Companies	8399
TITLE LVI.—LOST AND UNCLAIMED PROPERTY.....	8416
TITLE LVII.—MARRIAGE	8437
TITLE LVIII.—MILITIA.	
Chapter I. The Militia	8455
II. Military Code	8462
III. The Sons of Veterans.....	8604

TITLE LIX.—MINES AND MINERALS.

SECTION

Chapter I. Mining Corporations.....	8608
II. Location and Possession of Mining Lodes.....	8615
III. Coal Mining Code.....	8636
IV. Protection Against Open Shafts.....	8857
V. Prospecting for Mineral Deposits by Counties.....	8866

TITLE LX.—MUNICIPAL CORPORATIONS.

Chapter I. Incorporation	8833
II. Boundaries, Annexation, etc.	8892
III. Consolidation	8909
IV. Dissolution of Third and Fourth Class Cities.....	8914
V. Classification	8932
VI. Unclassified Cities.....	8944
VII. Cities of First Class, General Provisions.....	8947
VIII. Viaducts, etc., in Cities of the First Class.....	9001
IX. Second Class Cities.....	9006
X. Commission Form of Government.....	9090
XI. Government of Third Class Cities.....	9114
XII. Third and Fourth Class Cities—Construction of Sidewalks	9155
XIII. Fourth Class Cities or Towns.....	9163
XIV. Additional Powers, Bicycles, Poll Tax, Library Levies, Street Railway Extensions.....	9199
XV. Eminent Domain by Cities.....	9214
XVI. Police Matrons	9282
XVII. Plats, Streets, Additions and Parks.....	9288
XVIII. Bridges	9323
XIX. Renewal of Sidewalks.....	9331
XX. Damage Caused by Change of Grade.....	9333
XXI. Special Assessments, General Provisions.....	9340
XXII. Local Improvements	9352
XXIII. Filling Lowlands, First and Second Class Cities....	9426
XXIV. Filling Lowlands, Second and Third Class Cities....	9432
XXV. Liens for Water and Light Charges.....	9471
XXVI. Protection of Water Supply.....	9473
XXVII. Accident Claims and Funds.....	9478
XXIX. Public Utilities, Acquisition of, and Bonds for....	9488
XXX. Disposal of Utilities.....	9505
XXXI. Local Improvement Bonds.....	9515
XXXII. Bonds for Waterworks, etc.....	9526
XXXIII. Indebtedness and Funding Bonds.....	9532
XXXIV. Indebtedness upon Annexation or Consolidation....	9552
XXXV. Firemen's Pension Fund.....	9559
XXXVI. Police Pension Fund.....	9579

TITLE LXI.—NAVIGATION.

SECTION

Chapter I. Waterways Across Tide Lands.....	9593
II. Excavation of Waterways, and Filling in Tide Lands by Private Contract.....	9603
III. Erection of Wharves.....	9613
IV. Vacation of Waterways.....	9620
V. River Improvements	9625
VI. Canal, Harbor and River Improvements.....	9663
VII. Port Districts	9688
VIII. Lease of Harbor Areas on Fresh Waters Within Port Districts	9719
IX. Commercial Waterways	9724
X. Public Waterways.....	9777
XI. Regulation of Steam Vessels, etc.....	9843
XII. Pilotage on Puget Sound.....	9871
XIII. Pilotage on Columbia River.....	9876
XIV. Craft Adrift.....	9891
XV. Obstructions to Navigation.....	9897

TITLE LXII.—NOTARIES PUBLIC.

Chapter I. Notaries Public	9899
II. Commissioners of Deeds.....	9910

TITLE LXIII.—NUISANCES

9912

TITLE LXIV.—OFFICERS.

Chapter I. Elective Public Officers.....	9929
II. Official Bonds	9930
III. Release of Sureties on Official Bonds.....	9942
IV. Traveling Expense Vouchers.....	9947
V. Resignations and Vacancies.....	9949
VI. Inspection and Supervision of Public Offices.....	9952

TITLE LXV.—OILS AND NATURAL GAS.....

9964

TITLE LXVI.—PARTNERSHIPS AND BUSINESS NAMES.

Chapter I. Limited Partnerships.....	9966
II. Assumed Business Names.....	9976

TITLE LXVII.—PAUPERS, PENSIONERS AND PUBLIC AID.

Chapter I. Paupers	9981
II. Mothers' Pensions	9993
III. Aid to Adult Blind.....	9999

TITLE LXVIII.—PHYSICIANS, SURGEONS AND TREATMENT
OF THE SICK.

Chapter I. Physicians	10008
II. Dead Bodies.....	10026
III. Dentistry	10030
IV. Veterinary	10040

	SECTION
V. Osteopathy	10056
VI. Chiropody	10074
VII. Chiropractic Practice	10098
VIII. Drugless Healing.....	10112
IX. Pharmacy	10126
X. Optometry	10147
XI. Nurses	10164
XII. Midwifery	10174
 TITLE LXIX.—PRISONS AND REFORMATORIES.	
Chapter I. County and City Jails.....	10186
II. The State Penitentiary.....	10210
III. Pardons and Paroles.....	10247
IV. Penitentiary Products and Employment of Convicts.....	10257
V. State Reformatory	10280
VI. The State Training School.....	10299
VII. Truant Schools.....	10309
 TITLE LXX.—PUBLIC IMPROVEMENT CONTRACTS	
10320	
 TITLE LXXI.—PUBLIC PRINTER AND PRINTING.	
Chapter I. Public Printer	10323
II. Public Printing for Municipalities, etc.....	10335
 TITLE LXXII.—PUBLIC UTILITIES AND RAILROADS.	
Chapter I. Public Service Commission Law.....	10339
II. Right to Construct and Operate Railway Lines.....	10460
III. Railway Equipment Regulations.....	10470
IV. Transportation Regulations	10491
V. Sale of Tickets.....	10496
VI. Uniforms of Employees.....	10504
VII. Fences and Crossings.....	10506
VIII. Appropriation of Lands and Highways for Corporate Purposes.....	10538
IX. Conditional Sales of Rolling Stock and Railway Equipments	10540
X. Special Police for Railroads.....	10542
 TITLE LXXIII.—REAL PROPERTY.	
Chapter I. Age of Majority.....	10548
II. Deeds and Other Instruments Affecting Real Property	10550
III. Disability of Aliens and Indians.....	10581
IV. Recording Instruments	10596
V. Satisfaction and Assignments of Mortgages.....	10614
VI. Leases	10618
VII. Registration of Land Titles.....	10622

TITLE LXXIV.—SOLDIERS AND SAILORS.		SECTION
Chapter I.	Soldiers' Homes	10727
II.	County Aid.....	10737
III.	Soldiers' Bonus.....	10743-1
IV.	Veterans' Welfare Commission.....	10744
V.	Pension for Indian War Veterans.....	10749
VI.	Employment of, and Licenses to, Union Veterans...	10753
VII.	Burial.....	10757
TITLE LXXV.—STATE BOARDS AND APPOINTIVE OFFICES.		
Chapter I.	Administrative Code.....	10759
II.	State Board of Control.....	10899
III.	Budget System for State Offices.....	10927
IV.	State Bureau of Statistics.....	10933
V.	State Board of Park Commissioners.....	10940
VI.	Superintendent of Capitol Building and Grounds..	10952
VII.	Public Archives Commission.....	10953
VIII.	State Humane Bureau.....	10960
TITLE LXXVI.—STATE OFFICERS.		
Chapter I.	Salaries, Oaths and Terms of Office.....	10965
II.	Governor	10982
III.	Secretary of State.....	10991
IV.	State Auditor.....	10996
V.	State Treasurer	11019
VI.	Attorney General	11030
VII.	Judges of the Supreme Court.....	11035
VIII.	Judges of the Superior Courts.....	11045
IX.	Salaries and Gowns of Supreme and Superior Court Judges	11053
X.	Clerk, Reporter and Reports of Supreme Court....	11055
TITLE LXXVII.—STREET AND ELECTRIC RAILWAYS.		
Chapter I.	Regulations as to Employees and Appliances.....	11073
II.	Corporate Rights	11082
TITLE LXXVIII.—TAXATION.		
Chapter I.	State Tax Commissioners and Tax Investigations...	11087
II.	Definitions and Exemptions.....	11097
III.	Listing and Assessment of Property.....	11109
IV.	Assessment of Mining Properties and Profits.....	11150
V.	Assessment of Railroads.....	11160
VI.	Privilege Tax on Private Car and Express Com- panies	11172
VII.	Assessment of Telegraph and Telephone Companies, Electric Light Lines, etc.....	11188
VIII.	Inheritance Tax.....	11201
IX.	Equalization of Assessments.....	11219

	SECTION
X. Levy of Tax.....	11226
XI. Poll Tax	11242
XII. Collection of Taxes.....	11252
XIII. Certificates of Delinquency, Foreclosure, Tax Deeds, etc.	11289
XIV. Assessment and Collection of Taxes in Cities of First Class	11318
XV. Assessment of Taxes in Cities of the Second, Third and Fourth Classes, etc.....	11328
TITLE LXXIX.—TELEGRAPH AND TELEPHONE COMPANIES..11338	
TITLE LXXX.—TOWNSHIPS.	
Chapter I. The Vote on Organization.....	11360
II. Division of Counties into Townships.....	11363
III. Town Meetings, Powers of Towns.....	11369
IV. Qualifications of Town Officers.....	11393
V. Filling Vacancies	11405
VI. Duties of Town Supervisors.....	11407
VII. Duties of Town Clerk.....	11412
VIII. Claims Against Towns.....	11422
IX. Duties of Town Treasurer	11431
X. Duties of Town Officers at Elections.....	11439
XI. The Assessment of Property.....	11441
XII. Town Taxes and Charges.....	11445
XIII. Town Bonds	11450
XIV. Poll Tax, Collection of Town Taxes.....	11453
XV. Fees of Town Officers.....	11456
XVI. Pounds and Poundmasters.....	11458
XVII. Actions by or Against Towns.....	11460
XVIII. Guide-posts	11468
XIX. Posting Notices	11473
XX. Books and Papers of Outgoing Officers.....	11474
XXI. Miscellaneous Provisions	11478
TITLE LXXXI.—TOWNSITES	
TITLE LXXXII.—TRADEMARKS	
TITLE LXXXIII.—WAREHOUSES	
TITLE LXXXIV.—WATER AND WATER-POWER COMPANIES.	
Chapter I. Powers and Rights of Appropriation.....	11570
II. Water and Power Districts.....	11579
TITLE LXXXV.—WEIGHTS AND MEASURES.	

DECLARATION OF INDEPENDENCE.

IN CONGRESS, JULY 4, 1776.

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation, till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature,—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

DECLARATION OF INDEPENDENCE.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has effected to render the military independent of and superior to the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:—

For quartering large bodies of armed troops among us;

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our government;

For suspending our own legislature, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring, on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these oppressions, we have petitioned for redress in the most humble terms. Our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

DECLARATION OF INDEPENDENCE.

Nor have we been wanting in attention to our British brethren. We have warned them, from time to time, of attempts, by their legislature, to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war; in peace, friends.

We, therefore, the representatives of the United States of America, in general congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by authority of the good people of these colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent states; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire:
JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

Massachusetts Bay:
SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE,
ELBRIDGE GERRY.

Rhode Island, etc.:
STEPHEN HOPKINS,
WILLIAM ELLERY.

Connecticut:
ROGER SHERMAN,
SAMUEL HUNTINGTON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

New York:
WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS.

New Jersey:
RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

Pennsylvania:
ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER.

JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

Delaware:
CAESAR RODNEY,
GEORGE READ,
THOMAS M'KEAN.

Maryland:
SAMUEL CHASE,
WILLIAM PACA,
THOMAS STONE,
CHARLES CARROLL, of Carrollton.

Virginia:
GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, Jr.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina:
WILLIAM HOOPER,
JOSEPH HEWES,
JOHN PENN.

South Carolina:
EDWARD RUTLEDGE,
THOMAS HEYWARD, Jr.,
THOMAS LYNCH, Jr.,
ARTHUR MIDDLETON.

Georgia:
BUTTON GWINNETT,
LYMAN HALL,
GEORGE WALTON.

CONSTITUTION OF THE UNITED STATES.

PREAMBLE.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

ARTICLE I.

§ 1. LEGISLATIVE POWER—CONGRESS.—All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives.

§ 2. HOUSE OF REPRESENTATIVES.—The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand; but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

The house of representatives shall choose their speaker and other officers, and shall have the sole power of impeachment.

§ 3. SENATE.—The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years; and each senator shall have one vote.

Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be

CONSTITUTION OF THE UNITED STATES.

chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointment until the next meeting of the legislature, which shall then fill such vacancies.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

The vice president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

The senate shall choose their other officers, and also a president pro tempore, in the absence of the vice president, or when he shall exercise the office of president of the United States.

The senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law.

§ 4. ELECTIONS OF SENATORS AND REPRESENTATIVES.—The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators.

SESSIONS OF CONGRESS.—The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

§ 5. POWERS OF HOUSES OF CONGRESS—QUORUM.—Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

§ 6. COMPENSATION OF MEMBERS—PRIVILEGES—DISABILITIES.—The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases except treason, felony, and breach of

CONSTITUTION OF THE UNITED STATES.

the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

§ 7. MANNER OF PASSING BILLS—ORDERS, RESOLUTIONS, ETC.—All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States. If he approve he shall sign it, but if not he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment), shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives, according to the rules and limitations prescribed in the case of a bill.

§ 8. POWERS OF CONGRESS.—The congress shall have power,—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations and among the several states and with the Indian tribes;

To establish an uniform rule of naturalization; and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

CONSTITUTION OF THE UNITED STATES.

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the supreme court;

To define and punish piracies and felonies committed on the high seas and offenses against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress;

To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

§ 9. LIMITATIONS OF POWERS OF CONGRESS.—The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto law shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by laws; and a regular statement and account of the receipts and expenditure of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state.

CONSTITUTION OF THE UNITED STATES.

§ 10. LIMITATION OF POWERS OF STATES.—No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts; or grant any title of nobility.

No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

§ 1. EXECUTIVE POWER—PRESIDENT AND VICE PRESIDENT. The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice president, chosen for the same term, be elected as follows:—

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the vote shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list, the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice president. But if there should remain two or more who have equal votes, the senate shall choose from them, by ballot, the vice president.]

The congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

CONSTITUTION OF THE UNITED STATES.

No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice president, and the congress may by law provide for the case of removal, death, resignation, or inability, both of the president and vice president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or a president shall be elected.

The president shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

§ 2. POWERS AND DUTIES OF PRESIDENT.—The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the senate, to make treaties, provided two thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate shall appoint, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers as they think proper in the president alone, in the courts of law, or in the heads of departments.

The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session.

§ 3. MESSAGES—CONVENING AND ADJOURNING CONGRESS, ETC.—He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

§ 4. IMPEACHMENT OF OFFICERS.—The president, vice president, and all civil officers of the United States, shall be removed from office on

CONSTITUTION OF THE UNITED STATES.

impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

§ 1. JUDICIAL DEPARTMENT.—The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

§ 2. JUDICIAL POWER.—The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers, and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.

§ 3. TREASON—EVIDENCE—PUNISHMENT.—Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV.

§ 1. RECORDS AND PROCEEDINGS OF STATES—EFFECT—AUTHENTICATION.—Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

§ 2. PRIVILEGES OF CITIZENS.—The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime.

CONSTITUTION OF THE UNITED STATES.

No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

§ 3. NEW STATES.—New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned, as well as of the congress.

The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

§ 4. REPUBLICAN FORM OF GOVERNMENT—GUARANTEE OF. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

AMENDMENTS.—The congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three fourths of the several states, or by conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the congress: Provided, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first articles; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

ARTICLE VI.

DEBTS—SUPREME LAW—NO RELIGIOUS TEST.—All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution as under the confederation.

This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

CONSTITUTION OF THE UNITED STATES.

ARTICLE VII.

RATIFICATION.—The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

GEO. WASHINGTON,
President and Deputy from Virginia.

New Hampshire:
JOHN LANGDON,
NICHOLAS GILMAN.

Massachusetts:
NATHANIEL GORHAM,
RUFUS KING.

Connecticut:
WM. SAML. JOHNSON,
ROGER SHERMAN.

New York:
ALEXANDER HAMILTON.

New Jersey:
WIL. LIVINSTON,
WM. PATERSON,
DAVID BREARLEY,
JONA. DAYTON.

Pennsylvania:
B. FRANKLIN,
ROBT. MORRIS,
THOS. FITZSIMONS,
JAMES WILSON,
THOMAS MIFFLIN,
GEO. CLYMER,
JARED INGERSOLL,
GOUV. MORRIS.

Delaware:
GEO. READ,
JOHN DICKINSON,
JACO. BROOM,
GUNNING BEDFORD, Jr.,
RICHARD BASSETT.

Maryland:
JAMES McHENRY,
DANL. CARROLL,
DAN. of ST. THOS. JENIFER.

Virginia:
JOHN BLAIR,
JAMES MADISON, Jr.

North Carolina:
WM. BLOUNT,
HU. WILLIAMSON,
RICHD. DOBBS SPAIGHT.

South Carolina:
J. RUTLEDGE,
CHARLES PINCKNEY,
CHARLES COTESWORTH PINCKNEY,
PIERCE BUTLER.

Georgia:
WILLIAM FEW,
ABR. BALDWIN.

Attest: WILLIAM JACKSON, Secretary.

ARTICLES.

IN ADDITION TO AND AMENDATORY OF THE CONSTITUTION OF THE UNITED STATES,

Proposed by Congress and Ratified by the Legislatures of the Several States,
Pursuant to the Fifth Article of the Original Constitution.

ARTICLE I.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

FREEDOM OF RELIGION, SPEECH, ETC.—Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

ARTICLE II.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

RIGHT TO BEAR ARMS.—A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

ARTICLE III.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

QUARTERING OF SOLDIERS.—No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

UNREASONABLE SEARCHES PROHIBITED.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

RIGHTS OF PERSONS CHARGED WITH CRIME.—No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

ADDITIONAL AND AMENDATORY ARTICLES.

ARTICLE VI.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

MODE OF TRIAL.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE VII.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

JURY TRIAL—RIGHT OF GUARANTEED.—In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

ARTICLE VIII.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

EXCESSIVE BAIL, FINES AND PUNISHMENTS.—Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

POWERS RESERVED NOT DISPARAGED.—The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

[Proposed by Congress September 25, 1789; ratified December 15, 1791.]

POWERS NOT DELEGATED.—The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

ARTICLE XI.

[Proposed by Congress March 5, 1794; ratified January 8, 1798.]

LIMITATION OF JUDICIAL POWER.—The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

[Proposed by Congress December 12, 1803; ratified September 5, 1804.]

ELECTION OF PRESIDENT AND VICE PRESIDENT.—The electors shall meet in their respective states, and vote by ballot for president and vice president, one of whom at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice president, and

ADDITIONAL AND AMENDATORY ARTICLES.

they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice president shall act as president, as in the case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice president shall be the vice president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the senate shall choose the vice president; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice president of the United States.

ARTICLE XIII.

[Proposed by Congress February 1, 1865; declared ratified December 18, 1865.]

§ 1. **SLAVERY PROHIBITED.**—Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

§ 2. Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

[Proposed by Congress June 16, 1866; declared ratified July 28, 1868.]

§ 1. **CITIZENSHIP—EQUALITY OF RIGHTS.**—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. **APPORTIONMENT.**—Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive

ADDITIONAL AND AMENDATORY ARTICLES.

and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. **DISABILITIES FROM HOLDING OFFICE.**—No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who having previously taken an oath as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. **VALIDITY OF PUBLIC DEBT—INVALIDITY OF REBEL DEBT.**—The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection, or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

[Proposed by congress February 27, 1869; declared ratified March 30, 1870.]

§ 1. **RIGHT OF SUFFRAGE.**—The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

ARTICLE XVI.

[Proposed by sixty-first congress; declared ratified February 25, 1913.]

Income Tax.

The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

ARTICLE XVII.

[Amendment proposed by sixty-first congress; declared ratified May 31, 1913.]

Direct Election of Senators.

That in lieu of the first paragraph of section 3 of article I of the constitution of the United States, and in lieu of so much of paragraph 2 of the same

ADDITIONAL AND AMENDATORY ARTICLES.

section as relates to the filling of vacancies, the following be proposed as an amendment to the constitution, which shall be valid to all intents and purposes as part of the constitution, when ratified by the legislatures of three-fourths of the states:

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct. (See section 4047, post, for enabling act empowering governor to fill vacancy by appointment.)

This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as part of the constitution.

ARTICLE XVIII.

[Proposed by sixty-fourth congress; declared ratified January 15, 1919.]

National Prohibition.

Resolved by the senate and house of representatives of the United States of America in congress assembled (two-thirds of each house concurring therein), that the following amendment to the constitution be, and hereby is, proposed to the states, to become valid as a part of the constitution when ratified by the legislatures of the several states as provided by the constitution:

§ 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States, and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

§ 2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

§ 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

ARTICLE XIX.

[Proposed by sixty-sixth congress; declared ratified August 26, 1920.]

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

§ 2. Congress shall have power by appropriate legislation to enforce the provisions of this article.

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.

IN REGARD TO LIMITS WESTWARD OF THE ROCKY MOUNTAINS.

[Concluded June 15, 1846; proclaimed by the President August 5, 1846.]

PREAMBLE.

Whereas, a treaty between the United States of America and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, was concluded and signed by their plenipotentiaries at Washington, on the fifteenth day of June last, which treaty is word for word as follows:—

The United States of America and Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, deeming it to be desirable for the future welfare of both countries that the state of doubt and uncertainty which has hitherto prevailed respecting the sovereignty and government of the territory on the northwest coast of America, lying westward of the Rocky or Stony Mountains, should be finally terminated by an amicable compromise of the right mutually asserted by the two parties, over the said territory, have respectively named plenipotentiaries to treat and agree concerning the terms of such settlement; that is to say: The President of the United States of America has, on his part, furnished with full powers James Buchanan, Secretary of State of the United States, and her Majesty, the Queen of the United Kingdom of Great Britain and Ireland, has, on her part, appointed the right honorable Richard Pakenham, a member of her Majesty's most honorable Privy Council, and her Majesty's envoy extraordinary and minister plenipotentiary to the United States; who, after having communicated unto each other their respective full powers, found in good and due form, have agreed upon and concluded the following articles:—

ARTICLE I.

From the point on the forty-ninth parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territory of the United States, and those of her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly, through the middle of the said channel, and of Fuca Straits to the Pacific Ocean: Provided, however, That the navigation of the whole of said channel and straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties.

ARTICLE II.

From the point at which the forty-ninth parallel of north latitude shall be found to intersect the great northern branch of the Columbia River, the

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.

navigation of the said branch shall be free and open to the Hudson's Bay Company, and to all British subjects trading with the same, to the point where the said branch meets the main stream of the Columbia, and thence down the said main stream to the ocean, with free access into and through the said river or rivers, it being understood that all the usual portages along the line thus described shall, in like manner, be free and open. In navigating the said river or rivers, British subjects, with their goods and produce, shall be treated on the same footing as citizens of the United States; it being, however, always understood that nothing in this article shall be construed as preventing, or intended to prevent, the government of the United States from making any regulations respecting the navigation of the said river or rivers, not inconsistent with the present treaty.

ARTICLE III.

In the future appropriation of the territory south of the forty-ninth parallel of north latitude, as provided in the first articles of this treaty, the possessory rights of the Hudson's Bay Company, and of all British subjects who may be already in the occupation of land or other property lawfully acquired within the said territory, shall be respected.

"POSSESSORY RIGHTS" OF BRITISH SUBJECTS.—The stipulation of the United States as to the possessory rights of British subjects in the occupation of land in Oregon did not constitute a grant to such British subjects, nor confer upon them any interest in the soil: *Cowenia et al. v. Hannah et al.*,

3 Or. 465; *Town v. De Haven et al.*, 5 Saw. 146.

Such stipulation was merely a promise by the United States to Great Britain, for a violation of which the only remedy would be a claim upon the United States for compensation: *Id.*

ARTICLE IV.

The farms, lands, and other property of every description belonging to the Puget Sound Agricultural Company on the north side of the Columbia River shall be confirmed to the said company. In case, however, the situation of those farms and lands should be considered by the United States to be of public and political importance, and the United States government should signify a desire to obtain possession of the whole, or of any part thereof, the property so required shall be transferred to the said government, at a proper valuation, to be agreed upon between the parties.

ARTICLE V.

The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by her Britannic Majesty; and the ratifications shall be exchanged at London, at the expiration of six months from the date hereof, or sooner if possible.

In witness whereof, the respective plenipotentiaries have signed the same, and have affixed hereto the seals of their arms.

Done at Washington, the fifteenth day of June, in the year of our Lord one thousand eight hundred and forty-six.

JAMES BUCHANAN. [L. S.]
RICHARD PAKENHAM. [L. S.]

TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN.

And whereas, the said treaty has been duly ratified on both parts, and the respective ratifications of the same were exchanged at London on the seventeenth ultimo, by Louis McLane envoy extraordinary and minister plenipotentiary of the United States, and Viscount Palmerston, her Britannic Majesty's principal secretary of state for foreign affairs, on the part of their respective governments,—

Now, therefore, be it known, that I, James K. Polk, President of the United States of America, have caused the said treaty to be made public, to the end that the same, and every clause and article thereof, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington, this fifth day of August, in the year of our Lord one thousand eight hundred and forty-six, and of the [L. S.] independence of the United States the seventy-first.

JAMES K. POLK.

By the President:

JAMES BUCHANAN, Secretary of State.

ORGANIC ACT OF THE TERRITORY OF WASHINGTON.

AN ACT TO ESTABLISH THE TERRITORIAL GOVERNMENT OF WASHINGTON.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act, all that portion of Oregon Territory lying and being south of the forty-ninth degree of north latitude, and north of the middle of the main channel of the Columbia River, from its mouth to where the forty-sixth degree of north latitude crosses said river, near Fort Walla Walla, thence with said forty-sixth degree of latitude to the summit of the Rocky Mountains, be organized into and constitute a temporary government by the name of the Territory of Washington: Provided, That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed: Provided further, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the Territorial government of Oregon, together with the improvements thereon, be, and is hereby confirmed and established to the several religious societies to which said missionary stations respectively belong.

§ 2. And be it further enacted, That the executive power and authority in and over said Territory of Washington shall be vested in a governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the President of the United States. The governor shall reside in said Territory, shall be the commander-in-chief of the militia thereof, shall perform the duties and receive the emoluments of Superintendent of Indian affairs; he may grant pardons and remit fines and forfeitures for offenses against the laws of said Territory, and respites for offenses against the laws of the United States until the decision of the President can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of the said Territory, where, by law, such commissions shall be required, and shall take care that the laws be faithfully executed.

§ 3. And be it further enacted, That there shall be a Secretary of said Territory, who shall reside therein, and hold his office for four years, unless sooner removed by the President of the United States; he shall record and preserve all the laws and proceedings of the Legislative Assembly hereinafter constituted, and all the acts and proceedings of the Governor in his Executive department; he shall transmit one copy of

ORGANIC ACT OF TERRITORY OF WASHINGTON.

the laws and journals of the Legislative Assembly within thirty days after the end of each session, and one copy of the executive proceedings and official correspondence semi-annually, on the first days of January and July in each year, to the President of the United States, and two copies of the laws to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress. And in case of the death, removal, resignation, or absence of the Governor from the Territory, the Secretary shall be, and he is hereby authorized and required to execute and perform all the powers and duties of the Governor during such vacancy or absence, or until another Governor shall be duly appointed and qualified to fill such vacancy.

§ 4. And be it further enacted, That the Legislative power and authority of said Territory shall be vested in a Legislative Assembly, which shall consist of a Council and House of Representatives. The Council shall consist of nine members, having the qualifications of voters, as hereinafter prescribed, whose term of service shall continue three years. Immediately after they shall be assembled, in consequence of their first election, they shall be divided as equally as may be into three classes. The seats of the members of Council of the first class, shall be vacated at the expiration of the first year, of the second class at the expiration of the second year, and of the third class at the expiration of the third year, so that one-third may be chosen every year; and if vacancies happen, by resignation or otherwise, the same shall be filled at the next ensuing election. The House of Representatives shall, at its first session, consist of eighteen members, possessing the same qualifications as prescribed for members of the Council, and whose term of service shall continue one year. The number of representatives may be increased by the Legislative Assembly, from time to time, in proportion to the increase of qualified voters: Provided, That the whole number shall never exceed thirty. An apportionment shall be made, as nearly equal as practicable, among the several counties or districts, for the election of the Council and Representatives, giving to each section of the Territory representation in the ratio of its qualified voters, as nearly as may be. And the members of the Council and of the House of Representatives shall reside in, and be inhabitants of, the district or county or counties, for which they may be elected, respectively. Previous to the first election, the Governor shall cause a census or enumeration of the inhabitants and qualified voters of the several counties and districts of the Territory to be taken, by such persons, and in such mode, as the Governor shall designate and appoint; and the persons so appointed shall receive a reasonable compensation therefor. And the first election shall be held at such time and places, and be conducted in such manner, both as to the persons who shall superintend such election and the returns thereof, as the Governor shall appoint and direct; and he shall at the same time declare the number of members of the Council and House of Representatives to which each of the counties or districts shall be entitled under this act; and the Governor shall, by his proclamation, give at least sixty days' previous notice of such apportionment, and of the time, places, and man-

ORGANIC ACT OF TERRITORY OF WASHINGTON.

ner of holding such election. The persons having the highest number of legal votes in each of said council districts for members of the Council shall be declared by the Governor to be duly elected to the Council, and the persons having the highest number of legal votes for the House of Representatives shall be declared by the Governor to be duly elected members of said House: Provided, That in case two or more persons voted for shall have an equal number of votes, and in case a vacancy shall otherwise occur in either branch of the Legislative Assembly, the Governor shall order a new election; and the persons thus elected to the Legislative Assembly shall meet at such place, and on such day, within ninety days after such elections, as the Governor shall appoint. But thereafter the time, place, and manner of holding and conducting all elections by the people, and the apportioning the representation in the several counties or districts to the Council and House of Representatives, according to the number of qualified voters, shall be prescribed by law, as well as the day of the commencement of the regular session of the Legislative Assembly: Provided, That no session in any one year shall exceed the term of sixty days, except the first session, which shall not exceed one hundred days.

§ 5. And be it further enacted, That every white male inhabitant above the age of twenty-one years, who shall have been a resident of said Territory at the time of the passage of this act, and shall possess the qualifications hereinafter prescribed, shall be entitled to vote at the first election, and shall be eligible to any office within the said Territory; but the qualifications of voters and of holding office at all subsequent elections shall be such as shall be prescribed by the Legislative Assembly: Provided, That the right of suffrage and of holding office shall be exercised only by citizens of the United States above the age of twenty-one years, and those above that age who shall have declared on oath their intention to become such, and shall have taken an oath to support the constitution of the United States and the provisions of this act: And provided further, That no officer, soldier, seaman, mariner, or other person in the army or navy of the United States, or attached to troops in the service of the United States, shall be allowed to vote in said Territory, by reason of being on service therein, unless said Territory is, and has been for the period of six months, his permanent domicil: Provided further, That no person belonging to the army or navy of the United States shall ever be elected to or hold any civil office or appointment in said Territory.

§ 6. And be it further enacted, That the Legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly shall be submitted to the congress of the United States, and, if disapproved, shall be null and of no effect: Provided, That nothing in this act shall be construed to give power to incorporate a bank or any

ORGANIC ACT OF TERRITORY OF WASHINGTON.

institution with banking powers, or to borrow money in the name of the Territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank-notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting any other banking powers or privileges, shall be passed by the Legislative Assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in said Territory; nor shall said Legislative Assembly authorize the issue of any obligation, scrip, or evidence of debt, by said Territory, in any mode or manner whatever, except certificates for service to said Territory. And all such laws, or any law or laws inconsistent with the provisions of this act, shall be utterly null and void. And all taxes shall be equal and uniform; and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be according to the value thereof. To avoid improper influences, which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title.

§ 7. And be it further enacted, That all township, district, and county officers not herein otherwise provided for, shall be appointed or elected in such manner as shall be provided by the Legislative Assembly of the Territory of Washington.

§ 8. And be it further enacted, That no member of the Legislative Assembly shall hold or be appointed to any office which shall have been created, or the salary or emoluments of which shall have been increased while he was a member, during the term for which he was elected and for one year after the expiration of such term; but this restriction shall not be applicable to members of the first Legislative Assembly; and no person holding a commission or appointment under the United States shall be a member of the Legislative Assembly, or shall hold any office under the government of said Territory.

§ 9. And be it further enacted, That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually, and they shall hold their offices during the period of four years, and until their successors shall be appointed and qualified. The said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such times and places as may be prescribed by law; and the said judges shall, after their appointments, respectively reside in the districts which shall be assigned them. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law: Provided, That justices of the peace shall not have jurisdiction of any case in which the title to land shall in any wise come

ORGANIC ACT OF TERRITORY OF WASHINGTON.

in question, or where the debt or damages claimed shall exceed one hundred dollars; and the said supreme and district courts, respectively shall possess chancery as well as common-law jurisdiction. Each district court, or the judge thereof, shall appoint its clerk, who shall also be the register in chancery, and shall keep his office at the place where the court may be held. Writs of error, bills of exception, and appeals, shall be allowed in all cases from the final decisions of said district court to the supreme court under such regulations as may be prescribed by law; but in no case removed to the supreme court shall trial by jury be allowed in said court. The supreme court, or the justices thereof, shall appoint its own clerk, and every clerk shall hold his office at the pleasure of the court for which he shall have been appointed. Writs of error, and appeals from the final decisions of said supreme court, shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the circuit court of the United States, where the value of the property, or the amount in controversy, to be ascertained by the oath or affirmation of either party, or other competent witness, shall exceed two thousand dollars, and in all cases where the constitution of the United States, or acts of congress, or a treaty of the United States, is brought in question; and each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution of the United States and the laws of said Territory, as is vested in the circuit and district courts of the United States; writs of error and appeal in all such cases shall be made to the supreme court of said Territory the same as in other cases. Writs of error, and appeals from the final decisions of said supreme court, shall be allowed and may be taken to the supreme court of the United States in the same manner as from the circuit courts of the United States, where the value of the property, or the amount in controversy, shall exceed two thousand dollars, and each of said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the circuit and district courts of the United States; and also of all cases arising under the laws of said Territory, and otherwise. The said clerk shall receive in all such cases the same fees which the clerks of the district courts of the Territory of Oregon receive for similar services.

§ 10. And be it further enacted, That there shall be appointed an attorney for said Territory, who shall continue in office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President, and who shall receive the same fees and salary as is provided by law for the attorney of the United States for the Territory of Oregon. There shall also be a marshal for the Territory appointed, who shall hold his office for four years and until his successor shall be appointed and qualified, unless sooner removed by the President, and who shall execute all processes issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States; he shall perform the duties, be subject to the same regulation and penalties, and be entitled to the same fees, as are provided by law for the marshal of

ORGANIC ACT OF TERRITORY OF WASHINGTON.

the Territory of Oregon, and shall, in addition, be paid the sum of two hundred dollars annually as a compensation for extra services.

§ 11. And be it further enacted, That the governor, secretary, chief justice, and associate justices, attorney, and marshal, shall be nominated, and, by and with the advice and consent of the Senate, appointed by the President of the United States. The governor and secretary to be appointed as aforesaid shall, before they act as such, respectively take an oath or affirmation before the district judge, or some justice of the peace in the limits of said Territory duly authorized to administer oaths and affirmations by the laws in force therein, or before the chief justice or some associate justice of the supreme court of the United States, to support the constitution of the United States, and faithfully to discharge the duties of their respective offices, which said oaths, when so taken, shall be certified by the person before whom the same shall have been taken; and such certificates shall be received and recorded by the said Secretary among the executive proceedings; and the Chief Justice and Associate Justices, and all other civil officers in said Territory, before they act as such, shall take a like oath or affirmation before the said Governor or Secretary, or some judge or justice of the peace of the Territory who may be duly commissioned and qualified, which said oath or affirmation shall be certified and transmitted, by the person taking the same, to the Secretary, to be by him recorded as aforesaid; and afterwards, the like oath or affirmation shall be taken, certified and recorded in such manner and form as may be prescribed by law. The Governor shall receive an annual salary of fifteen hundred dollars as Governor, and fifteen hundred dollars as Superintendent of Indian affairs. The Chief Justice, and Associate Justices, shall each receive an annual salary of two thousand dollars. The Secretary shall receive an annual salary of fifteen hundred dollars. The said salaries shall be paid quarterly, from the dates of the respective appointments, at the Treasury of the United States, but no such payment shall be made until said officers shall have entered upon the duties of their respective appointments. The members of the legislative assembly shall be entitled to receive three dollars each per day during their attendance at the session thereof, and three dollars each for every twenty miles' travel in going to and returning from said sessions, estimated according to the nearest usually traveled route. And a chief clerk, one assistant clerk, a sergeant-at-arms, and door-keeper, may be chosen for each house; and the chief clerk shall receive five dollars per day, and the said other officers three dollars per day, during the session of the legislative assembly; but no other officers shall be paid by the United States: Provided, That there shall be but one session of the legislative assembly annually, unless, on an extraordinary occasion, the Governor shall deem it expedient and proper to call the legislature together. There shall be appropriated, annually, the sum of fifteen hundred dollars, to be expended by the Governor, to defray the contingent expenses of the Territory, including the salary of a clerk of the executive department; and there shall also be appropriated, annually, a sufficient sum to be expended by the Secretary of the Territory, and upon an estimate to be made by the Secretary

ORGANIC ACT OF TERRITORY OF WASHINGTON.

of the Treasury of the United States, to defray the expenses of the legislative assembly, the printing of the laws, and other incidental expenses; and the Governor and Secretary of the Territory shall, in the disbursement of all moneys intrusted to them, be governed solely by the instructions of the Secretary of the Treasury of the United States, and shall, semi-annually, account to the said Secretary for the manner in which the aforesaid sums of money shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by said legislative assembly for objects not specially authorized by the acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects.

§ 12. And be it further enacted, That the laws now in force in said Territory of Washington, by virtue of the legislation of Congress in reference to the Territory of Oregon, which have been enacted and passed subsequent to the first day of September, eighteen hundred and forty-eight, applicable to the said Territory of Washington, together with the legislative enactments of the Territory of Oregon, enacted and passed prior to the passage of, and not inconsistent with, the provisions of this act, and applicable to the said Territory of Washington, be, and they are hereby, continued in force in said Territory of Washington until they shall be repealed or amended by future legislation.

§ 13. And be it further enacted, That the legislative assembly of the Territory of Washington shall hold its first session at such time and place in said Territory as the Governor thereof shall appoint and direct; and at said first session, or as soon thereafter as they shall deem expedient, the legislative assembly shall proceed to locate and establish the seat of government for said Territory, at such place as they may deem eligible; which place, however, shall thereafter be subject to be changed by said legislative assembly. And the sum of five thousand dollars, out of any money in the Treasury not otherwise appropriated, is hereby appropriated and granted to said Territory of Washington, to be there applied by the Governor to the election of suitable buildings at the seat of government.

§ 14. And be it further enacted, That a delegate to the House of Representatives of the United States, to serve for the term of two years, who shall be a citizen of the United States, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been heretofore exercised and enjoyed by the delegates from the several other Territories of the United States to the House of Representatives, but the delegate first elected shall hold his seat only during the term of the Congress to which he shall be elected. The first election shall be held at such time, and places, and be conducted in such manner, as the Governor shall appoint and direct; of which, and the time, place, and manner of holding such elections, he shall give at least sixty days' notice by proclamation; and at all subsequent elections the time, places, and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the Governor to be duly elected, and a certificate thereof shall be given accordingly. The delegate from said

ORGANIC ACT OF TERRITORY OF WASHINGTON.

Territory shall be entitled to receive the same per diem compensation and mileage at present allowed the delegate from the Territory of Oregon.

§ 15. And be it further enacted, That all suits, complaints, process, and proceedings, civil and criminal, at law and in chancery, and all indictments and informations, which shall be pending and undetermined in the courts established within and for said Territory of Oregon, by act of congress, entitled "An act to establish the territorial government of Oregon," approved August fourteen, one thousand eight hundred and forty-eight, wherein the venue in said cases, suits at law, or in chancery, or criminal proceedings, shall be included within the limits hereinbefore declared and established for the said Territory of Washington; then, and in that case, said actions so pending in the Supreme or Circuit Courts of the Territory of Oregon shall be, by the clerks of said courts, duly certified to the proper courts of said Territory of Washington; and thereupon said causes shall, in all things concerning the same, be proceeded on, and judgments, verdicts, decrees, and sentences rendered thereon, in the same manner as if the said Territory had not been divided. All bonds, recognizances, and obligations of every kind whatsoever, valid, under the existing laws, within the limits of said Territory of Oregon, shall be held valid under this act, and all crimes and misdemeanors against the laws now in force within the said limits of the Territory of Washington may be prosecuted, tried, and punished in the courts established by this act, and all penalties, forfeitures, actions, and causes of action, may be recovered and enforced, under this act, before the Supreme and Circuit Courts established by this act as aforesaid: Provided, That no right of action whatever shall accrue against any person for any act done in pursuance of any law heretofore passed by the legislative assembly of the Territory of Oregon, and which may be declared contrary to the constitution or laws of the United States.

§ 16. And be it further enacted, That all justices of the peace, constables, sheriffs, and other judicial and ministerial officers, who shall be in office within the limits of said Territory of Washington when this act shall take effect, shall be and they are hereby authorized and required to continue to exercise and perform the duties of their respective offices, as officers of said Territory, until they or others shall be duly elected or appointed, and qualified, to fill their places in the manner herein directed, or until their offices shall be abolished.

§ 17. And be it further enacted, That the sum of five thousand dollars be, and the same is hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to be expended, by and under the direction of the Governor of Washington, in the purchase of a library, to be kept at the seat of government for the use of the Governor, legislative assembly, Judges of the Supreme Court, secretary, marshal, and Attorney of said Territory, and such other persons, and under such regulations, as shall be prescribed by law.

§ 18. And be it further enacted, That until otherwise provided for by law, the Governor of said Territory may define the judicial districts of said Territory, and assign the judges who may be appointed for said

ORGANIC ACT OF TERRITORY OF WASHINGTON.

Territory to the several districts, and also appoint the times and places for holding courts in the several counties or subdivisions in each of said judicial districts by proclamation, to be issued by him; but the legislative assembly, at their first or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times and places of holding the courts, as to them shall seem expedient and proper.

§ 19. And be it further enacted, That all officers to be appointed by the President, by and with the advice and consent of the Senate, for the Territory of Washington, who, by virtue of the provisions of any law of Congress now existing, or which may be enacted during the present session of Congress, are required to give security for moneys that may be intrusted with them for disbursement, shall give such security at such time and place, and in such manner, as the Secretary of the Treasury may prescribe.

§ 20. And be it further enacted, That when the lands in said Territory shall be surveyed under the direction of the Government of the United States preparatory to bringing the same into market or otherwise disposing thereof, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the County Commissioners of the counties in which said sections so occupied as aforesaid are situated be, and they are hereby, authorized to locate other lands to an equal amount in sections, or fractional sections, as the case may be. within their respective counties, in lieu of said sections so occupied as aforesaid.

§ 21. And be it further enacted, That the Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia River, where said river forms a common boundary between said Territories.

Approved, March 2, 1853.

ENABLING ACT.

AN ACT TO PROVIDE FOR THE DIVISION OF DAKOTA INTO TWO STATES AND TO ENABLE THE PEOPLE OF NORTH DAKOTA, SOUTH DAKOTA, MONTANA, AND WASHINGTON TO FORM CONSTITUTIONS AND STATE GOVERNMENTS, AND TO BE ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES, AND TO MAKE DONATIONS OF PUBLIC LANDS TO SUCH STATES.

[Approved February 22, 1889.]

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the territories of Dakota, Montana, and Washington, as at present described, may become the states of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

§ 2. The area comprising the territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall at the same time assemble in convention at the city of Sioux Falls.

§ 3. That all persons who are qualified by the laws of said territories to vote for representatives to the legislative assemblies thereof are hereby authorized to vote for and choose delegates to form conventions in said proposed states; and the qualifications for delegates to such conventions shall be such as by the laws of said territories, respectively, persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed states, in such districts as may be established as herein provided, in proportion to the population of each of such counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief justice, and the secretary of said territories; and the governors of said territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed states, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is

ENABLING ACT.

prescribed by the laws of said territories regulating elections therein for delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons residents in said proposed states, who are qualified voters of said territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

§ 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and after organization shall declare, on behalf of the people of said proposed states, that they adopt the constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and state governments, for said proposed states respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States, and the people of said states:—

First. That the perfect toleration of religious sentiment shall be secured, and that no inhabitant of said states shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of congress may prescribe.

Third. That the debts and liabilities of said territories shall be assumed and paid by said states, respectively.

ENABLING ACT.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said states, and free from sectarian control.

§ 5. That the convention which shall assemble at Bismarck shall form a constitution and state government for a state to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and state government for a state to be known as South Dakota: Provided, That at the election for delegates to the constitutional convention in South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words "For the Sioux Falls constitution," or the words "Against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "For the Sioux Falls constitution," it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection at the election hereinafter provided for in this act, the constitution framed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at that election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed state, to the reapportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the state of South Dakota shall be admitted as a state in the Union under said constitution as hereinafter provided; but the archives, records, and books of the territory of Dakota shall remain at Bismarck, the capital of North Dakota, until an agreement in reference thereto is reached by said states. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at that election shall be "Against the Sioux Falls constitution," then and in that event it shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and state government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

§ 6. It shall be the duty of the constitutional convention of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarck, the present seat of government of said territory, and agree upon an equitable division of all property belonging to the territory of Dakota, the disposition of all public records, and also adjust and agree upon the amount of the debts and liabilities of the territory, which shall be assumed and paid by each of the proposed states of North Dakota and South Dakota; and the agreement reached respecting the territorial debts and liabilities shall be incorporated in the respective constitutions, and each of said states shall obligate itself to pay its proportion of such debts and liabilities the same as if they had been created by such states respectively.

ENABLING ACT.

§ 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective constitutions, as provided for in this act, the territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the territory so rejecting its proposed constitution shall continue under the territorial government of the present territory of Dakota, but shall, after the state adopting its constitution is admitted into the Union, be called by the name of the territory of North Dakota, or South Dakota, as the case may be: Provided, That if either of the proposed states provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the governor of the territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution, or to amend the rejected constitution, and shall submit such new constitution, or amended constitution, to the people of the proposed state for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled, and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed state.

§ 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota, it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed state on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed states, respectively, for ratification or rejection, at elections to be held in said proposed states on said first Tuesday in October; at the elections provided in this section, the qualified voters of said proposed states shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said territories, who, with the governor and chief justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution, the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon, and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed states are republican in form, and if all the provisions of this act have been complied

ENABLING ACT.

with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed states which have adopted constitutions and formed state governments as herein provided shall be deemed admitted by congress into the Union, under and by virtue of this act, on an equal footing with the original states, from and after the date of said proclamation.

§ 9. That until the next general census, or until otherwise provided by law, said states shall be entitled to one representative in the House of Representatives of the United States, except South Dakota which shall be entitled to two; and the representatives to the fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said state officers are elected and qualified under the provisions of each constitution, and the states, respectively, are admitted into the Union, the territorial officers shall continue to discharge the duties of their respective offices in each of said territories.

§ 10. That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior: Provided, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act, until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain.

§ 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

§ 12. That upon the admission of each of said states into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said states, to be selected and located in legal subdivisions, as provided in section ten of this act, shall be and are hereby granted to said states for the purpose of erecting public buildings at the capital of said states for legislative, executive, and judicial purposes.

ENABLING ACT.

§ 13. That five per centum of the proceeds of the sales of public lands lying within said states which shall be sold by the United States subsequent to the admission of said states into the Union, after deducting all the expenses incident to the same, shall be paid to the said states, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within the said states respectively.

§ 14. That the lands granted to the territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the states of South Dakota, North Dakota, and Montana, respectively, if such states are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said states, and any portion of said lands that may not have been selected by either of said territories of Dakota or Montana may be selected by the respective states aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said states severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the territory of Washington, as, together with the lands confirmed to the vendees of the territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in the like manner to the state of Washington for the purposes of a university in said state. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said states respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted by the act of June sixteenth, eighteen hundred and eighty, to the territory of Dakota, for an asylum for the insane, shall, upon the admission of said state of South Dakota into the Union, become the property of said state.

§ 15. That so much of the lands belonging to the United States as have been acquired and set apart for the purpose mentioned in "An Act appropriating money for the erection of a penitentiary in the territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is, hereby granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said state of South Dakota for the purposes therein designated; and the states of North Dakota and Washington shall respectively have like grants for the same purpose and subject to like terms and conditions, as provided in said act of March second, eighteen hundred and eighty-one, for the territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the state of Montana.

ENABLING ACT.

§ 16. That ninety thousand acres of land, to be selected and located as provided in section ten of this act, are hereby granted to each of said states, except to the state of South Dakota, to which one hundred and twenty thousand acres are granted for the use and support of agricultural colleges in said states, as provided in the acts of congress making donations of lands for such purpose.

§ 17. That in lieu of the grant of land for purposes of internal improvement made to new states by the eighth section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the states provided for by this act, and in lieu of any claim or demand by the said states, or either of them, under the act of September twenty-eighth, eighteen hundred and fifty, and section 2479 of the Revised Statutes, making a grant of swamp and overflowed lands to certain states, which grant it is hereby declared is not extended to the states provided for in this act, and in lieu of any grant of saline lands to said states, the following grants of land are hereby made, to wit:—

To the state of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for state normal schools, eighty thousand acres; for public buildings at the capital of said state, fifty thousand acres; and for such other educational and charitable purposes as the legislature of said state may determine, one hundred and seventy thousand acres; in all five hundred thousand acres.

To the state of North Dakota: A like quantity of land as is in this section granted to the state of South Dakota, and to be for like purposes and in like proportion, as far as practicable.

To the state of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for state normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore made for that purpose, fifty thousand acres; for the establishment of a state reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the state, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the state of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for state normal schools, one hundred thousand acres; for public buildings at the state capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for state charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the states provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective states may severally provide.

§ 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivisions or por-

ENABLING ACT.

tion of any smallest subdivision thereof in any township, shall be found by the Department of the Interior to be mineral lands, said states are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said states in lieu thereof, for the use and the benefit of the common schools of said states.

§ 19. That all lands granted in quantity or as indemnity by this act shall be selected under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective states entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said states the number of acres in each heretofore donated by congress to said territories for similar objects.

§ 20. That the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the treasury not otherwise appropriated, to each of said territories for defraying the expenses of the said conventions, except to Dakota, for which the sum of forty thousand dollars is so appropriated, twenty thousand dollars each for South Dakota and North Dakota, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the territorial legislatures. Any money hereby appropriated not necessary for such purpose shall be covered into the treasury of the United States.

§ 21. That each of said states, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the states, respectively; and the circuit and districts courts therefor shall be held at the capital of such state for the time being, and each of said districts shall, for judicial purposes until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial circuit. There shall be appointed for each of said districts one district judge, one United States attorney, and one United States marshal. The judge of each of said districts shall receive a yearly salary of three thousand five hundred dollars, payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in each district, who shall keep their offices at the capital of said state. The regular terms of said courts shall be held in each district, at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerks of the circuit and district courts of each of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States; and shall, for the services they may perform, receive the fees and compensation allowed by

ENABLING ACT.

law to other similar officers and persons performing similar duties in the state of Nebraska.

§ 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the supreme court of the United States upon any record from the supreme court of either of the territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either of said courts, may be heard and determined by said supreme court of the United States. And the mandate of execution or of further proceedings shall be directed by the supreme court of the United States to the circuit or district court hereby established within the state succeeding the territory from which such record is or may be pending, or to the supreme court of such state, as the nature of the case may require: Provided, That the mandate of execution or of further proceedings shall, in cases arising in the territory of Dakota, be directed by the supreme court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the state of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the state of North Dakota, or to the supreme court of the territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and state courts herein named shall respectively, be the successor of the supreme court of the territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the territories mentioned in this act, in any case arising within the limits of any of the proposed states prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the supreme court of the United States as they shall have had by law prior to the admission of said state into the Union.

§ 23. That in respect to all cases, proceedings, and matters now pending in the supreme or districts courts of either of the territories mentioned in this act at the time of the admission into the Union of either of the states mentioned in this act, and arising within the limits of any such state, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said territory; and in respect to all other cases, proceedings, and matters pending in the supreme or district courts of any of the territories mentioned in this act at the time of the admission of such territory into the Union, arising within the limits of said proposed state, the courts established by such state shall, respectively, be the successors of said supreme and district territorial courts; and all the files, records, indictments, and proceedings relating to any such cases shall be transferred to such circuit, district, and state courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause, or proceeding now pending, or that prior to the admission of any of the states mentioned in this act shall be pending in any territorial court in any of the territories mentioned in this act, shall abate by the admission of any such state into the Union, but the same shall be transferred and proceeded with in

ENABLING ACT.

the proper United States circuit, district, or state court, as the case may be: Provided, however, That in all civil actions, causes, and proceedings in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request, such cases shall be proceeded with in the proper state courts.

§ 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full state governments, including members of the legislatures and representatives in the fifty-first congress; but said state governments shall remain in abeyance until the state shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed states shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed state shall certify the election of the Senators and Representatives in the manner required by law; and when such state is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other states in the Congress of the United States; and the officers of the state governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such state officers; and all laws in force made by said territories, at the time of their admission into the Union, shall be in force in said states, except as modified or changed by this act or by the constitutions of the states, respectively.

§ 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said territories or by congress, are hereby repealed.

CONSTITUTION OF THE STATE OF WASHINGTON.

[This constitution was framed by a convention of seventy-five delegates, chosen by the people of the territory of Washington at an election held May 14, 1889, under § 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with § 8 of the Enabling Act, the President of the United States proclaimed the admission of the State of Washington into the Union.]

PREAMBLE.

We the people of the state of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

ARTICLE I.

Bill of Rights.

Cited in 53 Wash. 2; 84 Wash. 62.

§ 1. POLITICAL POWER.—All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

Cited in 30 Wash. 443; 90 Wash. 419.

This section has no application to the

distribution of the sovereign power: *State v. Clark*, 30 Wash. 439, 71 Pac. 20.

§ 2. SUPREME LAW OF THE LAND.—The constitution of the United States is the supreme law of the land.

Cited in 1 Wash. 386.

This section only relates to matters wherein the general government assumes to control the individual states, and not to prosecutions by information and to dispensing with grand juries, as to which the federal constitution has no application in the states: *Rafferty, In re*, 1 Wash. 382, 25 Pac. 465.

Infamous crimes may be prosecuted in this state by information, as the constitution of the United States does not assume to regulate prosecutions under state laws:

Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *State v. Baldwin*, 15 Wash. 15, 45 Pac. 650.

The state cannot prescribe the kind of money in which debts are to be paid: *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

Decisions of federal courts as controlling upon constitutional questions: See *Remington's Digest, Courts*, § 38, and cases cited.

§ 3. PERSONAL RIGHTS.—No person shall be deprived of life, liberty, or property without due process of law.

Cited in 5 Wash. 304; 13 Wash. 159; 16 Wash. 415; 17 Wash. 450; 18 Wash. 78, 595; 19 Wash. 208, 337; 29 Wash. 604; 35 Wash. 512; 36 Wash. 312, 453; 39 Wash. 164; 41 Wash. 178; 42 Wash. 240; 44 Wash. 352, 354; 45 Wash. 252; 46 Wash. 302; 54 Wash. 153; 60 Wash. 112; 63 Wash. 468; 65 Wash. 175, 213; 67 Wash. 40, 641; 75 Wash. 582, 587; 77 Wash. 535; 78 Wash. 55; 79 Wash. 609; 80 Wash.

700; 81 Wash. 671; 86 Wash. 24, 434; 87 Wash. 655; 89 Wash. 506; 94 Wash. 277, 304; 98 Wash. 210, 659; 101 Wash. 505, 633; 102 Wash. 475, 103 Wash. 43, 49; 108 Wash. 136; 109 Wash. 691; 110 Wash. 531.

DUE PROCESS OF LAW: See *Remington's Digest, Const. Law*, §§ 120—142.

By "due process" and "the law of the land," is meant that life, liberty and

property are to be held under the protection of the general rules that govern society: *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216.

Remington's Code, section 7309, prohibiting the manufacture of intoxicating liquors for personal or home consumption, does not deprive any person of life, liberty or property without due process of law: *State v. Fabbri*, 98 Wash. 207, 167 Pac. 133.

This section is not violated by the workmen's compensation act: *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

Deprivation of liberty in general: See Remington's Digest, Const. Law, § 121; *Colby v. Backus*, 19 Wash. 347, 53 Pac. 367, 67 Am. St. Rep. 732; *Brown, In re*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540; *Pellissier v. Reed*, 75 Wash. 201, 134 Pac. 813; *Weber v. Doust*, 81 Wash. 668, 143 Pac. 148 (overruled on rehearing); *Weber v. Doust*, 84 Wash. 330, 146 Pac. 623.

One accused of murder who submits a plea of insanity to trial by a jury and is found not guilty by reason of insanity, may be committed to prison if found manifestly dangerous, conformably to § 6959, Bal. Code, and is not deprived of liberty without due process of law: *State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191.

Criminal prosecutions: See Remington's Digest, Const. Law, §§ 122, 122-1; *State v. Glindemann*, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; *State v. Zenner*, 35 Wash. 249, 77 Pac. 191; *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020, Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216; *State v. Anderson*, 5 Wash. 350, 31 Pac. 909; *State v. Kyle*, 14 Wash. 550, 45 Pac. 147.

A fine against keeping open any playhouse or theater on Sunday is not unconstitutional as an abridgment of the rights of the individual: *State v. Herald*, 47 Wash. 538, 92 Pac. 376, 20 L. R. A. (N. S.) 433.

Intoxicating liquors—Offenses—Opening and conducting "joint"—intent and overt acts: *State v. Burgess*, 111 Wash. 537, 191 Pac. 635.

Deprivation of liberty as to occupation or employment or to contract: See Remington's Digest, Const. Law, § 125; *State v. Considine*, 16 Wash. 358, 47 Pac. 755; *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979; *O'Neill, In re*, 41 Wash. 174, 83 Pac. 104, 6 Ann. Cas. 869, 3 L. R. A. (N. S.) 558; *State v. Littooy*, 52 Wash. 87, 100 Pac. 170, 17 Ann. Cas. 292;

State v. Somerville, 67 Wash. 638, 122 Pac. 324.

Minimum wage—Hearing before industrial welfare commission—Necessity of notice: *Spokane Hotel Co. v. Younger*, 113 Wash. 359, 194 Pac. 595.

The right of an attorney to practice is property, and depriving him of it by a punishment for contempt, when no contempt in fact was committed, is a taking without due process of law: *State ex rel. Rohde v. Sachs*, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857.

Section 3137, of this code, prohibiting the use of the word "trust" in the corporate name of a company not incorporated as a trust company, is not a taking of property without due process, as to existing corporations, in view of Const., Art. XII, § 1: *Union Trust Co. v. Moore*, 104 Wash. 50, 175 Pac. 565.

Deprivation of property in general: See Remington's Digest, Const. Law, § 126; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876; *Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863 (overruled in *Id.*, 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108; *State ex rel. Baldwin v. Moore*, 7 Wash. 173, 34 Pac. 461; *State ex rel. Burrows v. Superior Court*, 43 Wash. 225, 86 Pac. 632; *Fuhrman v. Power*, 43 Wash. 553, 86 Pac. 960; *Nielson v. Sponer*, 46 Wash. 14, 89 Pac. 155, 123 Am. St. Rep. 910; *Northern Pac. R. Co. v. Railroad Commission*, 58 Wash. 360, 108 Pac. 938, 28 L. R. A. (N. S.) 1021; *Chlopeck Fish Co. v. Seattle*, 64 Wash. 315, 17 Pac. 232; *Crosier v. Cudihee*, 85 Wash. 237, 147 Pac. 1146; *State ex rel. Kern v. Emerson*, 90 Wash. 565, 155 Pac. 579; *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574.

There is a property right in animals *ferae naturae*, such as deer, game birds, and domesticated swan, of which the owner cannot be deprived by an act of the legislature without due compensation, as guaranteed by this section: *Graves v. Dunlap*, 87 Wash. 648, 152 Pac. 532, Ann. Cas. 1917B, 944, L. R. A. 1916C, 338.

Exercise of power of eminent domain—Procedure: See Remington's Digest, Const. Law, § 128; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Smith's Petition, In re*, 9 Wash. 85, 37 Pac. 311, 494; *Snohomish County v. Haywood*, 11 Wash. 429, 39 Pac. 652; *Scanor v. County Commrs.*, 13 Wash. 48, 42 Pac. 552; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36; *Neitzel v. Spokane International R. Co.*, 80 Wash. 30, 141 Pac.

186; *State ex rel. Mountain Timber Co. v. Superior Court*, 77 Wash. 585, 137 Pac. 994; *State ex rel. Gray's Harbor Logging Co. v. Superior Court*, 82 Wash. 503, 144 Pac. 722; *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502, 171 Pac. 539.

Taxation of property: See Remington's Digest, Const. Law, §§ 129—131.

In general: *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795; *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563; *State ex rel. Kern v. Jerome*, 80 Wash. 261, 141 Pac. 753; *Northern Pac. R. Co. v. Adams County*, 78 Wash. 53, 138 Pac. 307, 51 L. R. A. (N. S.) 474.

Taxation—Public purpose: *State ex rel. Reclamation Board v. Clausen*, 110 Wash. 525, 188 Pac. 538.

— Tax sales and proceedings thereon: *State ex rel. American Savings Union v. Whittlesey*, 17 Wash. 447, 50 Pac. 119; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Pennsylvania Co. v. Tacoma*, 36 Wash. 656, 79 Pac. 306; *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299; *Plumb v. Dyas*, 38 Wash. 240, 80 Pac. 432; *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849; *Spokane Falls & N. R. Co. v. Abitz*, 38 Wash. 8, 80 Pac. 192; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786.

Local improvements—Notice of hearing of objections to assessments: *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 686; *State ex rel. Bussell v. Abraham*, 61 Wash. 601, 112 Pac. 671; *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Orcas Street etc. Seattle*, In re, 87 Wash. 218, 151 Pac. 506.

Fence and stock laws: See Remington's Digest, Const. Law, § 132; *Oregon R. & N. Co. v. Smalley*, 1 Wash. 206, 20 Pac. 601, 23 Pac. 1008, 22 Am. St. Rep. 143; *Jolliffe v. Brown*, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868; *Shook v. Sexton*, 37 Wash. 509, 79 Pac. 1093.

The right of a municipal corporation to impound stock running at large, when expressly granted under charter powers, does not violate this section: *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90, 31 Am. St. Rep. 858.

Prohibition or regulation of trade or business: See Remington's Digest, Const. Law, §§ 133, 134; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *Leonard v. Bassindale*, 46 Wash. 301, 89 Pac. 879; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947; *Lewer v. Cornelius*, 72 Wash. 124, 129 Pac. 911; *State ex rel. Leach v. Fishback*, 79 Wash. 290, 140 Pac. 387; *State v. Seattle Taxicab & Transfer Co.*, 90 Wash. 416, 156 Pac. 837.

The act requiring horseshoers to pass an examination and pay a license fee is unconstitutional as an arbitrary interference with personal liberty and private property without due process of law: *Aubrey, In re*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927.

Restricting the right to own, run or manage a dental office is an unwarranted abridgment of the private right of property and of the citizen's liberty to engage in legitimate pursuits for a livelihood: *State v. Brown*, 37 Wash. 97, 79 Pac. 635, 107 Am. St. Rep. 798, 68 L. R. A. 889.

The act regulating the business of plumbing and requiring plumbers to secure a license from an examining board infringes the state and federal constitutions by depriving them of the pursuit of happiness and liberty to pursue their chosen calling: *State ex rel. Richey v. Smith*, 42 Wash. 237, 84 Pac. 851, 114 Am. St. Rep. 114, 7 Ann. Cas. 577, 5 L. R. A. (N. S.) 674.

Laws 1901, page 349, regulating the business of barbering and requiring a license therefor, is not unconstitutional as an abridgment of the liberty or natural rights of citizens: *State v. Walker*, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257.

An act providing that the wages of labor shall be forthwith paid on cessation of the work is in accordance with a sound public policy and is not void under this section as a deprivation of property without due process of law: *Shortall v. Puget Sound Bridge & Dredge Co.*, 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899.

Police powers: *Fisher Flouring Mills Co. v. Brown*, 109 Wash. 680, 187 Pac. 399.

Regulation of railroad rates: See Remington's Digest, Const. Law, § 134½; *State ex rel. Washington Mill Co. v. Great Northern R. Co.*, 43 Wash. 658, 86 Pac. 1056, 117 Am. St. Rep. 1084, 6 L. R. A. (N. S.) 908; *State ex rel. Great Northern R. Co. v. Public Service Commission*, 76 Wash. 625, 137 Pac. 132.

Creation or displacement of liens: See Remington's Digest, Const. Law, § 135; *McCoy v. Cook*, 13 Wash. 158, 42 Pac. 546; *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 47 Pac. 894; *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845.

A law intended to apply retrospectively to validate a void tax would be void as a taking of property without due process of law: *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

The statute creating a lien on logs for boomage charges against a nonconsenting owner is constitutional: *East Hoquiam*

Boom etc. Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001.

Civil remedies and proceedings—Injunction: See Remington's Digest, Const. Law, § 136; Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

Finality of allowance to widow: Hamilton's Estate, In re, 108 Wash. 326, 184 Pac. 337.

— Process or notice: See Remington's Digest, Const. Law, § 137; Wilson v. Beyers, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858; Groen, In re, 22 Wash. 53, 60 Pac. 123; Tieton Hotel Co. v. Manheim, 75 Wash. 641, 135 Pac. 658; Krohn v. Hirsch, 81 Wash. 22, 142 Pac. 647; Bayer v. Bayer, 83 Wash. 430, 145 Pac. 433; Bruen, In re, 102 Wash. 473, 172 Pac. 1152.

Laws 1893, page 237, providing for the location of county roads and award of damages therefor, is unconstitutional as to resident owners of lands appropriated, for the reason that it does not provide for personal service of notice: Smith's Petition, In re, 9 Wash. 85, 37 Pac. 311, 494.

Upon the formation of a dyking district under Laws of 1895, page 304, personal service upon every person within the district of notice of the petition to organize the district is not necessary, and failure to give such personal service would not constitute a taking of private property without due process of law: Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.

The fact that a section of the irrigation act authorized the testing of the validity of the proceedings without personal notice, and the entry of a judgment thereon, would only affect the validity of such a judgment, and would not render the entire act void as a taking of property without due process: Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399.

By-laws of 1889, page 261, for the condemnation of rights of way for irrigation purposes, the filing of a complaint, etc., provides ample notice and due process of law: Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36.

Rules of pleading and evidence: See Remington's Digest, Const. Law, §§ 138, 139; Oldfield v. Angeles Brewing & Malt-ing Co., 77 Wash. 158, 137 Pac. 469; Howe v. Barto, 12 Wash. 627, 41 Pac. 908; Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868; Milecke, In re, 52 Wash. 312, 100 Pac. 743, 132 Am. St. Rep. 968, 21 L. R. A. (N. S.) 259.

Requiring the payment of all taxes by a vendor before his deed of conveyance will be recorded is a violation of the constitutional inhibition that no person shall

be deprived of his property without due process of law: State ex rel. Baldwin v. Moore, 7 Wash. 173, 34 Pac. 461.

Section 1230 of this code, authorizing the court to strike a pleading and give judgment against a party for failure to answer interrogatories is not unconstitutional as depriving a party of property without due process: Lawson v. Black Diamond Coal Co., 44 Wash. 26, 86 Pac. 1120.

— Provisional remedies: See Remington's Digest, Const. Law, § 140; Coombs v. Davis, 2 W. T. 466, 7 Pac. 860; Weisbach v. Arnold, 3 W. T. 111, 13 Pac. 417; State ex rel. German Sav. & Loan Soc. v. Prather, 19 Wash. 336, 53 Pac. 344, 67 Am. St. Rep. 729; Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 663; Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659; White v. Powers, 89 Wash. 502, 154 Pac. 820; Stertz v. Industrial Insurance Commission, 91 Wash. 588, 158 Pac. 256, Ann. Cas. 1918B, 354.

The statutory allowance of an attorney's fee to the plaintiff upon the foreclosure of a lien is not unconstitutional where it is not imposed as a penalty, but allowed as costs: Ivall v. Willis, 17 Wash. 645, 50 Pac. 467; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571.

And authorizing an attorney's fee in favor of the plaintiff in an action to foreclose a mechanic's lien is not unconstitutional: Littell v. Saulsberry, 40 Wash. 550, 82 Pac. 909.

— Appeal or other proceeding for review: See Remington's Digest, Const. Law, § 142; State ex rel. Latimer v. Henry, 28 Wash. 38, 68 Pac. 368; Carstens v. De Sellem, 82 Wash. 643, 144 Pac. 934; Oregon-Wash. R. & Nav. Co. v. Commrs. of Yakima County, 103 Wash. 480, 175 Pac. 37.

PERSONAL, CIVIL AND POLITICAL RIGHTS.—Constitutional guaranties in general: See Remington's Digest, Const. Law, § 52; Rafferty, In re, 1 Wash. 382, 25 Pac. 465; Walker v. Spokane, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994; State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10; Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122; L. R. A. 1916A, 739.

Pursuit of happiness: See Remington's Digest, Const. Law, § 55; Ah Lim v. Territory, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395.

Right to hold and dispose of property: See Remington's Digest, Const. Law, § 56; State ex rel. Hellar v. Young, 18 Wash. 21, 50 Pac. 786; State v. Clarke, 30 Wash. 439, 71 Pac. 20.

Liberty to choose occupation: See Remington's Digest, Const. Law, § 57; Aubrey, In re, 36 Wash. 308, 78 Pac. 900, 104 Am.

CONSTITUTION OF THE STATE OF WASHINGTON. ART. I, §§ 4-7

St. Rep. 952, 1 Ann. Cas. 927; State v. Brown, 37 Wash. 97, 79 Pac. 635, 107 Am. St. Rep. 798, 68 L. R. A. 889; O'Neill, In re, 41 Wash. 174, 83 Pac. 104, 6 Ann. Cas. 869, 3 L. R. A. (N. S.) 558; State ex rel. Richey v. Smith, 42 Wash. 237, 84 Pac. 851, 114 Am. St. Rep. 114, 7 Ann. Cas. 577, 5 L. R. A. (N. S.) 674; State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 Pac. 357, 17 Ann. Cas. 625, 21 L. R. A. (N. S.) 821; Smith v. Spokane, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220.

Liberty to contract: See Remington's Digest, Const. Law, § 58; State v. Con-sidine, 16 Wash. 358, 47 Pac. 755; Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 92 Am. St. Rep. 930, 59 L. R. A. 342; Seattle v. Smyth, 22 Wash. 327, 60 Pac. 1120, 79 Am. St. Rep. 939 (overruled); Broad, In re, 36 Wash. 449, 78 Pac. 1004, 2 Ann. Cas. 212, 70 L. R. A. 1011; Normile v. Thompson, 37 Wash. 465, 79 Pac. 1095; Gies v. Broad, 41 Wash. 448, 83 Pac. 1025; Ross

v. Kaufman, 48 Wash. 678, 94 Pac. 641; Seattle v. Hurst, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; State ex rel. Davis-Smith Co. v. Clausen, 64 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

Minimum wage law: Spokane Hotel Co. v. Younger, 113 Wash. 359, 194 Pac. 595.

Exercise by court of discretionary power conferred by statute as con-stituting due process of law. 2 Ann. Cas. 317.

Validity of statute or ordinance vesting discretion in public offi-cials without prescribing a rule of action. 12 A. L. R. 1435.

Continuance of constitutional guar-anties during war or insurrection. 45 L. R. A. (N. S.) 996.

Due process in arrest and imprison-ment of a citizen of Mexico sus-pected of organizing in the United States military expedition against Mexico. L. R. A. 1917A, 281.

§ 4. RIGHT OF PETITION AND ASSEMBLAGE.—The right of peti-tion and of the people peacefully to assemble for the common good shall never be abridged.

Cited in 70 Wash. 602; 75 Wash. 582.

A person nominated at a convention under section 5198, is not thereby dis-qualified from afterward becoming a can-didate at the September primaries; since

to construe the law to have that effect would render it unconstitutional as vio-lating this section: State ex rel. Wells v. Dykeman, 70 Wash. 599, 127 Pac. 218.

§ 5. FREEDOM OF SPEECH.—Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.

Cited in 19 Wash. 242; 82 Wash. 88; 94 Wash. 143.

Freedom of speech and the press: See Remington's Digest, Const. Law, § 59; State v. Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717; State v. Fox, 71 Wash. 185, 127 Pac. 1111; State v. Haffer, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917E, 229, L. R. A. 1917C, 610.

This section does not mean a license to assail the court, parties or witnesses in pending causes, or excuse contempt of court by publication of matter having a reasonable tendency to cause substantial prejudice to a party in a pending cause:

State ex rel. Dorrien v. Hazeltine, 82 Wash. 81, 143 Pac. 436.

Constitutional freedom of speech and press. 15 Ann. Cas. 3; Ann. Cas. 1915B, 1183; 32 L. R. A. 829.

Legislation directed against social or industrial propaganda deemed to be of a dangerous tendency as invasion of freedom of speech. 1 A. L. R. 336.

Validity of statute or ordinance pro-hibiting or regulating holding of meetings in street. 10 A. L. R. 1483.

§ 6. OATHS—MODE OF ADMINISTERING.—The mode of admin-istering an oath or affirmation shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath or affirma-tion may be administered.

§ 7. INVASION OF PRIVATE AFFAIRS OR HOME PROHIB-ITED.—No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

ART. I, §§ 8-12 CONSTITUTION OF THE STATE OF WASHINGTON.

Cited in 36 Wash. 454; 75 Wash. 582;
86 Wash. 24; 90 Wash. 419; 98 Wash. 210.

This section is not violated by the
prohibition act: *State v. Fabbri*, 98
Wash. 207, 167 Pac. 133.

§ 8. IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED.—No law granting irrevocably any privilege, franchise, or immunity shall be passed by the legislature.

Cited in 21 Wash. 522; 83 Wash. 13.
This section provides that no law shall
be passed granting irrevocably any priv-

ilege or franchise: *North Springs Water
Co. v. Tacoma*, 21 Wash. 517, 58 Pac. 773,
47 L. R. A. 214.

§ 9. RIGHTS OF ACCUSED PERSONS.—No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Cited in 7 Wash. 338; 14 Wash. 666;
18 Wash. 484; 36 Wash. 488; 40 Wash.
219; 56 Wash. 132; 81 Wash. 391; 83
Wash. 517; 86 Wash. 24; 87 Wash. 471;
90 Wash. 419, 429; 94 Wash. 305.

Compelling witness to criminate him-
self: See *Remington's Digest*, *Crim. Law*,
§ 122; *State v. Duncan*, 7 Wash. 336, 35
Pac. 117, 38 Am. St. Rep. 888; *State v.*
O'Hara, 17 Wash. 525, 50 Pac. 477, 933.

Compelling accused to testify: *State v.*
White, 113 Wash. 416, 194 Pac. 390.

A contempt proceeding is not a crim-
inal case, within the meaning of this sec-
tion: *State ex rel. Dye v. Reilly*, 40 Wash.
217, 82 Pac. 287.

Former jeopardy: See *Remington's Di-*
gest, *Crim. Law*, §§ 44-55, and cases
cited.

§ 10. ADMINISTRATION OF JUSTICE.—Justice in all cases shall be administered openly and without unnecessary delay.

Cited in 16 Wash. 575.

§ 11. RELIGIOUS FREEDOM.—Absolute freedom of conscience in all matters of religious sentiment, belief, and worship shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion, but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

This section is amended: See 4th Amendment, *infra*.

Religious liberty and freedom of con-
science: See *Remington's Digest*, *Const.*
Law, § 54; *State v. Nichols*, 28 Wash.
628, 69 Pac. 372; *State v. Bergfeldt*, 41
Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979;

State v. Herald, 47 Wash. 538, 92 Pac.
376, 20 L. R. A. (N. S.) 433; *State v.*
Neitzel, 69 Wash. 567, 125 Pac. 939, Ann.
Cas. 1914A, 899, 43 L. R. A. (N. S.) 203.

§ 12. SPECIAL PRIVILEGES AND IMMUNITIES PROHIBITED.—No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.

Cited in 4 Wash. 426; 15 Wash. 297,
421; 18 Wash. 78, 591; 21 Wash. 522,
554; 23 Wash. 580; 24 Wash. 31, 56; 28
Wash. 631; 29 Wash. 458; 31 Wash. 192,

641; 35 Wash. 36, 343, 515; 36 Wash. 454;
37 Wash. 429, 432; 38 Wash. 397; 41
Wash. 238; 42 Wash. 217, 240; 44 Wash.
352-354; 45 Wash. 477; 47 Wash. 539;

49 Wash. 35, 462; 54 Wash. 289; 55 Wash. 292; 58 Wash. 476; 63 Wash. 468, 469; 65 Wash. 175; 67 Wash. 641, 646, 647; 79 Wash. 231, 609; 80 Wash. 700; 84 Wash. 247; 86 Wash. 434; 88 Wash. 74; 90 Wash. 188, 419; 93 Wash. 60, 62; 94 Wash. 330, 359; 95 Wash. 30; 96 Wash. 432; 102 Wash. 475; 108 Wash. 139; 109 Wash. 691.

Grants of special privileges or immunities: See Remington's Digest, Const. Law, § 100; Walker v. Stone, 17 Wash. 578, 50 Pac. 488; State v. Vance, 29 Wash. 435, 70 Pac. 34; Henry v. Thurston County, 31 Wash. 638, 72 Pac. 488; State v. Fraternal Knights & Ladies, 35 Wash. 338, 77 Pac. 500; State ex rel. Griffith v. Newland, 37 Wash. 428, 79 Pac. 983; Terry v. King County, 43 Wash. 61, 86 Pac. 210, 9 Ann. Cas. 1170; State v. Lewis, 45 Wash. 475, 88 Pac. 940, 122 Am. St. Rep. 934; Day v. Richardson, 54 Wash. 288, 103 Pac. 8; Bilger v. State, 63 Wash. 457, 116 Pac. 19; State ex rel. Puget Mill Co. v. Superior Court, 68 Wash. 425, 123 Pac. 791; State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540; Salary of Superior Court Judges, In re, 82 Wash. 623, 144 Pac. 929; Cawsey v. Brickey, 82 Wash. 653, 144 Pac. 938; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595; Litchman v. Shannon, 90 Wash. 186, 155 Pac. 783; State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 156 Pac. 837.

Where a municipality has not by ordinance or contract attempted to give an exclusive right to the use of streets to a telephone company to which it had granted an easement therein, its refusal to grant the same rights to another telephone company would not raise any question as to the violation of this section: State ex rel. Spokane & B. C. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116.

Laws of 1901, page 377, section 8, authorizing county superintendents to charge five cents mileage in counties of the first to the tenth classes inclusive and ten cents mileage in all counties having a higher class number than the tenth, does not violate this section: Henry v. Thurston County, 31 Wash. 638, 72 Pac. 488.

An ordinance prohibiting any person from peddling fruits, vegetables, butter, eggs, etc., within the fire limits of a city, excepting farmers disposing of produce grown by themselves, grants special privileges in violation of this section: Camp, In re, 38 Wash. 393, 80 Pac. 547.

A charter amendment giving advisory powers with the right simply of recommendation is not such a right or privilege as comes within the prohibition of this

section: Bussell v. Gill, 58 Wash. 468, 108 Pac. 1080, 137 Am. St. Rep. 1070.

Liability of school districts: Swanson v. School Dist. No. 15, 109 Wash. 652, 187 Pac. 386.

Preference rights to soldiers: State ex rel. Reclamation Board v. Clausen, 110 Wash. 525, 188 Pac. 538.

Elections—Right to register and vote—Proof of citizenship: State ex rel. Carroll v. Superior Court, 113 Wash. 54, 193 Pac. 236.

Privileges and immunities of citizens of the several states: See Remington's Digest, Const. Law, § 101; Bacon v. Locke, 42 Wash. 215, 83 Pac. 721, 7 Ann. Cas. 589; State v. Merrill, 83 Wash. 8, 144 Pac. 925; Standard Oil Co. v. Graves, 94 Wash. 291, 162 Pac. 558.

Class legislation: See Remington's Digest, Const. Law, § 102; Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926; Nelson v. Troy, 11 Wash. 435, 39 Pac. 974; Redford v. Spokane St. R. Co., 15 Wash. 419, 46 Pac. 650; State v. Consideine, 16 Wash. 358, 47 Pac. 755; Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147; McDaniels v. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; State v. Bergfeldt, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979; Spokane v. Macho, 51 Wash. 322, 98 Pac. 755, 130 Am. St. Rep. 1100, 21 L. R. A. (N. S.) 263; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; State v. Sommerville, 67 Wash. 638, 122 Pac. 324; State v. Tice, 69 Wash. 403, 125 Pac. 168, 41 L. R. A. (N. S.) 469; State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540; State v. Merrill, 83 Wash. 8, 144 Pac. 925; Barker v. State Fish Commission, 88 Wash. 73, 152 Pac. 537; Snyder's Petition for Support of Mothers, In re, 93 Wash. 59, 160 Pac. 12.

Civil remedies: See Remington's Digest, Const. Law, § 102-1; North Pacific Loan & Trust Co. v. Bennett, 49 Wash. 34, 94 Pac. 664; State ex rel. Lathrop v. Hauptly, 86 Wash. 199, 149 Pac. 705, L. R. A. 1915F, 920.

EQUAL PROTECTION OF LAWS.—Constitutional guaranties in general: See Remington's Digest, Const. Law, §§ 103—109; State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; State ex rel. Fletcher v. Carroll, 94 Wash. 531, 162 Pac. 593.

Workmen's compensation act: Archibald v. Northern Pac. R. Co., 108 Wash. 97, 183 Pac. 95.

Nature of discriminations prohibited in general: Henry v. Thurston County, 31

Wash. 638, 72 Pac. 488; State ex rel. Case v. Howell, 85 Wash. 281, 147 Pac. 1162; State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 156 Pac. 837.

Discrimination—Land settlement act: State ex rel. Reclamation Board v. Clausen, 110 Wash. 525, 188 Pac. 538.

Places of business: State v. McFarland, 60 Wash. 98, 110 Pac. 792, 140 Am. St. Rep. 909.

Discrimination of class in juries: Redford v. Spokane St. R. Co., 15 Wash. 419, 46 Pac. 650.

Discrimination by reason of race or color—Inns and restaurants: Chase v. Knabel, 46 Wash. 484, 90 Pac. 642, 12 L. R. A. (N. S.) 1155.

Discrimination by reason of sex: Bloomer v. Todd, 3 W. T. 599, 19 Pac. 135; State v. Considine, 16 Wash. 358, 47 Pac. 755; State ex rel. Zenner v. Graham, 34 Wash. 81, 74 Pac. 1058.

Discrimination as to localities: Hays v. Territory, 2 W. T. 286, 5 Pac. 313, 927; Holmes & Bull Furniture Co. v. Hedges, 13 Wash. 696, 43 Pac. 944; Henry v. Thurston County, 31 Wash. 638, 72 Pac. 488; State v. Storey, 51 Wash. 630, 99 Pac. 878; McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (N. S.) 1207; State ex rel. Vance v. Frater, 84 Wash. 466, 147 Pac. 25; State v. Hals, 90 Wash. 540, 156 Pac. 395.

Exercise of power of eminent domain: See Remington's Digest, Const. Law, § 110; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779.

Taxation of property: See Remington's Digest, Const. Law, § 111; Newport v. Mudgett, 18 Wash. 271, 51 Pac. 466; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

Destruction of animal pests—Assessments on land—Taxation—Equality and uniformity: State ex rel. Stanger v. Bartlett, 112 Wash. 299, 192 Pac. 945.

License taxes: See Remington's Digest, Const. Law, § 112; State v. Ames, 47 Wash. 328, 92 Pac. 137; McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504; Seattle v. Dencher, 58 Wash. 501, 108 Pac. 1086, 137 Am. St. Rep. 1076, 28 L. R. A. (N. S.) 446; Sperry & Hutchinson Co. v. Tacoma, 68 Wash. 254, 122 Pac. 1060, L. R. A. 1915B, 241.

Grant or refusal of franchises in streets: See Remington's Digest, Const. Law, § 113; Wood v. Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; State ex rel. Spokane etc. Tel. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116; Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18.

Carriers—Jitney buses—Regulation: State ex rel. Schafer v. Spokane, 109 Wash. 360, 186 Pac. 864.

Prohibition of trade or business: See Remington's Digest, Const. Law, § 114; Tacoma v. Krech, 15 Wash. 296, 46 Pac. 255 (overruled in State v. Nichols, 28 Wash. 628, 69 Pac. 372); Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; McDaniels v. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947; Camp, In re, 38 Wash. 393, 80 Pac. 547; Allen v. Bellingham, 95 Wash. 12, 163 Pac. 18; Seattle v. Gibson, 96 Wash. 425, 165 Pac. 109.

Licenses—Revocation as prohibition of lawful business: State ex rel. Makris v. Superior Court, 113 Wash. 296, 193 Pac. 845.

Occupation and employment in general: See Remington's Digest, Const. Law, § 115; State v. Considine, 16 Wash. 358, 47 Pac. 755; O'Neill, In re, 41 Wash. 174, 83 Pac. 104, 6 Ann. Cas. 869, 3 L. R. A. (N. S.) 558.

Regulation of trade or business in general: See Remington's Digest, Const. Law, § 116; Fox v. Territory, 2 W. T. 297, 5 Pac. 603; State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 983; Daniels v. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947; State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; State v. Chaney, 36 Wash. 350, 78 Pac. 915; Thompson, In re, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149; State v. Brown, 37 Wash. 97, 79 Pac. 635, 107 Am. St. Rep. 798, 68 L. R. A. 889; Tacoma v. Keisel, 68 Wash. 685, 124 Pac. 137, 40 L. R. A. (N. S.) 757; State v. Ferry Line Auto Bus Co., 93 Wash. 614, 161 Pac. 467; State v. Robinson Co., 84 Wash. 246, 146 Pac. 628.

Regulation of charges or prices: See Remington's Digest, Const. Law, § 117; Crawford v. Cochran, 2 W. T. 117, 3 Pac. 837.

Creation or displacement of liens: See Remington's Digest, Const. Law, § 118; East Hoquiam Boom etc. Co. v. Neeson, 20 Wash. 142, 54 Pac. 1001; Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147.

Imposition of liability for costs or fees: See Remington's Digest, Const. Law, § 119; Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868; Ivall v. Willis, 17 Wash. 645, 50 Pac. 467; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571; Littell v. Soulsberry, 40 Wash. 550, 82 Pac. 909; State ex rel. Railroad Commission v. Oregon R. & Nav. Co., 68 Wash. 160, 123 Pac. 3.

Constitutional equality of privileges,
immunities and protection. 14
L. R. A. 579.

Constitutionality of statutes grant-
ing exclusive privileges. 1 Ann.
Cas. 847.

§ 13. HABEAS CORPUS.—The privilege of the writ of habeas corpus shall not be suspended, unless in case of rebellion or invasion the public safety requires it.

Cited in 84 Wash. 62.

The statute providing that no inquiry shall be made into the legality of any judgment or process whereby a party is in custody, when such custody is upon a process, issued on a final judgment of a court

of competent jurisdiction, precludes the issuance of a writ of habeas corpus in such case, and is not obnoxious to the constitution: *Lybarger, In re*, 2 Wash. 131, 25 Pac. 1075.

§ 14. EXCESSIVE BAIL, FINES AND PUNISHMENTS.—Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

Cited in 70 Wash. 67; 79 Wash. 609; 80 Wash. 700.

The state has power to protect its people from dangerous insane persons by providing, after a full hearing, for their confinement in a prison while the condition continues, and such confinement does not violate this section: *Brown, In re*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540.

The operation of vasectomy for the prevention of procreation, authorized by section 2287, cannot be judicially determined to be cruel punishment, in violation of this section where there was no showing that it was attended with any marked

degree of physical torture, suffering or pain: *State v. Feilen*, 70 Wash. 65, 126 Pac. 75, Ann. Cas. 1914B, 512, 41 L. R. A. (N. S.) 418.

Cruel or unusual punishment: See *Remington's Digest*, Crim. Law, § 461, and cases cited.

What is cruel and unusual punishment. 19 Ann. Cas. 725; Ann. Cas. 1918B, 396; 35 L. R. A. 561; L. R. A. 1915C, 558.

Sterilization of criminals or defectives as cruel and unusual punishment. Ann. Cas. 1914B, 515; 41 L. R. A. (N. S.) 419; L. R. A. 1918D, 236.

§ 15. CONVICTIONS, EFFECT OF.—No conviction shall work corruption of blood nor forfeiture of estate.

§ 16. EMINENT DOMAIN.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

See *infra*, Art. XII, § 19, eminent domain extended to telegraph and telephone companies.

See *infra*, Art. XII, § 10, right of, not to be abridged.

See notes to § 891 et seq., *infra*.

Cited in 3 Wash. 234, 235; 4 Wash. 451; 5 Wash. 38, 744; 6 Wash. 8, 164, 399, 402; 7 Wash. 269; 9 Wash. 2, 87, 92; 11 Wash. 430, 635; 13 Wash. 49, 159; 15 Wash. 319; 19 Wash. 202, 358; 20 Wash. 88; 23 Wash. 112; 24 Wash. 500; 26 Wash. 286; 27 Wash. 125, 526; 29 Wash. 5, 494; 30 Wash. 224, 254; 31 Wash. 560; 32 Wash. 227; 33 Wash. 391, 497; 34 Wash. 351; 53 Wash. 42, 44, 239, 585; 54 Wash. 153; 55 Wash. 187, 577; 57 Wash. 53; 58 Wash. 612; 59 Wash. 627, 629; 61 Wash. 272; 62 Wash. 221, 533; 63 Wash. 464, 468, 469; 65 Wash. 103, 107, 114; 66 Wash. 445; 67 Wash. 143, 541; 69 Wash. 659; 70 Wash. 490, 544; 71 Wash. 167, 653; 72 Wash. 182, 499; 73 Wash. 119, 126, 234; 74 Wash. 134, 620, 626; 75 Wash. 219, 369, 582; 76 Wash. 188, 631; 77 Wash. 586, 613; 80 Wash. 131; 82 Wash. 599, 601; 83 Wash. 383, 449; 85 Wash. 36, 37; 86 Wash. 105, 161; 88 Wash. 324; 92 Wash. 196; 93 Wash. 174, 175, 177; 94 Wash. 170, 172; 96 Wash. 334; 97 Wash. 516; 98 Wash. 263; 99 Wash. 500; 101 Wash. 633; 102 Wash. 351, 354, 356; 106 Wash. 521; 107 Wash. 158, 232; 108 Wash. 136, 410.

The provision in this section authorizing the taking of lands for private ways of necessity is not self-executing: *Long v. Billings*, 7 Wash. 267, 34 Pac. 936.

This section prevents the taxation of costs in condemnation proceedings against the land owner only in the lower court, and does not exempt him from the costs of his appeal to the supreme court, when, under section 929, *infra*, he fails to recover a greater amount of damages on the appeal: *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150.

Private ways of necessity, within this section has reference to the common-law definition of the term, requiring the element of grant, and having no reference to the land of strangers: *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820.

A party owning land appropriated for a public purpose cannot be compelled to present a claim for damages, as under this section the amount of damage for such appropriation must be first ascertained and paid to such property owner directly or into court for his benefit: *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Snohomish County v. Hayward*, 11 Wash. 420, 39 Pac. 652; *Seanor v. County Commrs.*, 13 Wash. 48, 42 Pac. 552; *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385.

By the express provisions of the constitution, the question whether a contem-

plated use is really a public use is a judicial question: *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681.

The declaration that the question of public use shall be a judicial question does not mean that it is to be determined without reference to constitutional assertions upon the subject: *State ex rel. Galbraith v. Superior Court*, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893.

Under this section the supreme court has power to issue the writ of certiorari for the purpose of bringing the determination of that question by the superior court before it for review, where the special statute governing appeals in condemnation cases restricts the supreme court to an inquiry into the "propriety and justness of the damages" awarded: *Seattle & M. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907; *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 484; *State ex rel. Trumble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820; *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, 74 Pac. 686.

That portion of Laws of 1893, page 301, providing for the appropriation of right of way for the construction of county roads is unconstitutional, since it conflicts with this section: *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552.

This section does not authorize compensation for depreciation in value caused by a legal act which is in law *damnum absque injuria*: *Taylor v. Chicago & St. Paul R. Co.*, 85 Wash. 592, 148 Pac. 887, L. R. A. 1915E, 634.

A county is construed to be a purely municipal corporation under this section: *Lincoln County v. Brook*, 37 Wash. 14, 79 Pac. 477.

Ballinger's Code, section 3787, providing that when condemnation proceedings are instituted against any person to whom tender has been made, and such person shall fail to recover judgment for a greater sum than the amount tendered, all costs of such condemnation proceedings shall be taxed against him, is in conflict with this section: *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339.

This section prevents the taxation of costs in condemnation proceedings against the land owner only in the lower court, and does not exempt him from the costs of his appeal to the supreme court, when he fails to recover a greater amount of damages on the appeal: *Kitsap County v. Melker*, 52 Wash. 49, 100 Pac. 150.

CONSTITUTION OF THE STATE OF WASHINGTON. ART. I, §§ 17-21

Consequential damages arising from proper exercise of governmental powers as a taking of property. 4 *Ann. Cas.* 1185.

Distinction between taking or damaging property and consequential injuries. 47 *L. R. A. (N. S.)* 462.

What is a "damaging" of property. 36 *L. R. A. (N. S.)* 1194.

What constitutes a "taking" of property. 18 *L. R. A.* 166.

Change of street grade as a damaging of property under constitutional provision against taking or damaging property without compensation. 10 *Ann. Cas.* 849.

§ 17. IMPRISONMENT FOR DEBT.—There shall be no imprisonment for debt except in cases of absconding debtors.

Cited in 2 *Wash.* 258; 19 *Wash.* 349; 21 *Wash.* 200; 24 *Wash.* 499; 53 *Wash.* 467; 60 *Wash.* 104; 78 *Wash.* 695; 81 *Wash.* 396; 84 *Wash.* 60; 86 *Wash.* 24; 88 *Wash.* 266—272; 90 *Wash.* 419, 429.

Personal liberty and security: See Remington's Digest, Const. Law, § 53; Burrichter v. Cline, 3 *Wash.* 135, 28 *Pac.* 367; Colby v. Backus, 19 *Wash.* 347, 53 *Pac.* 367; Cave, In re, 26 *Wash.* 213, 66 *Pac.* 425, 90 *Am. St. Rep.* 736; Milecke, In re, 52 *Wash.* 312, 100 *Pac.* 743, 132 *Am. St. Rep.* 968, 21 *L. R. A. (N. S.)* 259; State v. Pilling, 53 *Wash.* 464, 102 *Pac.* 230, 132 *Am. St. Rep.* 1080; State v. McFarland, 60 *Wash.* 98, 110 *Pac.* 792, 140 *Am. St. Rep.* 909; Bronson v. Syverson, 88 *Wash.* 264, 152 *Pac.* 1039, *L. R. A.* 1916B, 993; State v. Seattle Taxicab & Transfer Co., 90 *Wash.* 416, 156 *Pac.* 837.

This section abates the right of arrest given by the territorial act of 1854 (§§ 748—757, *infra*) for certain causes not including absconding debtors: Hamilton v. Pacific Drug Co., 78 *Wash.* 689, 139 *Pac.* 642.

There being no statute in this state authorizing the arrest of absconding debtors, the provisions of this section permit-

ting such arrest not being self-executing, a person causing the arrest of another is liable therefor: Hayes v. Hutchinson & Shields, 81 *Wash.* 394, 142 *Pac.* 865.

A judgment debtor in a civil action, arrested on a personal execution, is entitled to be admitted to bail pending the appeal, where the right to execute the judgment by arrest was questioned under this section: State ex rel. Syverson v. Foster, 84 *Wash.* 58, 146 *Pac.* 169, *L. R. A.* 1915E, 588.

Civil liability for tort as debt within constitutional provision against imprisonment. 20 *Ann. Cas.* 1344; *Ann. Cas.* 1917D, 841.

Imprisonment for nonpayment of alimony as within inhibition against imprisonment for debt. *Ann. Cas.* 1913E, 1087; 34 *L. R. A.* 665; 17 *L. R. A. (N. S.)* 1140; *L. R. A.* 1915B, 651.

Statute punishing frauds on innkeepers as within constitutional provision against imprisonment for debt. 16 *Ann. Cas.* 1231; 21 *L. R. A. (N. S.)* 259.

§ 18. MILITARY POWER, LIMITATION OF.—The military shall be in strict subordination to the civil power.

§ 19. FREEDOM OF ELECTIONS.—All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Cited in 92 *Wash.* 393.

A law for second choice voting does not violate this section where there is no interference with the freedom of the elector in

casting his first choice ballot: State ex rel. Zent v. Nichols, 50 *Wash.* 508, 97 *Pac.* 728.

§ 20. BAIL, WHEN AUTHORIZED.—All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident, or the presumption great.

Cited in 64 *Wash.* 141; 84 *Wash.* 62; 109 *Wash.* 290.

In general: See Remington's Digest, Bail, §§ 1—10, and cases cited.

§ 21. TRIAL BY JURY.—The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than

twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Cited in 13 Wash. 663; 15 Wash. 421, 447; 16 Wash. 384; 22 Wash. 131; 30 Wash. 325; 33 Wash. 537; 39 Wash. 164, 203; 58 Wash. 180; 60 Wash. 112; 61 Wash. 400; 65 Wash. 176, 213, 214; 75 Wash. 582; 76 Wash. 190; 82 Wash. 289; 86 Wash. 24; 89 Wash. 383.

Right to Trial by Jury.—Civil Cases: See Remington's Digest, Const. Law, § 141; Dacres v. Oregon R. & Nav. Co., 1 Wash. 525, 20 Pac. 601; Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415; State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; State ex rel. Orr v. Fawcett, 17 Wash. 188, 49 Pac. 346; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 166.

This section means that the right, as it existed in the territory when the constitution was adopted, shall continue unimpaired and inviolate: State v. Strasburg, 60 Wash. 106, 110 Pac. 1020, Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216.

This section has no application to actions of equitable cognizance: Garey v. Pasco, 89 Wash. 382, 154 Pac. 433.

Under this section, the defendant is entitled to a jury trial, where plaintiff sues upon a contract for legal services and seeks to recover a specific and designated fund in the hands of the probate court; since it is an action for recovery of specific personal property: Winston v. Crowe, 28 Wash. 65, 68 Pac. 174.

Right to Trial by Jury.—Criminal Cases: See Remington's Digest, Const. Law, §§ 122-2, 122-3; State v. Holedger, 15 Wash. 443, 46 Pac. 652; State v. Strasburg, 60 Wash. 106, 110 Pac. 1020, Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216.

This section is not violated by the trial court in taking from the consideration of the jury the questions upon which there was no conflict in the evidence: Furth v. Snell, 13 Wash. 660, 43 Pac. 935; Creagh v. Equitable Life Assur. Soc., 19 Wash. 108, 52 Pac. 526.

Laws of 1895, page 139, providing as a qualification for jurors that they be householders, does not violate this section: Redford v. Spokane St. R. Co., 15 Wash. 419, 46 Pac. 650; State v. Holedger, 15 Wash. 443, 46 Pac. 652.

A proceeding to recover specific real or personal property must be tried by jury: Alfstad's Estate, In re, 27 Wash. 175, 67

Pac. 593; Winston v. Crowe, 28 Wash. 65, 68 Pac. 174; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107. And so of an action to enjoin defendant from enforcing a judgment against plaintiff: Spokane Co-operative Min. Co. v. Pearson, 28 Wash. 118, 68 Pac. 165. As to when an action is an equitable one, see Bluett v. Wilce, 43 Wash. 492, 86 Pac. 853.

The jury law of 1913, page 50, providing for a twelve dollar jury fee in civil cases, is not unconstitutional as imposing any unreasonable conditions upon the right of trial by jury: State ex rel. Clark v. Neterer, 33 Wash. 535, 74 Pac. 668.

This section is not violated by Rem. & Bal. Code, section 94, requiring jurors to be taxpayers: State v. McDowell, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414.

Under this section the courts cannot trench on the province of the jury upon questions of fact if there is any evidence, direct or circumstantial, to warrant their verdict: Jensen v. Shaw Show Case Co., 76 Wash. 419, 136 Pac. 698.

The compulsory industrial insurance law is not unconstitutional as denying the right to trial by jury: State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10, 4 N. C. C. A. 811.

While the statute provides for the selection of petit and grand jurors by drawing names by chance without use of the word "impaneled," there is no such distinction between the words "drawn" and "impaneled" as here used, as to permit the judge to select without chance, a grand jury, in view of this section: State ex rel. Murphy v. Superior Court, 82 Wash. 284, 144 Pac. 32.

This section is simply intended as a limitation upon the right of the legislature to take away the right of trial by jury, and is not intended to interfere with the right of the individual to waive such privilege: State v. Ellis, 22 Wash. 129, 60 Pac. 136.

The constitutional right of trial by jury is not impaired by the summary trial and punishment of a person for the violation of a city ordinance: State ex rel. Belt v. Kennan, 25 Wash. 621, 66 Pac. 62.

General scope of constitutional provisions guaranteeing right of trial by jury. 1 Ann. Cas. 703.

§ 22. RIGHTS OF ACCUSED PERSONS.—In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to

have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Cited in 2 Wash. 125, 371; 3 Wash. 114; 7 Wash. 258, 337; 8 Wash. 232, 234, 464; 9 Wash. 214, 339; 12 Wash. 297; 13 Wash. 486; 15 Wash. 18, 421; 16 Wash. 575; 17 Wash. 563; 18 Wash. 48; 19 Wash. 466; 22 Wash. 5; 23 Wash. 578; 29 Wash. 60, 457; 30 Wash. 142; 35 Wash. 155; 41 Wash. 244; 45 Wash. 254; 49 Wash. 437; 54 Wash. 383; 55 Wash. 589; 56 Wash. 297; 57 Wash. 247; 58 Wash. 417; 65 Wash. 631; 68 Wash. 12; 71 Wash. 596; 72 Wash. 161; 75 Wash. 333; 80 Wash. 370; 82 Wash. 367; 84 Wash. 62; 88 Wash. 345, 673; 102 Wash. 565; 105 Wash. 423.

It is error to send the jurors back for further deliberation with general instructions as to their duty to arrive at a verdict if possible when neither the defendant nor his attorneys were present or notified: *State v. Shutzler*, 82 Wash. 365, 144 Pac. 284.

Error cannot be predicated upon instructions to the jurors while the accused was absent from the court room, where the address was to all jurors in attendance on the court touching a matter foreign to the case: *State v. Haffer*, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917E, 229, L. R. A. 1917C, 610.

Under this section a change of venue to another county cannot be had over the objection of the accused: *State ex rel. Howard v. Superior Court*, 88 Wash. 344, 153 Pac. 7; *State ex rel. O'Phelan v. Superior Court*, 88 Wash. 669, 163 Pac. 1078.

A venire to summon a jury in a police court "from a body of your city" violates this section: *State ex rel. Fugita v. Milroy*, 71 Wash. 592, 129 Pac. 384.

The right to a speedy trial is waived by failure to ask for a trial and acquiescence in the delay until the case has been set for trial upon the request of the state, where the state did not act arbitrarily and had a plausible excuse for the delay: *State v. Miller*, 72 Wash. 154, 129 Pac. 1100.

An information for bringing liquor into a dry unit in a certain county is insufficient where it fails to allege in which one of several dry units the offense was committed: *State v. Muller*, 80 Wash. 368, 141 Pac. 910.

This section and section 2091 of this code, providing that a copy of the charge shall be served, merely grant a privilege

that is waived by plea and entering upon the trial without request for the copy, service of which is not jurisdictional: *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

This section is not violated by Rem. & Bal. Code, section 94, which provides that the county shall be divided into jury districts, and that an equal number of the jurors shall be drawn from each district for service in any month: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

In a criminal prosecution, it is error for the court to direct a verdict of guilty in view of this section: *State v. Holmes*, 68 Wash. 7, 122 Pac. 345.

Under this section it is error to keep the accused in manacles during the progress of the trial and in the presence of the jury, unless it plainly appears that the prisoner is such a dangerous character as to warrant such precaution: *State v. Williams*, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821.

Under this section it is error for the court to refuse a continuance to procure the presence of a material witness for defendant, when proper application has been made therefor: *State v. Williams*, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821.

One guilty as an accessory to the crime of rape cannot be convicted under an information charging him as a principal, as such an information would be in violation of his constitutional right to be informed of the nature and cause of the accusation against him: *State v. Gifford*, 19 Wash. 464, 53 Pac. 709.

Rem. & Bal. Code, § 2015, violates this section, and a demurrer should be sustained to an information for burglary committed in one county, filed in another county into which the property was alleged to have been taken: *State v. Carroll*, 55 Wash. 588, 104 Pac. 814, 133 Am. St. Rep. 1047, 19 Ann. Cas. 1234.

It is in the discretion of the trial court to exclude the jury during the argument of counsel upon instructions in criminal prosecutions: *State v. Coella*, 3 Wash. 99, 28 Pac. 28.

Under this section a justice of the peace is not required to prepare a copy of the complaint in a criminal action and

deliver it to the accused: *State v. White*, 8 Wash. 230, 35 Pac. 1100.

RIGHTS TO JUSTICE AND REMEDIES FOR INJURIES.—Nature of remedies guaranteed—Right to appear and defend: See Remington's Digest, Const. Law, § 143; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881; *State v. Williams*, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821.

Requirements as to costs and fees: See Remington's Digest, Const. Law, § 144; *Stowe v. State*, 2 Wash. 124, 25 Pac. 1085.

§ 23. **BILL OF ATTAINDER, EX POST FACTO LAW, ETC.**—No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

Cited in 14 Wash. 539; 17 Wash. 613; 19 Wash. 208; 38 Wash. 628; 97 Wash. 218; 103 Wash. 43, 49.

VESTED RIGHTS.—Estates and interests in property in general: See Remington's Digest, Const. Law, §§ 60—63; *Eisenback v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *State ex rel. Billings v. Bridges*, 22 Wash. 64, 60 Pac. 60, 79 Am. St. Rep. 914; *Seattle etc. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845; *Seattle v. Hinckley*, 40 Wash. 468, 82 Pac. 747, 2 L. R. A. (N. S.) 398.

Rules of descent: *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337.

Dower and curtesy: *Hamilton v. Hirsch*, 2 W. T. 222, 5 Pac. 215.

Betterment laws: *Investment Co. v. Hambach*, 37 Wash. 629, 80 Pac. 190.

Redemption laws: See Remington's Digest, Const. Law, § 64; *Ford v. Durie*, 8 Wash. 87, 35 Pac. 595, 1082; *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414; *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849.

Tax laws: See Remington's Digest, Const. Law, § 65; *Heilig v. Puyallup City Council*, 7 Wash. 29, 34 Pac. 164; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Tacoma Land Co. v. Tacoma*, 14 Wash. 700, 44 Pac. 106; *State ex rel. Conner v. Superior Court*, 81 Wash. 480, 143 Pac. 112.

Public offices: See Remington's Digest, Const. Law, § 66; *State ex rel. McReavy v. Burke*, 8 Wash. 412, 36 Pac. 281.

Rights of action and defenses—Liens: See Remington's Digest, Const. Law, § 67; *Garneau v. Port Blakeley Mill Co.*, 8 Wash. 467, 36 Pac. 463.

Conditions precedent—Retroactive effect of law: *Everett v. Adamson*, 106 Wash. 355, 180 Pac. 144.

Remedies: See Remington's Digest, Const. Law, § 68; *Murne v. Schwabacher*, 2 W. T. 130, 3 Pac. 899; *Wintermute v.*

Inability of defendant in criminal case to understand language of witnesses as depriving him of his constitutional right to meet witnesses face to face. Ann. Cas. 1913D, 673.

Use of depositions in criminal case as encroaching on right of accused to meet witnesses. Ann. Cas. 1916A, 1066, 1099, 1102, 1108, 1111, 1124.

Carner, 8 Wash. 585, 36 Pac. 490; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337.

Right of action in tort: *Bailey v. School Dist. No. 49*, 108 Wash. 612, 185 Pac. 810.

Statutes of limitation: See Remington's Digest, Const. Law, § 69; *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *McAuliff v. Parker*, 10 Wash. 141, 38 Pac. 744.

OBLIGATION OF CONTRACTS.—**Powers of State in General:** The law impairing the obligation: See Remington's Digest, Const. Law, § 70; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337; *Booth v. Snohomish County*, 75 Wash. 122, 134 Pac. 686; *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574.

Judicial powers—Encroachment on legislation—Relief bills—Validity: *State ex rel. Govan v. Clausen*, 108 Wash. 133, 183 Pac. 115.

Exercise of police power: See Remington's Digest, Const. Law, § 70-1; *Seattle v. Hurst*, 50 Wash. 424, 97 Pac. 454, 18 L. R. A. (N. S.) 169; *State ex rel. Pratt v. Seattle*, 73 Wash. 396, 132 Pac. 45; *State v. Postal Telegraph-Cable Co.*, 101 Wash. 630, 172 Pac. 902.

Constitution and enabling act: See Remington's Digest, Const. Law, § 71; *Romnie v. State*, 7 Wash. 215, 34 Pac. 924.

Contracts of States and Municipalities.—Contracts of state with individuals in general: See Remington's Digest, Const. Law, § 72; *Rand, McNally & Co. v. Hartmanft*, 29 Wash. 591, 70 Pac. 77.

Contracts of state and school districts: *State ex rel. School Dist. No. 301 v. Clausen*, 109 Wash. 37, 186 Pac. 319.

Grants and sales of tide-land by state: See Remington's Digest, Const. Law, § 73; *Allen v. Forrest*, 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Tacoma Land Co. v. Young*, 18 Wash. 495, 52 Pac. 244.

Monopolies and exclusive franchises: See Remington's Digest, Const. Law, § 74; North Springs Water Co. v. Tacoma, 21 Wash. 517, 58 Pac. 773, 27 L. R. A. 214.

Corporate rights and privileges in general: See Remington's Digest, Const. Law, § 75; Tacoma v. Boutelle, 61 Wash. 434, 112 Pac. 661; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287.

Right to use streets: See Remington's Digest, Const. Law, § 76; Seattle v. Columbia etc. R. Co., 6 Wash. 379, 33 Pac. 1048; Com. Electric Light etc. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 592; State ex rel. Peabody v. Superior Court, 77 Wash. 593, 138 Pac. 277; Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

Tax sales: See Remington's Digest, Const. Law, § 77; Herrick v. Niesz, 16 Wash. 74, 47 Pac. 414.

Foreclosure of lien — Conditions precedent: Everett v. Adamson, 106 Wash. 355, 180 Pac. 144.

Pecuniary obligations of municipality: See Remington's Digest, Const. Law, § 78; Rand, McNally & Co. v. Hartranft, 32 Wash. 378, 73 Pac. 401; State v. Aberdeen, 34 Wash. 61, 74 Pac. 1022.

Remedies against municipality: See Remington's Digest, Const. Law, § 79; Union Sav. Bank etc. v. Gelbach, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359; Eidemiller v. Tacoma, 14 Wash. 376, 44 Pac. 877; State ex rel. Dunn v. Dorsey, 19 Wash. 120, 52 Pac. 1065; Townsend Gas etc. Co. v. Hill, 24 Wash. 469, 64 Pac. 778; State ex rel. Polson v. Hardcastle, 68 Wash. 548, 124 Pac. 110.

Contracts of Individuals.—Judgments: See Remington's Digest, Const. Law, § 80; Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53, 10 L. R. A. 815; Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216; Raught v. Lewis, 24 Wash. 47, 63 Pac. 1104; Denio v. Benham, 24 Wash. 485, 64 Pac. 749; Fischer v. Kittinger, 39 Wash. 174, 81 Pac. 551; Howard v. Ross, 38 Wash. 627, 80 Pac. 819; Williams v. Packard, 39 Wash. 217, 81 Pac. 710; Gaffney v. Jones, 29 Wash. 587, 81 Pac. 1058.

Marriage and divorce: See Remington's Digest, Const. Law, § 81; Maynard v. Valentine, 2 W. T. 3, 3 Pac. 195; Maynard v. Hill, 2 W. T. 321, 5 Pac. 717.

Change in rate of interest: See Remington's Digest, Const. Law, §§ 82, 83; Union Sav. Bank & Trust Co. v. Gelbach, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359; Burns v. Woolery, 15 Wash. 134, 45 Pac. 894.

Creation or displacement of liens: See Remington's Digest, Const. Law, § 84; Spokane Mfg. etc. Co. v. McChesney, 1

Wash. 609, 21 Pac. 198; Sitton v. Dubois, 14 Wash. 624, 45 Pac. 303.

Exemption laws: See Remington's Digest, Const. Law, § 85; Heilbron's Estate, In re, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602. See, also, Lavenberg's Estate, In re, 104 Wash. 515, 177 Pac. 328.

Imposition of penalty or forfeiture: See Remington's Digest, Const. Law, § 86; Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Peterson v. Jahn Contracting Co., 96 Wash. 210, 164 Pac. 937.

Withdrawal of Remedies: See Remington's Digest, Const. Law, § 87; Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216; Title Guaranty & Surety Co. v. Coffman, Dobson & Co., 97 Wash. 211, 166 Pac. 620.

Change of remedies: See Remington's Digest, Const. Law, § 88; Heilbron's Estate, In re, 14 Wash. 536, 45 Pac. 163, 35 L. R. A. 602; Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932; Canadian etc. Trust Co. v. Blake, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. Rep. 946; Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932.

Limitation of actions: See Remington's Digest, Const. Law, § 89; McQuesten v. Morrill, 12 Wash. 335, 41 Pac. 56; Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875.

Execution sales: See Remington's Digest, Const. Law, § 90; Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932; Wilson v. Wold, 21 Wash. 398, 58 Pac. 223; Canadian & American Mtg. & Trust Co. v. Blake, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. Rep. 946; Strand v. Griffith, 63 Wash. 334, 115 Pac. 512.

Retrospective and Ex Post Facto Laws: See Remington's Digest, Const. Law, §§ 91—98.

Constitutional prohibitions in general: Tacoma Land Co. v. Pierce County, 1 Wash. 482, 25 Pac. 904; State ex rel. Thurston County v. Grimes, 7 Wash. 445, 35 Pac. 361.

Construction to avoid retroactive operation: Heilbron's Estate, In re, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Packscher v. Fuller, 6 Wash. 534, 33 Pac. 875.

Retroactive operation as to rights and obligations: Lemon v. Waterman, 2 W. T. 485, 7 Pac. 899; Spokane Mfg. etc. Co. v. McChesney, 1 Wash. 609, 21 Pac. 198; Baer v. Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

Laws relating to remedies: Spokane County v. Northern Pacific R. Co., 5 Wash. 89, 31 Pac. 420; Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489, 61 Am.

ART. I, §§ 24, 25 CONSTITUTION OF THE STATE OF WASHINGTON.

St. Rep. 932; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

Curative acts: *Skellinger v. Smith*, 1 W. T. 369; *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926; *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462; *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318; *State ex rel. Traders' Bank v. Winter*, 15 Wash. 407, 46 Pac. 644; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; *Pullman v. Hungate*, 8 Wash. 519, 36 Pac. 483; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306.

Nature of *ex post facto* laws: *Fox v. Territory*, 2 W. T. 297, 5 Pac. 603; *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029; *State v. Hoyt*, 4 Wash. 818, 30 Pac. 1060.

Amendment of by-laws of beneficial association as impairment of vested rights as applied to existing members. 10 *Ann. Cas.* 626; 17 *Ann. Cas.* 817; *Ann. Cas.* 1913C, 679; *Ann. Cas.* 1917B, 814.

Impairment of ordinance granting privilege as impairment of contract obligation. 3 *Ann. Cas.* 88, 986; 6 *Ann. Cas.* 259, 601; 8 *Ann.*

Cas. 622; *Ann. Cas.* 1915A, 899, 911, 926.

Effect of change of judicial decision to impair the obligation of a contract. 16 *L. R. A.* 646; 5 *L. R. A. (N. S.)* 860; 23 *L. R. A. (N. S.)* 500; 4 *Ann. Cas.* 93; 9 *Ann. Cas.* 1121; *Ann. Cas.* 1915C, 578.

Extending time for redemption from tax sale or mortgage foreclosure as impairment of obligation of contract. 1 *A. L. R.* 143; 2 *Ann. Cas.* 801.

Power of state to increase franchise rates. 3 *A. L. R.* 730; 9 *A. L. R.* 1165.

Power of state to change private contract rates for public utilities. 9 *A. L. R.* 1423.

Power of public service commission with respect to regulation of street railways as affected by contract. 5 *A. L. R.* 44.

Paving ordinance as impairment of obligation of street railway franchise. 10 *A. L. R.* 897.

Examination and supervision of banks by public officers as impairment of charter rights. 8 *A. L. R.* 898.

§ 24. RIGHT TO BEAR ARMS.—The right of the individual citizen to bear arms in defense of himself or the state shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.

Cited in 46 Wash. 410.

Ballinger's Code, section 7085, prohibiting the organizing, maintaining or employing of an armed body of men, does not violate this section: *State v. Gohl*, 46 Wash. 408, 90 Pac. 259.

Right to bear arms. 1 *Ann. Cas.* 56; 7 *Ann. Cas.* 927; 17 *Ann. Cas.* 570; *Ann. Cas.* 1913B, 333; 14 *L. R. A.* 600; 3 *L. R. A. (N. S.)* 168; 20 *L. R. A. (N. S.)* 1007; 36 *L. R. A. (N. S.)* 115; *L. R. A.* 1917C, 63.

§ 25. PROSECUTION BY INFORMATION.—Offenses heretofore required to be prosecuted by indictment may be prosecuted by information or by indictment, as shall be prescribed by law.

Cited in 1 Wash. 380; 2 Wash. 555; 15 Wash. 510; 20 Wash. 247.

Statutes substituting informations for indictments: See *Remington's Digest, Ind. & Inf.*, § 2; *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029; *State v. Stowe*, 3 Wash. 206, 28 Pac. 337, 14 *L. R. A.* 609; *State v. Hoyt*, 4 Wash. 818, 30 Pac. 1060.

Under this section a person accused of larceny, committed before the admission of this state into the Union cannot be prosecuted by information: *McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 *Am. St. Rep.* 152.

This section does not require an infor-

mation or indictment against one charged with assault and battery in a municipal court or that of a justice of the peace: *State v. Gleason*, 15 Wash. 509, 46 Pac. 1043.

Felonies can only be tried in the superior court and upon indictment or information, and if any act conferred jurisdiction thereof on municipal courts, it would be unconstitutional: *Barbee, In re*, 19 Wash. 306, 53 Pac. 155.

A preliminary examination before a committing magistrate, prior to the filing of an information for a felony, is not essential, under this section: *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115.

§ 26. GRAND JURY.—No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

Cited in 2 Wash. 555.

§ 27. TREASON, DEFINED, ETC.—Treason against the state shall consist only in levying war against the state, or adhering to its enemies, or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or confession in open court.

§ 28. HEREDITARY PRIVILEGES ABOLISHED.—No hereditary emoluments, privileges, or powers shall be granted or conferred in this state.

§ 29. CONSTITUTION MANDATORY.—The provisions of this constitution are mandatory, unless by express words they are declared to be otherwise.

Cited in 11 Wash. 437; 25 Wash. 265; 46 Wash. 274; 80 Wash. 353; 88 Wash. 492.

Construction, Operation and Enforcement of Constitutional Provisions.—Construction: See Remington's Digest, Const. Law, §§ 3—10.

General rules of construction: State ex rel. Snell v. Warner, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263; State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204; State ex rel. Blakeslee v. Clausen, 85 Wash. 260, 148 Pac. 28, Ann. Cas. 1916B, 810; Bronson v. Syverson, 88 Wash. 264, 152 Pac. 1039, L. R. A. 1916B, 993; Standard Oil Co. v. Graves, 94 Wash. 291, 162 Pac. 558. See, also, State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920; State ex rel. French v. Clausen, 107 Wash. 667, 182 Pac. 610; State ex rel. Reclamation Board v. Clausen, 110 Wash. 525, 188 Pac. 538.

— Relation to common law: State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

— Relation to enabling act and United States constitution: Romine v. State, 7 Wash. 215, 34 Pac. 924; Herrick v. Niesz, 16 Wash. 74, 47 Pac. 414; Broad, In re, 36 Wash. 449, 78 Pac. 1004, 2 Ann. Cas. 212, 70 L. R. A. 1011; State v. Owen, 97 Wash. 446, 166 Pac. 793.

— Contemporaneous construction: Lewis v. Seattle, 5 Wash. 741, 32 Pac. 794; State ex rel. White v. Board of State Land Commrs., 23 Wash. 700, 63 Pac. 532; Winsor v. Bridges, 24 Wash. 540, 64 Pac. 780; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; State ex rel. Attorney General v. Seattle Gas & Elec. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; Board of Directors Middle Kittitas Irr. Dist. v. Peterson, 4 Wash. 147, 129 Pac. 995; State ex

rel. Atkinson v. Evans, 46 Wash. 219, 89 Pac. 565, 10 L. R. A. (N. S.) 1163.

— Debates in convention: State ex rel. School District No. 24 v. Grimes, 7 Wash. 270, 34 Pac. 836.

— Acquiescence: State ex rel. Dustin v. Rusk, 15 Wash. 403, 46 Pac. 387; State ex rel. Murphy v. McBride, 29 Wash. 335, 70 Pac. 25; State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243.

Construction of particular provisions: See Remington's Digest, Const. Law, § 11; Dacres v. Oregon R. & Nav. Co., 1 Wash. 525, 20 Pac. 601; Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; Northwestern & Pacific Hypotheek Bank v. State, 18 Wash. 731, 50 Pac. 586.

Operation as to laws previously in force: See Remington's Digest, Const. Law, § 12; Rafferty, In re, 1 Wash. 382, 25 Pac. 465; Stenger v. Roeder, 3 Wash. 412, 28 Pac. 748, 29 Pac. 211; State v. Ellis, 22 Wash. 129, 60 Pac. 136.

Grant or limitation of powers: See Remington's Digest, Const. Law, §§ 13, 14. State constitutions: State v. Clark, 30 Wash. 439, 71 Pac. 20. Constitution of United States: Rafferty, In re, 1 Wash. 382, 25 Pac. 465.

Prohibitions and restrictions: See Remington's Digest, Const. Law, § 15; State ex rel. Eshelman v. Cheetham, 21 Wash. 437, 58 Pac. 771; State v. Clark, 30 Wash. 439, 71 Pac. 20.

Self-executing provisions: See Remington's Digest, Const. Law, §§ 16—19. Directions as to legislative action: Seattle v. Chin Let, 19 Wash. 38, 52 Pac. 324.

— Relation to officers or official acts or proceedings: Rafferty, In re, 1 Wash. 382, 25 Pac. 465; State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; Anderson v. Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137; State ex rel.

ART. I, §§ 30-32 CONSTITUTION OF THE STATE OF WASHINGTON.

Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674.

— Prohibitions and restrictions: *Holmes & Bull Fur. Co. v. Hedges*, 13 Wash. 696, 43 Pac. 944; *Western American Co. v. Saint Ann Co.*, 22 Wash. 158, 60 Pac. 158; *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.*, 32 Wash. 218, 73 Pac. 388.

— Conferring privileges or exemptions: *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Long v. Billings*, 7 Wash. 267, 34 Pac. 936; *State ex rel. Spokane etc. Tel. Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116; *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *Hamilton v. Pacific Drug Co.*, 78 Wash. 689, 139 Pac. 642.

Mandatory or directory provisions: See *Remington's Digest*, Const. Law, § 20; *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340.

Duty of legislature to obey constitutional mandate: See *Remington's Digest*, Const. Law, 21; *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

Constitutional questions: See *Remington's Digest*, Const. Law, §§ 22-24. Persons entitled to raise constitutional questions: *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.

— Estoppel or waiver: *Romine v. State*, 7 Wash. 215, 34 Pac. 924; *Spokane County v. Allen*, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830; *Seanor v. Board of*

County Commissioners, 13 Wash. 48, 42 Pac. 552.

Determination of constitutional questions—Presumptions and construction in favor of constitutionality: *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395; *Board of Directors Middle etc. Dist. v. Peterson*, 4 Wash. 147, 29 Pac. 995; *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774; *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25; *State ex rel. School Dist. No. 24 v. Grimes*, 7 Wash. 270, 34 Pac. 836; *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974; *Barker v. State Fish Commission*, 88 Wash. 73, 152 Pac. 537; *Litchman v. Shannon*, 90 Wash. 186, 155 Pac. 783. See, also, *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 Pac. 920; *State ex rel. Carroll v. Superior Court*, 113 Wash. 54, 193 Pac. 236.

Self-executing provisions of constitution generally. 7 *Ann. Cas.* 627; 18 *Ann. Cas.* 199; *Ann. Cas.* 1914C, 1116; *Ann. Cas.* 1916D, 868; *Ann. Cas.* 1918D, 1080; 16 *L. R. A.* 281.

Self-executing provisions of constitution relating to initiative and referendum. 18 *Ann. Cas.* 202; *Ann. Cas.* 1914C, 1119; 50 *L. R. A.* (N. S.) 198; *L. R. A.* 1917B, 18.

§ 30. RIGHTS RESERVED.—The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people.

Cited in 30 Wash. 443.

§ 31. STANDING ARMY.—No standing army shall be kept up by this state in time of peace, and no soldier shall in time of peace be quartered in any house without the consent of its owner, nor in time of war except in the manner prescribed by law.

§ 32. FUNDAMENTAL PRINCIPLES.—A frequent recurrence to fundamental principles is essential to the security of individual rights, and the perpetuity of free government.

This article is amended by adding sections 33 and 34: See 8th Amendment.

Cited in 18 Wash. 571; 60 Wash. 113; 76 Wash. 315, 317, 333; 77 Wash. 580; 81 Wash. 411; 107 Wash. 171.

ARTICLE II.

Legislative Department.

Cited in 102 Wash. 474.

§ 1. LEGISLATIVE POWERS, WHERE VESTED.—The legislative powers shall be vested in a senate and house of representatives, which shall be called the legislature of the state of Washington.

This section is amended: See 7th Amendment.

Cited in 13 Wash. 20; 35 Wash. 132; 64 Wash. 79; 70 Wash. 300; 80 Wash. 693; 81 Wash. 632; 82 Wash. 648; 84 Wash. 309, 323; 85 Wash. 263, 272, 284, 299; 92 Wash. 22, 23, 36, 38; 97 Wash. 572.

DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.—Nature and scope in general: See Remington's Digest, Const. Law, § 25; State ex rel. Reed v. Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340; State v. Clark, 30 Wash. 439, 71 Pac. 20; Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239.

Encroachments on judiciary: See Remington's Digest, Const. Law, §§ 26—29. In general: Maynard v. Valentine, 2 W. T. 3, 3 Pac. 195; Maynard v. Hill, 2 W. T. 321, 5 Pac. 717; Hickman v. Hickman, 1 Wash. 257, 24 Pac. 445, 22 Am. St. Rep. 148; Mason, In re, 3 Wash. 609, 28 Pac. 1025; Bellingham Bay Imp. Co. v. New Whatcom, 20 Wash. 53, 54 Pac. 774; Heath v. McCrea, 20 Wash. 342, 55 Pac. 432.

— Establishment, organization and jurisdiction of courts: Cloherty, In re, 2 Wash. 137, 27 Pac. 1064; State ex rel. Maltby v. Superior Court, 7 Wash. 223, 34 Pac. 922; State ex rel. Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674; State ex rel. Dustin v. Rusk, 15 Wash. 403, 46 Pac. 387; State ex rel. Murphy v. McBride, 29 Wash. 335, 70 Pac. 25.

Interposition in particular proceedings: State ex rel. Hersner v. Arthur, 7 Wash. 358, 35 Pac. 120.

Encroachment on executive: See Remington's Digest, Const. Law, § 30; State ex rel. McReavy v. Burke, 8 Wash. 412, 36 Pac. 281; State ex rel. Rogers v. Jenkins, 20 Wash. 78, 54 Pac. 765.

Delegation of powers: See Remington's Digest, Const. Law, §§ 31—35. In general: Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; Thompson, In re, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149; Westlake Avenue, In re, 40 Wash. 144, 82

Pac. 279; State ex rel. Matson v. Superior Court, 42 Wash. 491, 85 Pac. 264; Carstens v. De Sellem, 82 Wash. 643, 144 Pac. 934; Los Angeles Berry Growers' Co-operative Assn. v. Huntley, 84 Wash. 155, 146 Pac. 373; State v. Merrill, 83 Wash. 8, 144 Pac. 925; Bruen, In re, 102 Wash. 472, 172 Wash. 1152.

— To local authorities: Lessman v. Territory, 3 W. T. 452, 19 Pac. 63; Thornton v. Territory, 3 W. T. 482, 17 Pac. 896; Nelson v. Troy, 11 Wash. 435, 39 Pac. 974; State ex rel. Griffith v. Newland, 37 Wash. 428, 79 Pac. 983; State ex rel. Attorney General v. McGraw, 13 Wash. 311, 43 Pac. 176; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332; State v. Storey, 51 Wash. 630, 99 Pac. 878; Cawsey v. Brickey, 82 Wash. 653, 144 Pac. 938.

— To municipal corporations: Cloherty, In re, 2 Wash. 137, 27 Pac. 1064; Tacoma v. State, 4 Wash. 64, 29 Pac. 847; State ex rel. Snell v. Warner, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; State ex rel. Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674; Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625; Tacoma v. Krech, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68; Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 Pac. 316; McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504, 40 L. R. A. (N. S.) 1207; State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; Salary of Superior Court Judges, In re, 82 Wash. 623, 114 Pac. 929; Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462; Foster v. Commissioners of Cowlitz County, 100 Wash. 502, 171 Pac. 539; State ex rel. McBride v. Superior Court, 103 Wash. 409, 174 Pac. 973.

— To corporations: O'Neill, In re, 41 Wash. 174, 83 Pac. 104, 3 L. R. A. (N. S.) 558.

Local option and submission to popular vote: Thornton v. Territory, 3 W. T. 482, 17 Pac. 896; Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609.

§ 2. HOUSE OF REPRESENTATIVES AND SENATE.—The house of representatives shall be composed of not less than sixty-three nor more than ninety-nine members. The number of senators shall not be more than one-half nor less than one-third of the number of members of the house of representatives. The first legislature shall be composed of seventy members of the house of representatives and thirty-five senators.

Cited in 85 Wash. 263; 92 Wash. 542.

§ 3. THE CENSUS.—The legislature shall provide by law for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five, and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration, made

by the authority of the United States, the legislature shall apportion and district anew the members of the senate and house of representatives, according to the number of inhabitants, excluding Indians not taxed, soldiers, sailors, and officers of the United States army and navy in active service.

Cited in 15 Wash. 50; 92 Wash. 542.

§ 4. ELECTION OF REPRESENTATIVES AND TERM OF OFFICE.—Members of the house of representatives shall be elected in the year eighteen hundred and eighty-nine at the time and in the manner provided by this constitution, and shall hold their offices for the term of one year and until their successors shall be elected.

Cited in 49 Wash. 72.

§ 5. ELECTIONS, WHEN TO BE HELD.—The next election of the members of the house of representatives after the adoption of this constitution shall be on the first Tuesday after the first Monday of November, eighteen hundred and ninety, and thereafter members of the house of representatives shall be elected biennially, and their term of office shall be two years; and each election shall be on the first Tuesday after the first Monday in November, unless otherwise changed by law.

§ 6. ELECTION AND TERM OF OFFICE OF SENATORS.—After the first election the senators shall be elected by single districts of convenient and contiguous territory at the same time and in the same manner as members of the house of representatives are required to be elected, and no representative district shall be divided in the formation of a senatorial district. They shall be elected for the term of four years, one-half of their number retiring every two years. The senatorial districts shall be numbered consecutively, and the senators chosen at the first election had by virtue of this constitution, in odd-numbered districts, shall go out of office at the end of the first year, and the senators elected in the even-numbered districts shall go out of office at the end of the third year.

Cited in 4 Wash. 14; 92 Wash. 543.

§ 7. QUALIFICATIONS OF LEGISLATORS.—No person shall be eligible to the legislature who shall not be a citizen of the United States and a qualified voter in the district for which he is chosen.

Cited in 54 Wash. 463.

§ 8. JUDGES OF THEIR OWN ELECTION AND QUALIFICATION—QUORUM.—Each house shall be the judge of the election, returns, and qualifications of its own members, and a majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

Cited in 60 Wash. 423.

§ 9. RULES OF PROCEDURE.—Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and, with the concurrence of two-thirds of all the members elected, expel a member, but no member shall be expelled a second time for the same offense.

§ 10. ELECTION OF OFFICERS.—Each house shall elect its own officers, and when the lieutenant-governor shall not attend as president, or shall act as governor, the senate shall choose a temporary president. When presiding, the lieutenant-governor shall have the deciding vote in case of an equal division of the senate.

Cited in 29 Wash. 340.

§ 11. JOURNAL, PUBLICITY OF MEETINGS—ADJOURNMENTS. Each house shall keep a journal of its proceedings and publish the same, except such parts as require secrecy. The doors of each house shall be kept open, except when the public welfare shall require secrecy. Neither house shall adjourn for more than three days, nor to any place other than that in which they may be sitting, without the consent of the other.

Cited in 88 Wash. 494.

§ 12. SESSIONS, WHEN—DURATION.—The first legislature shall meet on the first Wednesday after the first Monday in November, A. D. 1889. The second legislature shall meet on the first Wednesday after the first Monday in January, A. D. 1891, and sessions of the legislature shall be held biennially thereafter, unless specially convened by the governor, but the times of meeting of subsequent sessions may be changed by the legislature. After the first legislature the sessions shall not be more than sixty days.

§ 13. LIMITATION ON MEMBERS HOLDING OFFICE IN THE STATE.—No member of the legislature during the term for which he is elected shall be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

Cited in 107 Wash. 669—671, 673.

§ 14. SAME, FEDERAL OR OTHER OFFICE.—No person being a member of congress, or holding any civil or military office under the United States or any other power, shall be eligible to be a member of the legislature; and if any person after his election as a member of the legislature shall be elected to congress or be appointed to any other office, civil or military, under the government of the United States, or any other power, his acceptance thereof shall vacate his seat: Provided, that officers in the militia of the state who receive no annual salary, local officers, and postmasters, whose compensation does not exceed three hundred dollars per annum, shall not be ineligible.

§ 15. WRITS OF ELECTION TO FILL VACANCIES.—The governor shall issue writs of election to fill such vacancies as may occur in either house of the legislature.

§ 16. PRIVILEGES FROM ARREST.—Members of the legislature shall be privileged from arrest in all cases except treason, felony, and breach of the peace; they shall not be subject to any civil process during the session of the legislature, nor for fifteen days next before the commencement of each session.

§ 17. FREEDOM OF DEBATE.—No member of the legislature shall be liable in any civil action or criminal prosecution whatever for words spoken in debate.

§ 18. STYLE OF LAWS.—The style of the laws of the state shall be: "Be it enacted by the legislature of the state of Washington"; and no laws shall be enacted except by bill.

§ 19. BILL TO CONTAIN ONE SUBJECT.—No bill shall embrace more than one subject, and that shall be expressed in the title.

Cited in 1 Wash. 294, 307, 311, 387; 2 Wash. 495; 3 Wash. 275; 6 Wash. 149; 10 Wash. 149; 15 Wash. 10, 481; 17 Wash. 450, 634; 19 Wash. 398, 443, 448; 21 Wash. 383; 24 Wash. 256; 25 Wash. 126; 28 Wash. 321; 31 Wash. 192; 35 Wash. 166, 341; 36 Wash. 32, 537; 38 Wash. 312; 39 Wash. 185; 40 Wash. 407; 41 Wash. 4; 42 Wash. 193, 194, 499; 43 Wash. 664; 46 Wash. 597; 48 Wash. 44, 71; 49 Wash. 623; 50 Wash. 518; 54 Wash. 233; 66 Wash. 230, 612, 613; 70 Wash. 529, 532; 71 Wash. 596; 75 Wash. 85, 616; 76 Wash. 317; 78 Wash. 105, 110, 111, 117; 79 Wash. 231, 639; 80 Wash. 362; 81 Wash. 491, 606; 82 Wash. 646; 83 Wash. 13; 86 Wash. 434; 88 Wash. 469; 90 Wash. 419-421; 91 Wash. 420, 423, 425; 94 Wash. 415; 106 Wash. 545; 108 Wash. 107; 109 Wash. 654, 685; 110 Wash. 483.

SUBJECT AND TITLES OF ACTS.—Acts relating to one or more subjects: See Remington's Digest, Statut., §§ 13, 13-1, and cases cited.

Expression in Title of subject of act in general: See Remington's Digest, Statut., § 14, and cases cited. See, also, State ex rel. Anderson v. Howell, 106 Wash. 542, 181 Pac. 37; Fisher Flouring Mills Co. v. Brown, 109 Wash. 680, 187 Pac. 399.

— Amending or repealing acts: See Remington's Digest, Statut., § 15; Harland v. Territory, 3 W. T. 131, 13 Pac. 453; White v. Territory, 3 W. T. 397, 19 Pac. 37; Rumsey v. Territory, 3 W. T. 332, 21 Pac. 152; Marston v. Humes, 3 Wash. 267, 28 Pac. 520; State v. Halbert, 14 Wash. 306, 44 Pac. 538; State v. Dillon, 14 Wash. 703, 46 Pac. 1119; Nolan, In re, 21 Wash. 395, 58 Pac. 222; State ex rel. Seattle Electric Co. v. Superior Court, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831; State v. Scott, 32 Wash. 279, 73 Pac. 365; Shortall v. Puget Sound Bridge & Dredging Co., 45 Wash. 290, 88 Pac. 212, 122 Am. St. Rep. 899; Blalock v. Condon, 51 Wash. 604, 99 Pac. 733; State ex rel. Golden Valley Irrigation Co. v. Superior Court, 67 Wash. 556, 122 Pac. 19.

Titles and provisions of acts relating to particular subjects: See Remington's Digest, Statut., §§ 15-1-28.

§ 15-1. In general: State v. Allen, 80 Wash. 83, 141 Pac. 292.

§ 16. — Persons and personal rights and relations: O'Neill, In re, 41 Wash. 174, 83 Pac. 104, 6 Ann. Cas. 869, 3 L. R. A. (N. S.) 558.

§ 16-1. — Franchises, privileges and immunities: Ewing v. Seattle, 55 Wash. 9, 104 Pac. 259.

§ 17. — Corporations and corporate officers: State v. Fraternal Knights and Ladies, 35 Wash. 338, 77 Pac. 500; State ex rel. Osborne etc. Co. v. Nichols, 38 Wash. 309, 80 Pac. 462; State ex rel. Great Northern R. Co. v. Superior Court, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793; Davis-Kaser Co. v. Colonial Fire Underwriters' Insurance Co., 91 Wash. 383, 157 Pac. 870.

§ 18. — Occupations and employments: State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; State ex rel. Smith v. Dental Examiners, 31 Wash. 492, 72 Pac. 110; State v. Ames, 47 Wash. 328, 92 Pac. 137; State v. Pollman, 51 Wash. 110, 98 Pac. 88; Lower v. Cornelius, 72 Wash. 124, 129 Pac. 911; Peet v. Mills, 76 Wash. 437, 136 Pac. 685, Ann. Cas. 1915D, 154, L. R. A. 1916A, 358; State v. Seattle Taxicab & Transfer Co., 90 Wash. 416, 156 Pac. 837; State v. Ferry Line Auto Bus Co., 93 Wash. 614, 161 Pac. 467. See, also: Archibald v. Northern Pac. R. Co., 108 Wash. 97, 183 Pac. 95.

§ 19. — Rights of property, transfers and encumbrances: McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060; Goudy v. Meath, 38 Wash. 126, 80 Pac. 295; Seattle National Bank v. Ally, 66 Wash. 610, 120 Pac. 94; Scott v. Stark, 75 Wash. 610, 135 Pac. 643; Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659; McMullen & Co. v. Croft, 92 Wash. 411, 159 Pac. 375.

§ 20. — Contracts and rights and liabilities under contracts: Johnston v. Wood, 19 Wash. 441, 53 Pac. 707; Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 Pac. 1106.

§ 21. — Civil remedies and proceedings: Marston v. Humes, 3 Wash. 267, 28 Pac. 520; Maling v. Crummey, 5 Wash.

222, 31 Pac. 600; Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932; Fletcher v. Seattle, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 143; Bradley Eng. & Mach. Co. v. Muzzy, 54 Wash. 227, 103 Pac. 37, 18 Ann. Cas. 1072; National Surety Co. v. Bratnobar Lumber Co., 67 Wash. 601, 122 Pac. 337.

§ 22. — Crimes and criminal prosecutions and punishment: Rafferty, In re, 1 Wash. 382, 25 Pac. 465; Hathaway v. McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889; State v. Tieman, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854; State ex rel. Zenner v. Graham, 74 Wash. 81, 74 Pac. 1058; State v. Moran, 46 Wash. 596, 90 Pac. 1044; Donnellan, In re, 49 Wash. 460, 95 Pac. 1085; State v. Montgomery, 57 Wash. 192, 106 Pac. 771; State v. Blaine, 64 Wash. 122, 116 Pac. 660; State v. George, 84 Wash. 113, 146 Pac. 378.

§ 23. — Counties, towns and municipal corporations: Commissioners of King County v. Davies, 1 Wash. 290, 24 Pac. 540; State ex rel. Cole v. New Whatcom, 3 Wash. 7, 27 Pac. 1020; Pacific American Fisheries v. Whatcom County, 69 Wash. 291, 124 Pac. 905; Hambach v. Ward, 69 Wash. 351, 125 Pac. 140; State ex rel. Fugita v. Milroy, 71 Wash. 592, 129 Pac. 384; Castle Rock v. Furth, 78 Wash. 47, 138 Pac. 317.

§ 24. — Taxation and public funds: State ex rel. American Savings Union v. Whittlesey, 17 Wash. 447, 50 Pac. 119; White's Estate, In re, 42 Wash. 360, 84 Pac. 831; State ex rel. Wolfe v. Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707; Spokane & Inland Empire R. Co. v. Spokane County, 75 Wash. 72, 134 Pac. 688.

§ 25. — Schools and school districts: Van Houten v. Routhe, 1 Wash. 306, 25 Pac. 728; State ex rel. Henry v. McDonald, 25 Wash. 122, 64 Pac. 912; Callvert v. Winsor, 26 Wash. 368, 67 Pac. 91; State v. Pakenham, 40 Wash. 403, 82 Pac. 597; State ex rel. McFadden v. Shorrocks, 55 Wash. 208, 104 Pac. 214; State ex rel. School District No. 56 v. Superior Court, 69 Wash. 189, 124 Pac. 484. See, also: Swanson v. School Dist. No. 15, 109 Wash. 652, 187 Pac. 386.

§ 26. — Public works and improvements: Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; Tacoma Land Co. v. Young, 18 Wash. 495, 52 Pac. 244; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Seattle & Lake Washington Waterway Co. v. Seattle Dock Co., 35 Wash.

503, 77 Pac. 845; State ex rel. Conner v. Superior Court, 81 Wash. 480, 143 Pac. 112; Holzman v. Spokane, 91 Wash. 418, 157 Pac. 1086.

§ 27. — Courts and judges: State ex rel. Dustin v. Rusk, 15 Wash. 403, 46 Pac. 387; Bogue v. Seattle, 19 Wash. 396, 53 Pac. 548; Grant v. Cole, 23 Wash. 542, 63 Pac. 263; State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540; State ex rel. Fair v. Hamilton, 92 Wash. 347, 159 Pac. 379.

§ 28. — Public officers: State ex rel. Griffith v. Newland, 37 Wash. 428, 79 Pac. 983; State ex rel. Funke v. Board of Commrs., 48 Wash. 461, 93 Pac. 920; State ex rel. Zent v. Nichols, 50 Wash. 508, 97 Pac. 728; Tabor v. Walla Walla, 77 Wash. 579, 137 Pac. 1040.

Validity of Acts as affected by expression in title: See Remington's Digest, Statut., §§ 29, 30; State v. Clark, 43 Wash. 664, 86 Pac. 1067; Donnellan, In re, 49 Wash. 460, 95 Pac. 1085; Jolliffe v. Brown, 1 Wash. 155, 4 Pac. 149, 53 Am. St. Rep. 868; Howlett v. Cheetham, 17 Wash. 626, 50 Pac. 522.

Invalidity of Acts relating to subjects not expressed in title: See Remington's Digest, Statut., § 31; Harland v. Territory, 3 W. T. 131, 13 Pac. 453; State v. Halbert, 14 Wash. 306, 44 Pac. 538; Percival v. Cowychee & Wide Hollow Irr. Dist., 15 Wash. 480, 46 Pac. 1035; Howlett v. Cheetham, 17 Wash. 626, 50 Pac. 522; Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 Pac. 1106; State ex rel. Henry v. Macdonald, 25 Wash. 122, 64 Pac. 912; State ex rel. Nettleton v. Case, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L. R. A. (N. S.) 152; Anderson v. Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137; Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; State v. Clark, 43 Wash. 664, 86 Pac. 1067.

Invalidity of Provisions not expressed in title of act: See Remington's Digest, Statut., § 32; State v. Tieman, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854; State v. Poole, 42 Wash. 192, 84 Pac. 727; State ex rel. Matson v. Superior Court, 42 Wash. 491, 85 Pac. 264; State v. Merchant, 48 Wash. 69, 92 Pac. 890; Blalock v. Condon, 51 Wash. 604, 99 Pac. 733; State ex rel. Arnold v. Mitchell, 55 Wash. 513, 104 Pac. 791.

Construction of constitutional provisions relative to titles of statutes. 1 Ann. Cas. 584; Ann. Cas. 1915A, 79.

Constitutionality of statute having title more comprehensive than act itself. Ann. Cas. 1912A, 102.

ART. II, §§ 20-25 CONSTITUTION OF THE STATE OF WASHINGTON.

§ 20. ORIGIN AND AMENDMENT OF BILLS.—Any bill may originate in either house of the legislature, and a bill passed by one house may be amended in the other.

§ 21. YEAS AND NAYS.—The yeas and nays of the members of either house shall be entered on the journal on the demand of one-sixth of the members present.

§ 22. PASSAGE OF BILLS.—No bill shall become a law unless, on its final passage, the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal of each house, and a majority of the members elected to each house be recorded thereon as voting in its favor.

Cited in 88 Wash. 495.

§ 23. COMPENSATION OF MEMBERS.—Each member of the legislature shall receive for his services five dollars for each day's attendance during the session, and ten cents for every mile he shall travel in going to and returning from the place of meeting of the legislature, on the most usual route.

§ 24. LOTTERIES AND DIVORCE.—The legislature shall never authorize any lottery, or grant any divorce.

Cited in 19 Wash. 40.

This section is mandatory and self-executing and prohibitory of lotteries for any purpose, charitable or otherwise: *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324.

The organic act of the territory of Oregon authorized a special act of the legislature divorcing parties from the bonds of

matrimony: *Maynard v. Hill*, 2 W. T. 321, 5 Pac. 717.

The marriage relation being a status, rather than a contract, its dissolution by the legislature is not the impairment of the obligation of a contract: *Id.*; see *Maynard v. Valentine*, 2 W. T. 1, 3 Pac. 195.

§ 25. EXTRA COMPENSATION, PROHIBITED.—The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office.

See *infra*, Art. III, § 25, compensation of state officers.

Cited in 4 Wash. 92; 6 Wash. 258; 7 Wash. 450; 9 Wash. 232; 19 Wash. 488; 21 Wash. 439; 22 Wash. 268; 47 Wash. 375; 48 Wash. 465; 54 Wash. 456; 107 Wash. 610; 108 Wash. 136; 111 Wash. 242, 250; 113 Wash. 582.

Increase or reduction of compensation, in general: See *Remington's Digest, Officers*, § 43, and cases cited; *Municipal Corporations*, § 71, and cases cited.

This section does not apply to officers who receive specific fees for specific services, and accordingly the fees of justices and constables may be reduced by a law passed subsequently to their election and qualification: *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 Pac. 361.

This section does not prohibit the legislature, or either branch, from granting an employee compensation for services performed in addition to the regular duties for which he was employed: *State ex rel. Eshelman v. Cheetham*, 21 Wash. 437, 58 Pac. 771.

The allowance of witness fees to a policeman is permissible under this section: *State v. Saillard*, 27 Wash. 267, 60 Pac. 651.

Laws of 1907, changing the title of the county surveyor to county engineer, and changing his compensation from \$5 per day for the time employed to a fixed salary per year, violates this section: *State ex rel. Funke v. Board of Commrs.*, 48 Wash. 461, 93 Pac. 920.

A legislative act which provides that the county treasurer shall be charged with the duty of assessing and collecting city taxes, and that the city shall pay him therefor the sum of \$500 per year, does not violate this section: *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428. See *Rohde v. Seavey*, 4 Wash. 91, 29 Pac. 768, question as to justices' of the peace salaries in cities over five thousand inhabitants raised, but not decided.

Attorneys' fees paid by delinquent taxpayers upon collections made by county attorneys under Laws of 1891, page 321, § 105, cannot be allowed as extra compensation under this section: *Spokane County v. Allen*, 9 Wash. 229, 232, 37 Pac. 428, 43 Am. St. Rep. 830, affirming and distinguishing *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428.

A law requiring the city council in cities of the third class to sit as a board of equalization, for which they may receive compensation, merely imposes a special duty, and the repeal of such law does not violate the provisions of this section: *Heilig v. Puyallup City Council*, 7 Wash. 29, 34 Pac. 164.

The allowance of a deputy to a county officer does not violate the provisions of this section as to increasing compensation of an officer during his term: *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974.

The state treasurer is not entitled to compensation in addition to his salary for services in disposing of the securities deposited with him by a foreign insurance company as trustee for the policy-holders: *Young v. Millett*, 19 Wash. 486, 53 Pac. 823.

As to members of a city council, see *Tacoma v. Lillis*, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; *James v. Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957.

Where the commissioner of public lands,

an office created by the constitution, was elected for the term of four years, and served for two years drawing a salary under the general appropriation acts, which for ten years theretofore allowed a salary of \$2,000 per annum, his salary cannot be increased during his term by a general act fixing his compensation at \$3,000, even if the same were the first general act fixing his salary: *State ex rel. Ross v. Clausen*, 47 Wash. 607, 92 Pac. 453.

The salary of a county officer cannot be increased during his term by reason of an increase in the population of the county: *State ex rel. Maltby v. Will*, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

This section prohibits the increase of Port Commissioners' salary under L. '17, p. 502, § 2: *State ex rel. Port of Seattle v. Wardall*, 107 Wash. 606, 182 Pac. 67.

Power of courts to inquire as to increases of compensation by legislature: *State ex rel. Govan v. Clausen*, 108 Wash. 133, 183 Pac. 115.

The state labor commissioner's salary could not be increased during his term of office, by reason of his increase of duties by § 7727 et seq.: *State ex rel. Younger v. Clausen*, 111 Wash. 241, 190 Pac. 324.

This section has no application to compensation granted under the soldiers' bonus act, § 10743-1: *State ex rel. Hart v. Clausen*, 113 Wash. 570, 194 Pac. 793.

Constitutional prohibition against increase of compensation of officer during term as applicable where new duties are imposed after taking office. 18 Ann. Cas. 403; Ann. Cas. 1918E, 1062; L. R. A. 1918E, 761.

Constitutional prohibition against change of salary of officer during term as affecting fees. 23 L. R. A. 609.

§ 26. SUITS AGAINST THE STATE.—The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

Cited in 2 Wash. 497; 18 Wash. 75; 27 Wash. 291; 68 Wash. 331; 86 Wash. 688.

Claims and Liability and Consent of State to be Sued, in General.—The word "claim" used in the statute must be held to mean "cause of action": *Northwestern & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33.

A state is not liable for damages suffered by an individual by reason of the negligence or malfeasance of one of its

officers in the absence of a statute making it liable for such damages: *Billings v. State*, 27 Wash. 288, 67 Pac. 583.

The state dental board has incidental capacity to be sued by individuals, independently of statute, as a corporation sub modo: *Stern v. State Board of Dental Examiners*, 50 Wash. 100, 96 Pac. 693.

No cause of action is created or liability imposed upon the state by this section: *Riddoch v. State*, 68 Wash. 329, 122 Pac. 450, Ann. Cas. 1913E, 1033, 42 L. R. A. (N. S.) 251.

ART. II, §§ 27, 28 CONSTITUTION OF THE STATE OF WASHINGTON.

Conditions precedent to action against state: See *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528.

The state auditor cannot plead an offset in favor of the state against a county when mandamus is at the suit of the county to issue warrants for the amount of school funds duly apportioned to the county: *State ex rel. Tanner v. Cheetham*, 23 Wash. 666, 63 Pac. 552.

This section does not create any cause of action or impose any liability: *Riddock v. State*, 68 Wash. 329, 123 Pac. 450.

Effect of statute permitting state to be sued upon the question of its liability for negligence or tort. 13 L. R. A. 1276.

Liability of state or its officers to action for specific performance of contract. 5 Ann. Cas. 295.

When claim against state deemed based on contract within statute permitting action against state. 42 L. R. A. (N. S.) 256.

§ 27. ELECTIONS—VIVA VOCE VOTE.—In all elections by the legislature the members shall vote viva voce, and their votes shall be entered on the journal.

§ 28. SPECIAL LEGISLATION.—The legislature is prohibited from enacting any private or special laws in the following cases:—

1. For changing the names of persons, or constituting one person the heir at law of another.
2. For laying out, opening, or altering highways, except in cases of state roads extending into more than one county, and military roads to aid in the construction of which lands shall have been or may be granted by congress.
3. For authorizing persons to keep ferries wholly within this state.
4. For authorizing the sale or mortgage of real or personal property of minors, or others under disability.
5. For assessment or collection of taxes or for extending time for collection thereof.
6. For granting corporate powers or privileges.
7. For authorizing the apportionment of any part of the school fund.
8. For incorporating any town or village, or to amend the charter thereof.
9. From giving effect to invalid deeds, wills, or other instruments.
10. Releasing or extinguishing, in whole or in part, the indebtedness, liability, or other obligation of any person or corporation to this state, or to any municipal corporation therein.
11. Declaring any person of age, or authorizing any minor to sell, lease, or encumber his or her property.
12. Legalizing, except against the state, the unauthorized or invalid act of any officer.
13. Regulating the rate of interest on money.
14. Remitting fines, penalties, or forfeitures.
15. Providing for the management of common schools.
16. Authorizing the adoption of children.
17. For limitation of civil or criminal action.
18. Changing county lines, locating or changing county seats: Provided, This shall not be construed to apply to the creation of new counties.

See Art. XI, § 10.

Cited in 3 Wash. 11; 7 Wash. 231, 232; 79 Wash. 231; 95 Wash. 221; 109 Wash. 15 Wash. 140; 33 Wash. 503; 43 Wash. 657.
64; 64 Wash. 73, 74; 69 Wash. 293, 294;

GENERAL AND SPECIAL OR LOCAL LAWS.—Creation and regulations of corporations and corporate offices: See Remington's Digest, Statut., §§ 9-1—12; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287.

§ 10. Regulation of government and affairs of counties, towns and municipalities in general: Newman v. North Yakima, 7 Wash. 220, 34 Pac. 921; Terry v. King County, 43 Wash. 61, 86 Pac. 210, 9 Ann. Cas. 1170; State ex rel. Hunt v. Tausick, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802; State ex rel. Moulshy v. Fleming, 88 Wash. 583, 153 Pac. 347; Young Men's Christian Assn. v. Parish, 89 Wash. 495, 154 Pac. 785, L. R. A. 1916D, 272; Orrock v. South Moran Township, 97 Wash. 144, 165 Pac. 1096.

§ 11. Establishment and regulation of drains and other public works: Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781.

§ 12. Curative statutes: Baker v. Seattle, 2 Wash. 576, 27 Pac. 462.

Special municipal charters: See Remington's Digest, Const. Law, § 99; Alger v. Hill, 2 Wash. 344, 27 Pac. 922; Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926.

The contention that by the terms of the act under which District No. 10 was incorporated a different and better system of education was provided for cities than was enjoyed by the rest of the state, amounting to special legislation, will not be sustained: Holmes & Bull Furn. Co. v. Hedges, 13 Wash. 696, 707, 43 Pac. 944.

A law is not necessarily a general law merely because it applies to all communities in the state similarly situated: Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926.

As to regulation of government and affairs of counties, towns and municipalities, see Newman v. North Yakima, 7 Wash. 220, 34 Pac. 921.

Laws of 1903, page 209, chapter 115, appropriating certain sums for the construction of armories in three specified cities, violates the provisions of subdivision 6 of this section: Terry v. King County, 43 Wash. 61, 86 Pac. 210, 9 Ann. Cas. 1170.

A law conferring the right of eminent domain upon boom companies does not violate subdivision 6 of this section: North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750.

The drainage act of 1895, page 143, granting the power of eminent domain, applying alike to all lands and persons similarly situated, is not special legislation: Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781.

A law authorizing the validation of invalid warrants of a city is not special legislation, but is a curative act, applicable only to what has been done before the date of the act: Baker v. Seattle, 2 Wash. 576, 27 Pac. 462; Hunt v. Fawcett, 8 Wash. 396, 36 Pac. 318. And so, of a law authorizing a municipal corporation to assume and ratify an indebtedness created by the residents of a de facto municipality: State ex rel. Traders' Bank v. Winter, 15 Wash. 407, 46 Pac. 644. And the legislature may authorize the payment of an indebtedness incurred under an unconstitutional law: Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781; State ex rel. Latimer v. Henry, 28 Wash. 38, 68 Pac. 368. Or the legislature may validate municipal contracts entered into by a de facto municipality: Pullman v. Hungate, 8 Wash. 519, 36 Pac. 483; State ex rel. Hemen v. Ballard, 16 Wash. 418, 47 Pac. 970; Abernethy v. Medical Lake, 9 Wash. 112, 37 Pac. 306.

The power to create municipal corporations is vested exclusively in the legislature: Territory ex rel. Kelly v. Stewart, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; Ferguson v. Snohomish, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795; State ex rel. Traders' Bank v. Winter, 15 Wash. 407, 46 Pac. 644.

Under the provisions of our state constitution the power is delegated to cities of the first class to frame charters for their own government, subject to the general laws of the state: Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625; Scurry v. Seattle, 8 Wash. 278, 36 Pac. 145.

The prohibition of the state constitution against special legislation incorporating cities and towns is prospective in its operation, and does not affect existing special charters: Tacoma Land Co. v. Pierce County, 1 Wash. 482, 25 Pac. 904.

Chapter 3, Laws of 1917, page 2, compelling Pierce county to levy a tax for the purpose of acquiring a federal mobilization training camp and supply station for the federal army and other military organizations under the federal government, does not violate this section: State ex rel. Board of Commissioners of Pierce County v. Clausen, 95 Wash. 214, 163 Pac. 744.

Section 4706, infra, prohibiting actions against school districts relating to certain matters does not violate this section: Swanson v. School Dist. No. 15, 109 Wash. 652, 187 Pac. 386.

What constitutes "local" statute. 4 Ann. Cas. 659.

Province of legislature to determine whether special law is necessary in given case. 6 Ann. Cas. 926.

§ 29. CONVICT LABOR.—After the first day of January, eighteen hundred and ninety, the labor of convicts of this state shall not be let out by contract to any person, copartnership, company, or corporation, and the legislature shall by law provide for the working of convicts for the benefit of the state.

§ 30. BRIBERY OR CORRUPT SOLICITATION.—The offense of corrupt solicitation of members of the legislature, or of public officers of the state or any municipal division thereof, and any occupation or practice of solicitation of such members or officers to influence their official action, shall be defined by law, and shall be punished by fine and imprisonment. Any person may be compelled to testify in any lawful investigation or judicial proceeding against any person who may be charged with having committed the offense of bribery or corrupt solicitation, or practice of solicitation, and shall not be permitted to withhold his testimony on the ground that it may criminate himself or subject him to public infamy, but such testimony shall not afterwards be used against him in any judicial proceeding, except for perjury in giving testimony; and any person convicted of either of the offenses aforesaid shall, as part of the punishment therefor, be disqualified from ever holding any position of honor, trust, or profit in this state. A member who has a private interest in any bill or measure proposed or pending before the legislature shall disclose the fact to the house of which he is a member, and shall not vote thereon.

Cited in 67 Wash. 520.

§ 31. LAWS, WHEN TO TAKE EFFECT.—No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted, unless in case of any emergency (which emergency must be expressed in the preamble or in the body of the act) the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house; said vote to be taken by yeas and nays and entered on the journals.

Cited in 24 Wash. 419; 25 Wash. 612; 55 Wash. 482; 73 Wash. 398; 84 Wash. 305, 310; 106 Wash. 545.

Time of taking effect, in general. See Remington's Digest, Statut., §§ 78—81, and cases cited.

Conclusiveness of legislative declaration of emergency. 7 A. L. R. 519.

Effect of declaring an emergency in the enactment of a law without declaring it free from the operation of the referendum. 7 A. L. R. 530.

§ 32. LAWS, HOW SIGNED.—No bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session, and under such rules as the legislature shall prescribe.

An enrolled bill properly certified is conclusive, and courts cannot inquire into the proceedings before its passage: State ex rel. Reed v. Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340. Distinguished in Scouten v. Whatcom, 33 Wash. 273, 74 Pac. 389, allowing the enrolled bill to be impeached to determine the legislative

intent when there was an ambiguity. If it appears from the history of the act that a clause repealing a former act was included through inadvertence, such clause will be held qualified by the intention of the legislature as manifested in other parts of the same act: Howlett v. Cheetam, 17 Wash. 626, 50 Pac. 522.

§ 33. OWNERSHIP OF LANDS BY ALIENS, PROHIBITED—EXCEPTIONS.—The ownership of lands by aliens, other than those who in

good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly, or in trust for such alien, shall be void: Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purposes of this prohibition.

Cited in 16 Wash. 167, 172, 375; 18 Wash. 664; 19 Wash. 85; 29 Wash. 230; 33 Wash. 546; 45 Wash. 340; 46 Wash. 105, 221; 81 Wash. 163; 84 Wash. 143; 112 Wash. 345, 346, 351; 113 Wash. 91, 92.

In general: See Remington's Digest, Aliens, § 3, and cases cited.

Under this section a lease of lands for a period of ninety-nine years is for such an unreasonable term as to fall within the meaning and spirit of the constitutional prohibition against alien ownership: State ex rel. Winston v. Morrison, 18 Wash. 664, 52 Pac. 228.

And a lease of forty-five years made to a corporation becomes void upon a majority of the stock being conveyed to aliens: State ex rel. Winston v. Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430.

But a deed to an alien of mortgaged lands, in satisfaction of a bona fide mortgage debt is not void: Oregon Mortgage Co. v. Carstens, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841.

This constitutional inhibition against the ownership of lands by corporations, the majority of whose stock is held by aliens, applies to the acquisition of a right of way for a water flume: State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686.

But the inhibition of this section places no restriction upon the granting of fishing licenses to such a corporation: See Hastings v. Anacortes P. Co., 29 Wash. 224, 69 Pac. 776. An alien can acquire

land in this state containing deposits of limestone, silica and silicated rock, such deposits being minerals within the meaning of this section, and not to be restricted by the words "metals, iron, coal or fireclay": State ex rel. Atkinson v. Evans, 46 Wash. 219, 89 Pac. 565, 10 L. R. A. (N. S.) 1163.

One who conveys land to an alien has no right to the property since only the state can raise objection to the alien ownership of real property: Abrams v. State, 45 Wash. 327, 88 Pac. 327, 122 Am. St. Rep. 914, 13 Ann. Cas. 527, 9 L. R. A. (N. S.) 186; Prentice v. How, 84 Wash. 136, 146 Pac. 388.

Grantees of an owner who leased the property to an alien, a Japanese citizen, cannot resist claims to the property in a suit for specific performance brought by an assignee of the lessee, an American citizen on the constitutional ground that ownership of lands by aliens is prohibited in this state: Keene v. Zindorf, 81 Wash. 152, 142 Pac. 484.

"Good faith," under this section, was not shown where the applicant evaded military duty: State ex rel. Tanner v. Staeheli, 112 Wash. 344, 192 Pac. 991; State ex rel. Tanner v. Rychen, 113 Wash. 90, 193 Pac. 220.

Inheritance by or from aliens as proper subject of treaty regulation. 4 A. L. R. 1391; Ann. Cas. 1912A, 1100; 32 L. R. A. 177; L. R. A. 1915E, 327.

Right of alien enemy to take by inheritance. 11 A. L. R. 162.

§ 34. BUREAU OF STATISTICS, AGRICULTURE AND IMMIGRATION.—There shall be established in the office of the secretary of state a bureau of statistics, agriculture, and immigration, under such regulations as the legislature may provide.

§ 35. PROTECTION OF EMPLOYEES.—The legislature shall pass necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health, and fix pains and penalties for the enforcement of the same.

Police power, in general: See Remington's Digest, Const. Law, §§ 43—51, and cases cited.

ART. II, §§ 36-39 CONSTITUTION OF THE STATE OF WASHINGTON.

§ 36. WHEN BILLS MUST BE INTRODUCED.—No bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature, unless the legislature shall otherwise direct by a vote of two-thirds of all the members elected to each house, said vote to be taken by yeas and nays and entered upon the journal, or unless the same be at a special session.

§ 37. REVISION OR AMENDMENT.—No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

Cited in 9 Wash. 65; 14 Wash. 486; 26 Wash. 647; 83 Wash. 53; 91 Wash. 420, 425; 92 Wash. 46, 354; 107 Wash. 166; 109 Wash. 657.
Amendment or revision in general: See Remington's Digest, Statut., §§ 33-36, and cases cited.

§ 38. LIMITATION ON AMENDMENTS.—No amendment to any bill shall be allowed which shall change the scope and object of the bill.

Cited in 64 Wash. 81; 80 Wash. 362; 106 Wash. 545.

§ 39 FREE TRANSPORTATION TO PUBLIC OFFICERS PROHIBITED.—It shall not be lawful for any person holding public office in this state to accept or use a pass or to purchase transportation from any railroad or other corporation, other than as the same may be purchased by the general public, and the legislature shall pass laws to enforce this provision.

Cited in 45 Wash. 584.

Constitutional or statutory provisions
against gift or receipt of free

railroad transportation to public
officers. 17 Ann. Cas. 662; Ann.
Cas. 1915D, 559.

ARTICLE III.

The Executive.

Cited in 68 Wash. 150; 102 Wash. 474.

§ 1. EXECUTIVE DEPARTMENT.—The executive department shall consist of a governor, lieutenant-governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and a commissioner of public lands, who shall be severally chosen by the qualified electors of the state at the same time and place of voting as for the members of the legislature.

Cited in 4 Wash. 25, 26; 28 Wash. 497; 33 Wash. 459; 47 Wash. 608; 59 Wash. 493; 74 Wash. 579; 79 Wash. 638.

The language of this section is mandatory: State v. Womack, 4 Wash. 19, 29 Pac. 939.

A member of the state board of education is an executive officer within the meaning of this section: Id.; State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974.

This section does not limit the executive officers of the state to those enumerated therein. The object was to classify the executive department, rather than to exclusively establish its officers: State v. Womack, supra.

By this section, the function of the attorney general is to represent the state in legal matters, and actions in the name of the state are contemplated: State v. Asotin County, 79 Wash. 634, 140 Pac. 914.

§ 2. GOVERNOR, TERM OF OFFICE.—The supreme executive power of this state shall be vested in a governor, who shall hold his office for a term of four years, and until his successor is elected and qualified.

Cited in 28 Wash. 16, 498; 29 Wash. 337. executive: State v. Womack, 4 Wash. 19, 29 Pac. 939; see State ex rel. Stearns v. Smith, 9 Wash. 195, 37 Pac. 295; State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974.

Under this section the governor is to be considered the head of the executive department, in which department other officers may exist whose functions are

§ 3. OTHER EXECUTIVE OFFICERS, TERMS OF OFFICE.—The lieutenant-governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public lands shall hold their offices for four years respectively, and until their successors are elected and qualified.

Cited in 4 Wash. 26; 28 Wash. 16; 29 Wash. 338; 59 Wash. 494.

§ 4. RETURNS OF ELECTIONS, CANVASS, ETC.—The returns of every election for the officers named in the first section of this article shall be sealed up and transmitted to the seat of government by the returning officers, directed to the secretary of state, who shall deliver the same to the speaker of the house of representatives at the first meeting of the house thereafter, who shall open, publish, and declare the result thereof in the presence of a majority of the members of both houses. The person having the highest number of votes shall be declared duly elected, and a certificate thereof shall be given to such person, signed by the presiding officers of both houses; but if any two or more shall be highest and equal in votes for the same office, one of them shall be chosen by the joint vote of both houses. Contested elections for such officers shall be decided by the legislature in such manner as shall be decided by law. The terms of all officers named in section one of this article shall commence on the second Monday in January after their election, until otherwise provided by law.

§ 5. GENERAL DUTIES OF GOVERNOR.—The governor may require information in writing from the officers of the state upon any subject relating to the duties of their respective offices, and shall see that the laws are faithfully executed.

Cited in 19 Wash. 637; 28 Wash. 498; 89 Wash. 184, 185.

§ 6. MESSAGES.—He shall communicate at every session by message to the legislature the condition of the affairs of the state, and recommend such measures as he shall deem expedient for their action.

§ 7. EXTRA LEGISLATIVE SESSIONS.—He may, on extraordinary occasions, convene the legislature by proclamation, in which shall be stated the purposes for which the legislature is convened.

Cited in 35 Wash. 130. ernor power to do so: State v. Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

This section does not restrict legislative action at an extra session to the purposes for which it was called, nor has the gov-

§ 8. COMMANDER-IN-CHIEF.—He shall be commander-in-chief of the military in the state, except when they shall be called into the service of the United States.

§ 9. PARDONING POWER.—The pardoning power shall be vested in the governor, under such regulations and restrictions as may be prescribed by law.

Cited in 3 Wash. 611; 20 Wash. 79; 47 Wash. 280.

This section is not violated by Laws of 1890, page 276, § 17, authorizing trustees of the reform school to return an incorrigible youth to the committing court for discharge or sentence: *Mason, In re*, 3 Wash. 609, 28 Pac. 1025.

By Ballinger's Code, sections 204—208, establishing the state board of pardons, the legislature did not intend to abrogate the pardoning powers of the governor, and recommendations of the board are

not binding on the governor: *State ex rel. Rogers v. Jenkins*, 20 Wash. 78, 54 Pac. 765.

Pardoning power of governor as confined to offenses against state. 19 *Ann. Cas.* 115; *Ann. Cas.* 1914A, 484.

Power of lieutenant-governor or governor pro tem. to pardon. 47 *L. R. A. (N. S.)* 1036.

Constitutionality of restrictions upon governor's pardoning power. *L. R. A.* 1915F, 519.

§ 10. VACANCY IN.—In case of the removal, resignation, death, or disability of the governor, the duties of the office shall devolve upon the lieutenant-governor, and in case of a vacancy in both the offices of governor and lieutenant-governor, the duties of governor shall devolve upon the secretary of state, who shall act as governor until the disability be removed or a governor be elected.

This section is amended: See 6th Amendment.

Cited in 29 Wash. 338.

Upon the death of the governor the duties of the office devolve upon the lieutenant-governor for the balance of the term, and there is no vacancy in the office

of governor required to be filled by an election; and in such case the office of lieutenant-governor does not thereby become vacant: *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25.

§ 11. REMISSION OF FINES AND FORFEITURES.—The governor shall have power to remit fines and forfeitures, under such regulations as may be prescribed by law, and shall report to the legislature at its next meeting each case of reprieve, commutation, or pardon granted, and the reasons for granting the same, and also the names of all persons in whose favor remission of fines and forfeitures shall have been made, and the several amounts remitted, and the reasons for the remission.

Cited in 20 Wash. 79.

Power of executive to remit fines and forfeitures. 17 *Ann. Cas.* 603.

§ 12. VETO POWER.—Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal, and proceed to reconsider. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law; but in all such cases the vote of both houses shall be determined by the yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be returned by the governor within five days, Sundays excepted, after it shall be presented to him, it shall become a law without his signature, unless the general adjournment shall

prevent its return, in which case it shall become a law unless the governor, within ten days next after the adjournment, Sundays excepted, shall file such bill, with his objections thereto, in the office of the secretary of state, who shall lay the same before the legislature at its next session, in like manner as if it had been returned by the governor. If any bill presented to the governor contain several sections or items he may object to one or more sections or items while approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the section or sections, item or items, to which he objects, and the reasons therefor, and the section or sections, item or items, so objected to, shall not take effect unless passed over the governor's objection, as hereinbefore provided.

Veto power withheld from initiated and referred measures: See 7th Amendment.

Cited in 55 Wash. 482.

Power of governor to approve or veto bill in part only. 20 Ann. Cas. 162; 55 L. R. A. 882.

Exclusion or inclusion of Sunday or holiday in computation of time for

return of bill by governor to legislature. Ann. Cas. 1917E, 943.

Right of executive to withdraw approval of bill. 13 Ann. Cas. 230.

Withdrawal of bill from governor. 14 L. R. A. 251.

§ 13. VACANCY IN APPOINTIVE OFFICE.—When, during a recess of the legislature, a vacancy shall happen in any office the appointment to which is vested in the legislature, or when at any time a vacancy shall have occurred in any other state office for the filling of which vacancy no provision is made elsewhere in this constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified.

See *infra*, Art. XIII, § 1, appointment of officers.

Cited in 9 Wash. 199; 59 Wash. 494; 89 Wash. 184, 185.

If the term of a state officer expires, without provision for holding over, the governor may fill the vacancy under this provision, and an appointee continues to hold until the election of a successor: State ex rel. Stearns v. Smith, 9 Wash. 195, 37 Pac. 295.

Under this section an appointment to

fill a vacancy in the office of secretary of state is for the balance of the term, or until the next general election of state officers, fixed at every fourth year: State ex rel. Fish v. Howell, 59 Wash. 492, 110 Pac. 386.

The governor may fill vacancies in the office of two county commissioners: State ex rel. Gilbert v. Dimmick, 89 Wash. 182, 154 Pac. 163.

§ 14. SALARY.—The governor shall receive an annual salary of four thousand dollars, which may be increased by law, but shall never exceed six thousand dollars per annum.

Cited in 35 Wash. 173.

§ 15. COMMISSIONS, HOW ISSUED.—All commissions shall issue in the name of the state, shall be signed by the governor, sealed with the seal of the state, and attested by the secretary of state.

§ 16. LIEUTENANT-GOVERNOR, DUTIES AND SALARY.—The lieutenant-governor shall be presiding officer of the state senate, and shall discharge such other duties as may be prescribed by law. He shall receive an annual salary of one thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

See *supra*, Art. II, § 10; Art. III, § 10.

Cited in 29 Wash. 340.

§ 17. SECRETARY OF STATE, DUTIES AND SALARY.—The secretary of state shall keep a record of the official acts of the legislature and the executive department of the state, and shall, when required, lay the same, and all matters relative thereto, before either branch of the legislature, and shall perform such other duties as shall be assigned him by law. He shall receive an annual salary of twenty-five hundred dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

Cited in 20 Wash. 79.

As to duties of secretary of state, see
State ex rel. Rogers v. Jenkins, 20 Wash.

78, 54 Pac. 765; State ex rel. Gorman v.
Nichols, 40 Wash. 437, 82 Pac. 741.

§ 18. SEAL.—There shall be a seal of the state kept by the secretary of state for official purposes, which shall be called "The seal of the state of Washington."

See *infra*, Art. XVIII, § 1, seal of the state.

§ 19. STATE TREASURER, DUTIES AND SALARY.—The treasurer shall perform such duties as shall be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed four thousand dollars per annum.

Cited in 35 Wash. 174.

§ 20. STATE AUDITOR, DUTIES AND SALARY.—The auditor shall be auditor of public accounts, and shall have such powers and perform such duties in connection therewith as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed three thousand dollars per annum.

Cited in 83 Wash. 13.

§ 21. ATTORNEY GENERAL, DUTIES AND SALARY.—The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law. He shall receive an annual salary of two thousand dollars, which may be increased by the legislature, but shall never exceed thirty-five hundred dollars per annum.

Cited in 28 Wash. 498; 35 Wash. 172,
174, 175; 42 Wash. 655; 79 Wash. 638.

The act of 1887-88, providing that the attorney general shall receive a certain salary and ten per cent on all moneys collected upon legal process instituted by him to enforce claims due the territory, is repugnant to the provisions of this section: State ex rel. Stratton v. Maynard, 35 Wash. 168, 76 Pac. 937.

The attorney general has no power to employ an architect as an expert to assist

him, when the public interests require it: Ritchie v. State, 42 Wash. 653, 85 Pac. 417. The attorney general has no authority upon his own motion to inquire by quo warranto into wrongful exercise of public franchises: State ex rel. Attorney General v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

The attorney general may be authorized to bring actions in the name of the state: State v. Asotin County, 79 Wash. 634, 140 Pac. 914.

§ 22. SUPERINTENDENT OF PUBLIC INSTRUCTION, DUTIES AND SALARY.—The superintendent of public instruction shall have supervision over all matters pertaining to public schools, and shall perform such specific duties as may be prescribed by law. He shall receive an annual salary of twenty-five hundred dollars, which may be increased by law, but shall never exceed four thousand dollars per annum.

Cited in 35 Wash. 174; 90 Wash. 191.

§ 23. COMMISSIONER OF PUBLIC LANDS—COMPENSATION.—The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct.

Cited in 47 Wash. 608; 74 Wash. 579, 583.

§ 24. RECORDS, WHERE KEPT, ETC.—The governor, secretary of state, treasurer, auditor, superintendent of public instruction, commissioner of public lands, and attorney general shall severally keep the public records, books, and papers relating to their respective offices at the seat of government, at which place also the governor, secretary of state, treasurer, and auditor shall reside.

§ 25. QUALIFICATIONS.—No person except a citizen of the United States and a qualified elector of this state shall be eligible to hold any state office, and the state treasurer shall be ineligible for the term succeeding that for which he was elected. The compensation for state officers shall not be increased or diminished during the term for which they shall have been elected. The legislature may, in its discretion, abolish the offices of the lieutenant-governor, auditor and commissioner of public lands.

See infra, § 14, Art. IV, of judges may be increased.

See infra, Art. XI, § 8.

See supra, § 25, Art. II, of officers generally not to be increased, etc.

Cited in 6 Wash. 497; 47 Wash. 375, 609, 610; 51 Wash. 587; 54 Wash. 456; 107 Wash. 611; 111 Wash. 251.

See notes to Art. II, § 25, supra.

"State officer" is applicable only to those superior executive officers who constitute the heads of the executive departments. The constitution does not in terms say who they shall be, but it is noticeable

that this article is devoted entirely to superior state officers: *State ex rel. Stearns v. Smith*, 6 Wash. 496, 33 Pac. 974. See § 1 of this article.

Eligibility of a candidate who pays for advertising by publication of his photograph, under Laws of 1907: See *State ex rel. Coon v. Hay*, 51 Wash. 576, 99 Pac. 748.

ARTICLE IV.

The Judiciary.

Cited in 102 Wash. 474.

§ 1. JUDICIAL POWER, WHERE VESTED.—The judicial power of the state shall be vested in the supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

Cited in 3 Wash. 611; 7 Wash. 224; 19 Wash. 21, 310; 20 Wash. 56; 23 Wash. 702; 71 Wash. 594; 82 Wash. 625, 626; 88 Wash. 551.

JUDICIAL POWERS AND FUNCTIONS.—Nature and scope in general: See *Remington's Digest*, Const. Law, §§ 36-38; *Cloherly*, In re, 2 Wash. 137, 27 Pac. 1064; *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201; *Scanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552; *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728; *State ex rel. Campbell v. Superior Court*, 25 Wash. 271, 65 Pac. 183.

Encroachment on Legislature: See *Remington's Digest*, Const. Law, § 39; *State*

v. Carey, 4 Wash. 424, 30 Pac. 729; *Fredrick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Selde v. Lincoln County*, 25 Wash. 198, 65 Pac. 192; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336; *Kakeldy v. Columbia & Puget Sound R. Co.*, 37 Wash. 675, 80 Pac. 205; *Kelly v. Cowan*, 49 Wash. 606, 96 Pac. 152; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11.

Encroachment on Executive: See *Remington's Digest*, Const. Law, § 40; *Mason*, In re, 3 Wash. 609, 28 Pac. 1025.

Powers, Duties and Acts under legislative authority: See *Remington's Digest*,

ART. IV, §§ 2-3 CONSTITUTION OF THE STATE OF WASHINGTON.

Const. Law, § 41; *Karasek v. Peier*, 22 Wash. 449, 61 Pac. 33, 50 L. R. A. 345.

Encroachment on Judiciary: See *Remington's Digest*, Const. Law, § 42; *Mason, In re*, 3 Wash. 609, 28 Pac. 1025; *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774; *State ex rel. Abbott v. Ross*, 62 Wash. 82, 113 Pac. 273; *State v. Storey*, 51 Wash. 630, 99 Pac. 878; *Pellissier v. Reed*, 75 Wash. 201, 134 Pac. 813.

Bank examiner: *Hanson v. Soderberg*, 105 Wash. 255, 177 Pac. 827.

Municipal Courts.—Municipal courts are "inferior" courts under this section: *Barbee, In re*, 19 Wash. 306, 53 Pac. 155.

Under this section and article IV, section 12, the legislature had power by *Rem. & Bal. Code*, section 7656, to create police courts in cities of the second class, and by section 7657, to confer on them jurisdiction of petit larceny committed within the city: *State ex rel. Fugita v. Milroy*, 71 Wash. 592, 129 Pac. 384.

Section 1271, *infra*, authorizes the

restoration of lost records in justice courts, although they are not courts of record: *State ex rel. Brockway v. Whitehead*, 88 Wash. 549, 153 Pac. 349.

Inferior Courts.—The provision of *Laws of 1893*, page 226 (*Bal. Code*, § 1143), authorizing a city council to enter a decision determining the regularity of a reassessment, and providing for an appeal from such decision, does not violate this section: *Bellingham Bay Imp. Co. v. New Whatcom*, 20 Wash. 53, 54 Pac. 774; *Id.*, 20 Wash. 231, 55 Pac. 630.

A statute authorizing city councils to sit as boards of equalization and pass upon the validity of reassessments for local improvements is not unconstitutional on the ground of conferring judicial power on such bodies: *Heath v. McCrea*, 20 Wash. 342, 55 Pac. 432.

Judicial power within constitutional theory as to separation of powers of government. *Ann. Cas.* 1913E, 1097.

§ 2. SUPREME COURT.—The supreme court shall consist of five judges, a majority of whom shall be necessary to form a quorum and pronounce a decision. The said court shall always be open for the transaction of business except on nonjudicial days. In the determination of causes, all decisions of the court shall be given in writing, and the grounds of the decision shall be stated. The legislature may increase the number of judges of the supreme court from time to time, and may provide for separate departments of said court.

Cited in 29 Wash. 342; 53 Wash. 553, 554; 102 Wash. 414.

Creation and abolition of office: *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25.

A litigant is not entitled, as a matter of right, to a rehearing by the full court sitting en banc: *State ex rel. Vanderveer v. Gormley*, 53 Wash. 543, 102 Pac. 435.

Duration of Terms.—There are no terms

of the supreme court in the sense in which they were formerly held, but only a division of its sittings into sessions: *Skagit R. & L. Co. v. Cole*, 1 Wash. 330, 26 Pac. 535.

There being no terms of court, the court may recall a remittitur and vacate a judgment after the end of a session: *Gordon v. Hillman*, 102 Wash. 411, 173 Pac. 22.

§ 3. ELECTION AND TERMS OF SUPREME JUDGES.—The judges of the supreme court shall be elected by the qualified electors of the state, at large, at the general state election, at the times and places at which state officers are elected, unless some other time be provided by the legislature. The first election of judges of the supreme court shall be at the election which shall be held upon the adoption of this constitution, and the judges elected thereat shall be classified by lot, so that two shall hold their office for the term of three years, two for the term of five years, and one for the term of seven years. The lot shall be drawn by the judges who shall for that purpose assemble at the seat of government, and they shall cause the result thereof to be certified to the secretary of state, and filed in his office. The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all sessions of the supreme court, and in case there shall be two

judges having in like manner, the same short term, the other judges of the supreme court shall determine which of them shall be chief justice. In case of the absence of the chief justice, the judge having in like manner the shortest or next shortest term to serve shall preside. After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election. If a vacancy occur in the office of a judge of the supreme court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold the office for the remainder of the unexpired term. The term of office of the judges of the supreme court first elected shall commence as soon as the state shall have been admitted into the Union, and continue for the term herein provided, and until their successors are elected and qualified. The sessions of the supreme court shall be held at the seat of government until otherwise provided by law.

Cited in 29 Wash. 343, 349; 59 Wash. 494. vacancy for the remainder of the unexpired term: *State ex rel. Murphy v. McBride*, 29 Wash. 335, 70 Pac. 25.

The provision as to term of office does not apply to a judge elected to fill a

§ 4. JURISDICTION.—The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or before the supreme court, or before any superior court of the state, or any judge thereof.

See notes to § 1 of the Civil Code, *infra*.

Cited in 1 Wash. 367, 383; 2 Wash. 160; 3 Wash. 60, 62, 78, 690, 701; 6 Wash. 167, 497, 499; 7 Wash. 238; 8 Wash. 271; 9 Wash. 372, 638; 10 Wash. 226; 12 Wash. 684; 13 Wash. 170; 14 Wash. 255; 15 Wash. 671, 697; 16 Wash. 385, 418; 17 Wash. 6; 18 Wash. 693; 19 Wash. 10; 20 Wash. 98; 21 Wash. 112, 604; 22 Wash. 161, 633; 24 Wash. 542; 26 Wash. 283; 28 Wash. 5, 476; 29 Wash. 494; 30 Wash. 224; 31 Wash. 639; 32 Wash. 53, 451, 511; 47 Wash. 260, 261, 510; 40 Wash. 475, 683; 41 Wash. 152, 360; 48 Wash. 67; 49 Wash. 502, 505; 51 Wash. 310; 54 Wash. 125; 56 Wash. 69; 60 Wash. 222; 68 Wash. 149, 150; 69 Wash. 141; 71 Wash. 287; 78 Wash. 518, 676; 82 Wash. 592, 594; 86 Wash. 93, 94, 140; 90 Wash. 648; 94 Wash. 681; 96 Wash. 356; 101 Wash. 150; 102 Wash. 577; 103 Wash. 629; 105 Wash. 168; 106 Wash. 364; 107 Wash. 251; 113 Wash. 216.

§ 5. SUPERIOR COURT—ELECTION OF JUDGES, TERMS OF, ETC.—There shall be in each of the organized counties of this state a superior court, for which at least one judge shall be elected by the qualified electors of the county at the general state election: Provided, that until otherwise directed by the legislature one judge only shall be elected for the

counties of Spokane and Stevens; one judge for the county of Whitman; one judge for the counties of Lincoln, Okanogan, Douglas, and Adams; one judge for the counties of Walla Walla and Franklin; one judge for the counties of Columbia, Garfield, and Asotin; one judge for the counties of Kittitas, Yakima, and Klickitat; one judge for the counties of Clark, Skamania, Pacific, Cowlitz, and Wahkiakum; one judge for the counties of Thurston, Chehalis, Mason, and Lewis; one judge for the county of Pierce; one judge for the county of King; one judge for the counties of Jefferson, Island, Kitsap, San Juan, and Clallam; and one judge for the counties of Whatcom, Skagit, and Snohomish. In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor, and the business of the court shall be so distributed and assigned by law, or, in the absence of legislation therefor, by such rules and orders of court as shall best promote and secure the convenient and expeditious transaction thereof. The judgments, decrees, orders, and proceedings of any session of the superior court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court presided at such session. The first superior judges elected under this constitution shall hold their offices for the period of three years, and until their successors shall be elected and qualified, and thereafter the term of office of all superior judges in this state shall be for four years from the second Monday in January next succeeding their election, and until their successors are elected and qualified. The first election of judges of the superior court shall be at the election held for the adoption of this constitution. If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Cited in 4 Wash. 717; 15 Wash. 404; 19 Wash. 21; 20 Wash. 222; 29 Wash. 351; 42 Wash. 27; 54 Wash. 384, 386, 392, 393; 59 Wash. 594; 70 Wash. 469; 71 Wash. 485; 82 Wash. 625, 626; 93 Wash. 249, 250.

The intention of the constitution is that the regular term of all superior court judges shall be uniform both as to duration, commencement and ending thereof, hence the act (Laws of 1890, p. 346) providing for additional judges is void in so far as it changed the term of office of judges appointed thereunder: *State ex rel. Dyer v. Twichell*, 4 Wash. 715, 31 Pac. 19.

This section fixing the judicial districts "until otherwise directed by the legislature" vests the power in the legislature to change the districts: *State ex rel. Dustin v. Rusk*, 15 Wash. 403, 46 Pac. 387.

The constitution and laws of this state

recognize the distinction between the superior courts and the judges thereof: *State ex rel. Romano v. Yakey*, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071. The term "court" is broader than the term "judge," as the former continues while the latter may change: *Gunderson v. Cochran*, 3 Wash. 476, 28 Pac. 1105; *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256.

A judge of the superior court, who has been elected to fill an unexpired term, is entitled to qualify and take office as soon as the result of the election has been declared, the provision herein as to beginning of term of office only applying to original terms, and not to unexpired terms: *State ex rel. Linn v. Millett*, 20 Wash. 221, 54 Pac. 1124.

This section is violated by Laws of 1909, page 82, providing that the county commissioners may divide a county into

independent judicial districts: State ex rel. Lytle v. Superior Court, 54 Wash. 378, 103 Pac. 464.

Eligibility to Other Office.—Under this section, a judge elected for the term of four years is ineligible as a candidate for governor during such period: State ex rel.

Reynolds v. Howell, 70 Wash. 467, 126 Pac. 954, 41 L. R. A. (N. S.) 1119.

If a vacancy occurs in the office of a judge of the superior court, the appointee's term ends at the election or when the judge elected to fill the vacancy has qualified: State ex rel. Sears v. Gilliam, 93 Wash. 248, 160 Pac. 757.

§ 6. JURISDICTION OF SUPERIOR COURTS.—The superior court shall have original jurisdiction in all cases in equity and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage; and for such special cases and proceedings as are not otherwise provided for. The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. They shall always be open, except on nonjudicial days, and their process shall extend to all parts of the state. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued and served on legal holidays and nonjudicial days.

Cited in 2 Wash. 3, 545, 665; 3 Wash. 62, 93; 12 Wash. 439; 14 Wash. 263, 605; 15 Wash. 671; 16 Wash. 116, 354, 361; 21 Wash. 162; 24 Wash. 547; 27 Wash. 83, 182; 31 Wash. 13, 222, 306; 32 Wash. 53; 33 Wash. 172; 37 Wash. 260; 43 Wash. 228; 46 Wash. 405; 47 Wash. 484; 50 Wash. 655; 54 Wash. 389; 55 Wash. 42; 57 Wash. 628; 58 Wash. 180; 68 Wash. 490; 75 Wash. 241; 82 Wash. 625, 626; 85 Wash. 200; 86 Wash. 176; 87 Wash. 153; 102 Wash. 474; 110 Wash. 521.

See notes to § 15 of the Civil Code, *infra*.

Under this section real property can be sold under execution in a foreclosure case only in the county in which it is situated, and an execution sale in one county, of lands situated in two counties foreclosed in one action, is void: Vietzen v. Otis, 46 Wash. 402, 90 Pac. 264.

Jurisdiction of the superior court does not extend to a contest of the election of a city officer, in the absence of any statute providing for such contest: State ex rel. Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674.

Under this section any act of a judicial nature performed by a judge is, in contemplation of law, done in open court, although it is in reality performed by the judge at chambers: Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005.

This section cannot be construed as prohibiting the reception of a verdict on nonjudicial days, since such act is a ministerial, and not a judicial, one: State v. Straub, 16 Wash. 111, 47 Pac. 227.

Under this section the superior court is authorized to assume jurisdiction to enjoin the officers of a county, who in excess of their powers are seeking to create a burden on taxpayers by directing an illegal expenditure of public moneys; Krieschel v. County Commrs., 12 Wash. 428, 41 Pac. 186.

Laws of 1909, page 82, providing that the county commissioners may divide a county into judicial districts, each of which is constituted a separate and distinct constitutional county, contravenes this section: State ex rel. Lytle v. Superior Court, 54 Wash. 378, 103 Pac. 464.

ART. IV, §§ 7-10 CONSTITUTION OF THE STATE OF WASHINGTON.

This section is sufficiently broad to embrace general chancery jurisdiction to appoint guardians of the local estate of nonresident insane persons: *Sall, In re*, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885; *Stewart, In re*, 85 Wash. 190, 147 Pac. 1153.

This section does not confer jurisdiction in naturalization proceedings, independent of federal law: *State ex rel. Gorelick v. Superior Court*, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

In nonintervention wills the superior

court has jurisdiction to entertain an application by the executor for an order of distribution of the estate which was in effect a construction of the will and within its general jurisdiction: *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433.

The superior courts of this state have concurrent jurisdiction with justices of the peace where the sum sued for is less than one hundred dollars: *State ex rel. Shannon v. Hunter*, 3 Wash. 92, 27 Pac. 1076.

§ 7. EXCHANGE OF JUDGES—JUDGE PRO TEMPORE.—The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so. A case in the superior court may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record, approved by the court, and sworn to try the case.

Cited in 12 Wash. 172.

Authority and Powers of Substitute Judges in General.—The provision of this section empowering the judge of any superior court to hold court in any county at the request of the judge of the superior court of such county, is self-executing: *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

The visiting judge has the same powers as the regularly elected judge of the county: *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362.

Where a case is heard by a judge pro tempore appointed for the purpose, he has jurisdiction to hear and determine a motion to vacate and set it aside: *Fisher v. Puget Sound Brick etc. Co.*, 34 Wash. 578, 76 Pac. 107.

A visiting judge of the superior court may hold a session of the court at the request of a resident judge, without any request by the governor: *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.

§ 8. ABSENCE OF JUDICIAL OFFICER.—Any judicial officer who shall absent himself from the state for more than sixty consecutive days shall be deemed to have forfeited his office: Provided, that in cases of extreme necessity the governor may extend the leave of absence such time as the necessity therefor shall exist.

§ 9. REMOVAL OF JUDGES, ATTORNEY GENERAL, ETC.—Any judge of any court of record, the attorney general, or any prosecuting attorney may be removed from office by joint resolution of the legislature, in which three-fourths of the members elected to each house shall concur, for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient cause stated in such resolution. But no removal shall be made unless the officer complained of shall have been served with a copy of the charges against him as the ground of removal, and shall have an opportunity of being heard in his defense. Such resolution shall be entered at length on the journal of both houses, and on the question of removal the ayes and nays shall also be entered on the journal.

§ 10. JUSTICES OF THE PEACE.—The legislature shall determine the number of justices of the peace to be elected in incorporated cities or towns and in precincts, and shall prescribe by law the powers, duties and jurisdiction of justices of the peace: Provided, that such jurisdiction granted

by the legislature shall not trench upon the jurisdiction of superior or other courts of record, except that justices of the peace may be made police justices of incorporated cities and towns. In incorporated cities or towns having more than five thousand inhabitants, the justices of the peace shall receive such salary as may be provided by law, and shall receive no fees for their own use.

See *supra*, Art. IV, § 6.

Cited in 2 Wash. 3; 4 Wash. 92, 93; 15 Wash. 49; 25 Wash. 267; 31 Wash. 306; 41 Wash. 48; 54 Wash. 455; 57 Wash. 627; 58 Wash. 27; 78 Wash. 624; 88 Wash. 551; 92 Wash. 378; 113 Wash. 648.

The last clause of this section does not apply to justices of the peace in incorporated cities which contained less than five thousand inhabitants by the last federal census, but which contained more than five thousand inhabitants by a census taken pursuant to Code of 1881, section 2754: *Rohde v. Seavey*, 4 Wash. 91, 29 Pac. 768.

This section is self-executing with reference to the matter of population, merely the matter of fixing salaries being referred to the legislature, and the courts are justified in receiving testimony to determine the amount of population: *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137.

Under this section an official determination of the population is essential to entitle a justice to the salary: *State ex rel. Elwood v. Lovering*, 78 Wash. 624, 139 Pac. 617.

§ 11. COURTS OF RECORD.—The supreme court and the superior court shall be courts of record, and the legislature shall have power to provide that any of the courts of this state, excepting justices of the peace, shall be courts of record.

Cited in 58 Wash. 27; 88 Wash. 550.

That justices' courts are not courts of record does not mean that they may

not keep dockets and records: *State ex rel. Brockway v. Whitehead*, 88 Wash. 549, 153 Pac. 349.

§ 12. INFERIOR COURTS.—The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this constitution.

Cited in 71 Wash. 594.

The power conferred upon the legislature to create additional inferior courts is not one of its original, inherent powers, which can be delegated by it, but is a delegated power which must be exercised

in the manner pointed out, and cannot be again delegated: *Cloherly, In re*, 2 Wash. 137, 27 Pac. 1064.

The legislature being originally vested with authority to create police courts, it cannot delegate that power to a city: *Id.*

§ 13. SALARIES OF JUDICIAL OFFICERS—HOW PAID, ETC.—No judicial officer, except court commissioners and unsalaried justices of the peace, shall receive to his own use any fees or perquisites of office. The judges of the supreme court and judges of the superior courts shall severally, at stated times, during their continuance in office, receive for their services the salaries prescribed by law therefor, which shall not be increased after their election, nor during the term for which they shall have been elected. The salaries of the judges of the supreme court shall be paid by the state. One-half of the salary of each of the superior court judges shall be paid by the state, and the other one-half by the county or counties for which he is elected. In cases where a judge is provided for more than one county, that portion of his salary which is to be paid by the counties shall be apportioned between or among them according to the assessed value of their taxable property, to be determined by the assessment next preceding the time for which such salary is to be paid.

ART. IV, §§ 14-20 CONSTITUTION OF THE STATE OF WASHINGTON.

Cited in 47 Wash. 375; 54 Wash. 456; 82 Wash. 625, 626; 107 Wash. 611; 111 Wash. 251. See, Salary of Superior Court Judges, In re, 82 Wash. 623, 144 Pac. 929.

§ 14. SALARIES OF SUPREME AND SUPERIOR COURT JUDGES. Each of the judges of the supreme court shall receive an annual salary of four thousand dollars (\$4,000); each of the superior court judges shall receive an annual salary of three thousand dollars (\$3,000), which said salaries shall be payable quarterly. The legislature may increase the salaries of the judges herein provided.

Cited in 82 Wash. 625, 626.

See, Salary of Superior Court Judges, In re, 82 Wash. 623, 144 Pac. 929.

§ 15. INELIGIBILITY OF JUDGES.—The judges of the supreme court and the judges of the superior court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected.

Cited in 13 Wash. 63; 70 Wash. 469, 478; 104 Wash. 100, 105.

§ 16. CHARGING JURIES.—Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

Cited in 3 Wash. 42, 43, 121; 4 Wash. 445; 5 Wash. 125; 6 Wash. 487; 7 Wash. 250, 341, 343; 9 Wash. 333; 13 Wash. 663; 14 Wash. 680; 15 Wash. 183; 20 Wash. 236; 22 Wash. 246; 23 Wash. 659; 24 Wash. 653; 26 Wash. 269; 32 Wash. 66; 35 Wash. 334, 569; 36 Wash. 366; 39 Wash. 202; 41 Wash. 647; 47 Wash. 46; 49 Wash. 28; 50 Wash. 569; 53 Wash. 261; 58 Wash. 529; 61 Wash. 404; 62 Wash. 384;

65 Wash. 675; 69 Wash. 400; 72 Wash. 176; 75 Wash. 341; 81 Wash. 123; 83 Wash. 522; 85 Wash. 223; 91 Wash. 565; 93 Wash. 543; 105 Wash. 636; 109 Wash. 157; 112 Wash. 536.

See notes to § 339 et seq., infra. See Remington's Digest, Crim. Law, §§ 216, 217, 255; Trial, §§ 14, 66-69, 92; Homicide, § 119, and cases cited.

§ 17. ELIGIBILITY OF JUDGES.—No person shall be eligible to the office of judge of the supreme court or judge of a superior court unless he shall have been admitted to practice in the courts of record of this state or of the territory of Washington.

Cited in 93 Wash. 5.

Eligibility.—An attorney who is suspended from practice at the time he becomes a candidate or is required to qual-

ify is not eligible to the office of superior court judge: State ex rel. Willis v. Monfort, 93 Wash. 4, 159 Pac. 889, L. R. A. 1917B, 801.

§ 18. SUPREME COURT REPORTER.—The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law.

Cited in 64 Wash. 329.

§ 19. JUDGES MAY NOT PRACTICE LAW.—No judge of a court of record shall practice law in any court of this state during his continuance in office.

§ 20. DECISIONS, WHEN TO BE MADE.—Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof: Provided, that if within said period of ninety days a rehearing shall have been ordered, then the period within

which he is to decide shall commence at the time the cause is submitted upon such a rehearing.

Cited in 33 Wash. 202.

The failure of a judge to decide a case within ninety days from its submission

does not render the judgment void for want of jurisdiction: *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362.

§ 21. PUBLICATION OF OPINIONS.—The legislature shall provide for the speedy publication of opinions of the supreme court, and all opinions shall be free for publication by any person.

§ 22. CLERK OF SUPREME COURT.—The judges of the supreme court shall appoint a clerk of that court, who shall be removable at their pleasure, but the legislature may provide for the election of the clerk of the supreme court and prescribe the term of his office. The clerk of the supreme court shall receive such compensation by salary only as shall be provided by law.

§ 23. COURT COMMISSIONERS.—There may be appointed in each county, by the judge of the superior court having jurisdiction therein, one or more court commissioners, not exceeding three in number, who shall have authority to perform like duties as a judge of the superior court at chambers, subject to revision by said judge, to take depositions and to perform such other business connected with the administration of justice as may be prescribed by law.

Cited in 27 Wash. 83; 44 Wash. 616; 49 Wash. 317; 90 Wash. 251.

In general: See *Remington's Digest*, Court Commrs., §§ 1-4.

Powers and functions in general: *Peter-son v. Dillon*, 27 Wash. 78, 67 Pac. 397; *State v. Philip*, 44 Wash. 615, 87 Pac. 955.

§ 2. Appointment, qualification and

tenure: *Howard v. Hanson*, 49 Wash. 314, 95 Pac. 265.

§ 3. Civil jurisdiction and authority: *Howard v. Hanson*, 49 Wash. 314, 95 Pac. 265.

§ 4. Procedure: *State ex rel. Richard-son v. Superior Court*, 41 Wash. 439, 83 Pac. 1027.

§ 24. RULES FOR SUPERIOR COURTS.—The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts.

§ 25. REPORTS OF SUPERIOR COURT JUDGES.—Superior judges shall, on or before the first day of November in each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest, and the judges of the supreme court shall, on or before the first day of January in each year, report in writing to the governor such defects and omissions in the laws as they may believe to exist.

§ 26. CLERK OF THE SUPERIOR COURT.—The county clerk shall be, by virtue of his office, clerk of the superior court.

§ 27. STYLE OF PROCESS.—The style of all process shall be "The State of Washington," and all prosecutions shall be conducted in its name and by its authority.

Cited in 14 Wash. 240; 19 Wash. 41; 20 Wash. 491.

In Name of State or Municipality. This section does not apply to prosecutions by municipal corporations for the

violation of city ordinances: *Spokane v. Robison*, 6 Wash. 547, 33 Pac. 960.

A prosecution for the violation of a town ordinance may be brought in the name of the state: *State v. Fountain*, 14 Wash. 236, 44 Pac. 270.

Prosecutions for the violation of Penal ordinances may be properly conducted in the name of the municipality: *Seattle v.*

Chin Let, 19 Wash. 38, 52 Pac. 324; *Puyallup v. Crosby*, 99 Wash. 218, 169 Pac. 322.

§ 28. OATH OF JUDGES.—Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the constitution of the United States and the constitution of the state of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

ARTICLE V.

Impeachment.

§ 1. IMPEACHMENT—POWER OF AND PROCEDURE.—The house of representatives shall have the sole power of impeachment. The concurrence of a majority of all the members shall be necessary to an impeachment. All impeachments shall be tried by the senate, and when sitting for that purpose, the senators shall be upon oath or affirmation to do justice according to law and evidence. When the governor or lieutenant-governor is on trial, the chief justice of the supreme court shall preside. No person shall be convicted without a concurrence of two-thirds of the senators elected.

§ 2. OFFICERS LIABLE TO.—The governor and other state and judicial officers, except judges and justices of courts not of record, shall be liable to impeachment for high crimes or misdemeanors, or malfeasance in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust, or profit in the state. The party, whether convicted or acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

Cited in 6 Wash. 497; 92 Wash. 377.

Impeachment of public officer for acts committed prior to commence-

ment of term. *Ann. Cas.* 1916B, 707; 50 *L. R. A. (N. S.)* 553.

§ 3. REMOVAL FROM OFFICE.—All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law.

Cited in 6 Wash. 498; 8 Wash. 417; 19 Wash. 332; 56 Wash. 234; 59 Wash. 496; 92 Wash. 377, 379.

Impeachments under this article are limited to superior state officers, of the executive and judiciary departments: *State ex rel. Stearns v. Smith*, 6 Wash. 496, 33 Pac. 974.

Alleged malfeasance shall be stated as definitely as in an information in a criminal action: *State ex rel. Whitney v. Friars*, 10 Wash. 348, 39 Pac. 104.

The summary power of removal is vested in the governor as to state officers appointed by him without right in the officer removed to notice and a hearing,

whether his term of office be for a fixed or for an indefinite period: *State ex rel. Howlett v. Cheetham*, 19 Wash. 330, 53 Pac. 349.

This section has no application to a removal by the recall provided for in the city charter: *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, 21 *Ann. Cas.* 305.

The mayor has no power to remove a justice of the peace or revoke the appointment, there being no implied power of removal by the mayor resting in public policy: *State ex rel. Evans v. Superior Court*, 92 Wash. 375, 159 Pac. 84.

ARTICLE VI.

Elections and Elective Rights.

§ 1. QUALIFICATIONS OF ELECTORS.—All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided, that Indians not taxed shall never be allowed the elective franchise: And further provided, that this amendment shall not effect [affect] the right of franchise of any person who is now a qualified elector of this state. The legislature shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this section.

This section is amended: See 2d and 5th Amendments, *infra*.

Cited in 8 Wash. 65; 12 Wash. 382; 13 Wash. 150, 362, 707; 42 Wash. 32; 108 Wash. 341, 343; 113 Wash. 56, 57.

The right to vote in this state at any election resides in those possessing the qualifications prescribed in this section,

subject only to reasonable legislative provisions respecting registration and regulating the exercise of the right: *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

§ 2. SCHOOL ELECTIONS—FRANCHISE, HOW EXTENDED.—The legislature may provide that there shall be no denial of the elective franchise at any school election on account of sex.

Cited in 13 Wash. 362, 707.

School Elections.—Women have the right to vote in school elections: *Holmes*

& *Bull Furniture Co. v. Hedges*, 13 Wash. 696, 43 Pac. 944.

§ 3. WHO DISQUALIFIED.—All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise.

Cited in 13 Wash. 362; 69 Wash. 270, 271.

This section cannot be taken as a construction of the existing territorial statute (§ 5112, *infra*), to mean that such

persons lost their civil rights, when the act only forfeited their right to vote, a political and not a civil right: *State v. Collins*, 69 Wash. 268, 124 Pac. 903.

§ 4. RESIDENCE, CONTINGENCIES AFFECTING.—For the purpose of voting and eligibility to office, no person shall be deemed to have gained a residence by reason of his presence, or lost it by reason of his absence, while in the civil or military service of the state or of the United States, nor while a student at any institution of learning, nor while kept at public expense at any poorhouse or other asylum, nor while confined in public prison, nor while engaged in the navigation of the waters of this state or of the United States, or of the high seas.

Cited in 13 Wash. 362; 51 Wash. 556; 83 Wash. 434.

§ 5. VOTER—WHEN PRIVILEGED FROM ARREST.—Voters shall, in all cases except treason, and breach of the peace, be privileged from arrest during their attendance at elections and going to and returning

therefrom. No elector shall be required to do military duty on the day of any election except in time of war or public danger.

Cited in 28 Wash. 16.

§ 6. BALLOT.—All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.

Cited in 12 Wash. 382; 60 Wash. 373; 78 Wash. 84, 85.

Shepard v. Superior Court, 60 Wash. 370, 111 Pac. 233, 140 Am. St. Rep. 925.

Power to Confer and Regulate—State Legislatures.—This section is subject to regulation by the legislature in any reasonable way not prohibited: State ex rel.

Section 5300, *infra*, providing for the use of voting machines, does not violate this section: State ex rel. Empire Voting Machine Co. v. Carroll, 78 Wash. 83, 138 Pac. 306.

§ 7. REGISTRATION.—The legislature shall enact a registration law, and shall require a compliance with such law before any elector shall be allowed to vote: Provided, that this provision is not compulsory upon the legislature, except as to cities and towns having a population of over five hundred inhabitants. In all other cases the legislature may or may not require registration as a prerequisite to the right to vote, and the same system of registration need not be adopted for both classes.

Cited in 13 Wash. 145; 108 Wash. 342; 113 Wash. 56, 57.

§ 8. ELECTIONS, TIME OF HOLDING.—The first election of county and district officers not otherwise provided for in this constitution, shall be on the Tuesday next after the first Monday in November, eighteen hundred and ninety, and thereafter all elections for such officers shall be held biennially on the Tuesday next succeeding the first Monday in November. The first election of all state officers not otherwise provided for in this constitution, after the election held for the adoption of this constitution, shall be on the Tuesday next after the first Monday in November, eighteen hundred and ninety-two, and the elections for such state officers shall be held in every fourth year thereafter on the Tuesday succeeding the first Monday in November.

See *infra*, Art. XXVII, § 14.

Cited in 4 Wash. 717, 720; 5 Wash. 460, 461; 9 Wash. 532; 16 Wash. 573; 53 Wash. 552; 59 Wash. 494; 81 Wash. 19; 92 Wash. 352, 353; 102 Wash. 475; 113 Wash. 57.

Judges of the superior courts are state officers within the purview of this section: State ex rel. Dyer v. Twichell, 4 Wash. 715, 31 Pac. 19.

Term of Office, Vacancies and Holding Over.—Under this section, the term of office for county officers is for two years commencing on the second Monday of January next succeeding their election: McMurray v. Hollis, 5 Wash. 458, 32 Pac. 293.

This section must be construed in connection with constitution, article XI, sec-

tion 5, which authorizes the legislature to provide for the election of county commissioners and fix their terms of office: State ex rel. Hays v. Twichell, 9 Wash. 530, 38 Pac. 134; State ex rel. Fair v. Hamilton. 92 Wash. 347, 159 Pac. 379.

Sections 4038, 4041, *infra*, providing that at the biennial election, one county commissioner shall be chosen for four years, does not violate this section: State ex rel. Gowan v. Superior Court, 81 Wash. 18, 142 Pac. 452.

Justices of the peace and constables belong to the judicial department of the state and are not county officers: State ex rel. Fair v. Hamilton, 92 Wash. 347, 159 Pac. 379.

ARTICLE VII.

Revenue and Taxation.

Cited in 74 Wash. 279; 84 Wash. 536, 538; 94 Wash. 304.

§ 1. ANNUAL STATE TAX.—All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the estimated ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt.

Cited in 3 Wash. 304; 17 Wash. 12; 18 Wash. 252; 20 Wash. 678; 21 Wash. 54, 554; 23 Wash. 77; 28 Wash. 100; 29 Wash. 163; 30 Wash. 445; 35 Wash. 31; 39 Wash. 179; 45 Wash. 639; 50 Wash. 173; 65 Wash. 176; 75 Wash. 85; 79 Wash. 231, 233; 82 Wash. 626; 85 Wash. 350; 90 Wash. 409; 95 Wash. 135, 238; 106 Wash. 97, 101.

Franchises, being a species of personal

property, are taxable under this section: Commercial Elec. L. & P. Co. v. Judson, 21 Wash. 49, 56 Pac. 829, 57 L. R. A. 78.

Restrictions on Exemptions.—Laws of 1907, page 69, section 1, exempting "moneys" from taxation, violates this section: State ex rel. Wolfe v. Parmenter, 50 Wash. 104, 96 Pac. 1047, 19 L. R. A. (N. S.) 707.

§ 2. TAXATION — UNIFORMITY AND EQUALITY — EXEMPTION.—The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulation by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property: Provided, that a deduction of debts from credits may be authorized: Provided, further, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation.

This section is amended: See 3d Amendment, infra.

Cited in 5 Wash. 146; 6 Wash. 254; 7 Wash. 107, 271; 8 Wash. 549; 14 Wash. 267; 17 Wash. 112, 452; 18 Wash. 253, 276; 20 Wash. 152, 683; 21 Wash. 101, 554; 28 Wash. 258; 29 Wash. 164; 30 Wash. 445; 35 Wash. 483; 37 Wash. 16; 44 Wash. 66, 468; 48 Wash. 482; 49 Wash. 173; 50 Wash. 173, 177; 62 Wash. 410; 65 Wash. 176, 532; 59 Wash. 322; 70 Wash. 50, 52; 71 Wash. 322; 75 Wash. 85; 78 Wash. 55; 79 Wash. 231, 233; 82 Wash. 626; 85 Wash. 350, 628; 89 Wash. 497; 90 Wash. 409; 94 Wash. 304, 311—313; 95 Wash. 135, 221, 237; 106 Wash. 97, 101.

Whether a tax is uniform and equal within the requirement of constitution, is a judicial question: Whatcom County v. Fairhaven Land Co., 7 Wash. 101, 34 Pac. 563.

Power to Exempt—Effect of Require-

ment of Equality and Uniformity.—Laws of 1897, page 139, section 5, subdivisions 6, 8, exempting each person from taxation on personal property to an amount not exceeding \$500, and also improvements upon land to a like amount, are in conflict with this section: State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243.

Only public property, and that of a quasi public character, can be exempt from taxation under the provisions of this section: State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243.

Section 946-S, infra, providing that in prosecutions under the "Red-light Law" whenever a permanent injunction issues, a tax of \$300 shall be assessed against the building and grounds and against the owners, does not offend against the consti-

ART. VII, §§ 3-6 CONSTITUTION OF THE STATE OF WASHINGTON.

tutional provisions providing for uniformity and equality of taxation: State ex rel. Kern v. Jerome, 80 Wash. 261, 141 Pac. 753.

The assessment of property for taxation at fifty per cent of its value, as required by section 11121, *infra*, does not violate this section: State ex rel. Board of Tax Commrs. v. Cameron, 90 Wash. 407, 156 Pac. 537.

Laws of 1901, page 67, providing for the taxation of inheritance is not invalid by reason of exempting some and laying proportional taxes on different ones: State v. Clark, 30 Wash. 439, 71 Pac. 20; White's Estate, In re, 42 Wash. 360, 84 Pac. 831.

"Credits" are not property within this section: State ex rel. Wolfe v. Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707.

Section 42-4, *infra*, providing for the payment of a fee upon filing an appear-

ance, to be taxed as stenographer's costs, does not violate this section: State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540.

The proviso to this section does not recognize credits as property within the requirement of the section that all property be taxed: State ex rel. Wolfe v. Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707.

Under this section, section 11099, *infra*, is unconstitutional in so far as it exempts from taxation ships or vessels whose situs is within this state, when they are used exclusively in trade between this state and other states and territories of the United States, or foreign countries: Pacific Cold Storage Co. v. Pierce County, 85 Wash. 626, 149 Pac. 34.

Classification of subjects of taxation as affected by constitutional requirement of uniformity. 1 Ann. Cas. 638.

§ 3. ASSESSMENT OF CORPORATE PROPERTY.—The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property.

Cited in 75 Wash. 85; 84 Wash. 539.

Sections 1—3 are not violated by Laws of 1911, page 601, section 92, providing that the public service commission shall value the operating property of railroad companies, and that such valuation shall be conclusive for the purpose of assessment and taxation: Spokane & Inland Empire R. Co. v. Spokane County, 75 Wash. 72, 134 Pac. 688.

The assessment of railway operating

property as a unit by the state board of tax commissioners instead of by the county assessors as other property is assessed under the general revenue laws, does not violate this section: Northern Pac. R. Co. v. State, 84 Wash. 510, 147 Pac. 45, Ann. Cas. 1916E, 1166.

Constitutional equality in relation to corporate taxation. 60 L. R. A. 321.

§ 4. NO SURRENDER OF POWER OR SUSPENSION OF TAX ON CORPORATE PROPERTY.—The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party.

Cited in 97 Wash. 269.

§ 5. TAXES, HOW LEVIED.—No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

Cited in 14 Wash. 381; 17 Wash. 141; 28 Wash. 45; 30 Wash. 445; 31 Wash. 146; 36 Wash. 454; 50 Wash. 256; 79 Wash. 328, 329, 330; 85 Wash. 271; 94 Wash. 304.

An act authorizing a county to levy taxes for expenses already incurred is not

unconstitutional: Mason v. Purdy, 11 Wash. 591, 40 Pac. 130.

Section 8355, *infra*, fixing the license fees to be collected from peddlers for county licenses, does not violate this section, since the constitution has reference only to taxes on property: State v. Shepard, 79 Wash. 328, 140 Pac. 332.

§ 6. TAXES, HOW PAID.—All taxes levied and collected for state purposes shall be paid in money only into the state treasury.

Cited in 65 Wash. 532; 103 Wash. 321, § 5804, *infra*, are not state funds within this section: *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468.

Fees for forest fire protection, under

§ 7. ANNUAL STATEMENT.—An accurate statement of the receipts and expenditures of the public moneys shall be published annually in such manner as the legislature may provide.

§ 8. TAX TO COVER DEFICIENCIES.—Whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for levying a tax for the ensuing fiscal year, sufficient, with other sources of income to pay the deficiency, as well as the estimated expenses of the ensuing fiscal year.

Restrictions as to Purposes of Taxation. This section applies only to matters of state revenue and expenses, and not to

those of counties: *Mason v. Purdy*, 11 Wash. 591, 40 Pac. 130; *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

§ 9. SPECIAL ASSESSMENTS OR TAXATION FOR LOCAL IMPROVEMENTS.—The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited. For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same.

Cited in 2 Wash. 586, 668, 670; 4 Wash. 134; 6 Wash. 255; 11 Wash. 594; 15 Wash. 316; 20 Wash. 63, 279; 21 Wash. 554; 25 Wash. 306; 30 Wash. 446; 35 Wash. 584, 585, 589; 39 Wash. 180; 40 Wash. 147; 42 Wash. 41, 498; 44 Wash. 353, 354; 47 Wash. 203; 62 Wash. 434; 63 Wash. 468, 469; 77 Wash. 222, 575; 78 Wash. 97; 79 Wash. 231, 233; 82 Wash. 281; 85 Wash. 290, 537; 90 Wash. 216, 219; 91 Wash. 207, 224; 92 Wash. 552; 94 Wash. 560, 590; 100 Wash. 510, 511; 106 Wash. 97; 107 Wash. 157; 108 Wash. 243.

There is no vested right, either in a municipal corporation or in the citizen, to have property assessed in any particular way, these matters, like others pertaining to such corporations, are entirely within legislative control: *Heileg v. Puyallup*, 7 Wash. 29, 34 Pac. 164.

The provisions of this section and of article XI, section 12, do not render invalid the act of March 9, 1893 (Laws 1893, p. 167), making the assessment-roll of a city of the first class the same as that of the county, and making the county treasurer ex-officio tax collector: *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428; compare *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462.

The act of March 9, 1893, entitled "an act relating to internal improvements in cities, authorizing the issuance and collection of bonds upon the property benefited by local improvements, and declaring an

emergency," is constitutional: *Germond v. Tacoma*, 6 Wash. 365, 33 Pac. 961.

Charging the indebtedness of each of the former cities, consolidated under act of March 27, 1890, to the property within its limits is a regulation in accordance with equity and justice, and not forbidden by the provisions of this section: *De Mattos v. New Whatcom*, 4 Wash. 127, 29 Pac. 933.

The authority given by the legislature to validate certain municipal indebtedness, under act of February 26, 1890 (§ 5, p. 225), already created in excess of the limit of one and one-half per cent, is not a void exercise of legislative power, or an attempt to assess and collect taxes on municipal corporations in violation of this section: *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462.

Where a municipal corporation has done an act beyond its statutory powers, but within the powers competent for the legislature to have conferred upon it, the act may be validated by a curative statute: *Id.*

The act relating to diking districts contained in § 4242, *infra* (prior to amendment), is not unconstitutional under this section: *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332.

Laws 1899, page 234, authorizing laying of water-mains as local improvement is valid: *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612. The improvement by the state of its own tide lands, lying within the

ART. VIII, § 1 CONSTITUTION OF THE STATE OF WASHINGTON.

corporate limits of a city, does not violate this section: *Mississippi Valley Trust Co. v. Hofius*, 20 Wash. 272, 55 Pac. 54.

Laws of 1903, page 290, prescribing a scale of fees to be paid to the clerk of the court upon filing the first papers in probate, is void because not uniform or levied in proportion to value: *State ex rel. Nettleton v. Case*, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L. R. A. (N. S.) 152.

A poll tax may be restricted to males over twenty-one years of age and under fifty: *Thurston County v. Tenino Stone Quarries*, 44 Wash. 351, 87 Pac. 634, 12 Ann. Cas. 314, 9 L. R. A. (N. S.) 306; *Tekoa v. Reilly*, 47 Wash. 202, 91 Pac. 769, 13 L. R. A. (N. S.) 901.

The act authorizing a city to initiate special assessments for local improvements which provides that the apportionment of the tax shall be made by commissioners appointed by the superior court subject to revision by the court, is not obnoxious to this section: *Westlake Avenue, In re*, 40 Wash. 144, 82 Pac. 279.

A local assessment upon contiguous property to pay the cost of the construction of a sewer, levied upon all the property in the assessment district, in proportion to the assessment of the property for general taxation, is invalid: *Monk v. Ballard*, 42 Wash. 35, 84 Pac. 397.

The drainage act of 1895 does not violate this section in that it imposes upon the court and jury the duty of making an assessment: *State ex rel. Matson v. Superior Court*, 42 Wash. 491, 85 Pac. 264.

Liens for Improvements by the State.—The improvement by the state of its own tide lands lying within the corporate limits of a city is not a violation of this section. *Mississippi Val. Trust Co. v. Hofius*, 20 Wash. 272, 55 Pac. 54.

Laws of 1897, page 77, which requires the county treasurer to collect assessments for street improvements certified to him by the legislative body of cities of the first class within his county, is not un-

constitutional as rendering taxation unequal and ununiform: *State ex rel. Olmstead v. Mudgett*, 21 Wash. 99, 57 Pac. 351.

Section 938, Ballinger's Code, providing that cities of the third class may levy upon and collect from every male inhabitant between certain ages, an annual street poll tax, but exempting therefrom members of volunteer fire companies, is unconstitutional and void: *State v. Ide*, 35 Wash. 576, 77 Pac. 961, 102 Am. St. Rep. 914, 1 Ann. Cas. 634, 67 L. R. A. 280.

It is not necessary that a jury be impaneled in order to levy the assessment: *Jackson Street, In re*, 62 Wash. 432, 113 Pac. 1112.

Local improvement assessments must be limited to the amount of the benefits: *Eighth Avenue Northwest, In re*, 77 Wash. 570, 138 Pac. 10.

General benefits cannot be made the basis of a levy: *Shilshole Avenue, In re*, 85 Wash. 522, 148 Pac. 781.

A local improvement for a street lighting system, the operation of which was limited to a period of ten years, is not unconstitutional since permanency is not an essential element: *Ankeny v. Spokane*, 92 Wash. 549, 159 Pac. 806, L. R. A. 1917A, 1093.

Special benefits are judicial questions reviewable by the courts: *Shilshole Avenue, In re*, 94 Wash. 583, 162 Pac. 1010.

Public property as subject to special assessment. 16 Ann. Cas. 886; Ann. Cas. 1917D, 844; 23 L. R. A. 807.

Special assessments as a tax. 3 L. R. A. (N. S.) 837.

Exemption from taxation as including exemption from assessment for local improvement. 15 Ann. Cas. 349; Ann. Cas. 1913D, 1114; Ann. Cas. 1915A, 219; 35 L. R. A. 33; L. R. A. 1916F, 864.

Assessment of parkway occupied by street railway company for street improvement. 10 A. L. R. 164.

ARTICLE VIII.

Public Indebtedness.

Cited in 74 Wash. 16.

§ 1. **LIMITATION OF STATE DEBT.**—The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

Cited in 12 Wash. 542; 16 Wash. 572; 21 Wash. 208; 74 Wash. 19—21; 91 Wash. 12, 13.

The act of March 22, 1895, creating a state board of finance is unconstitutional: *State ex rel. Jones v. McGraw*, 12 Wash. 541, 41 Pac. 893.

This section constitutes an "impassable barrier" to the creation of any indebtedness in excess of the limitation for any period of time, however brief, or for any purpose, however worthy: *State ex rel. Jones v. McGraw*, 12 Wash. 541, 543, 41 Pac. 893.

§ 2. POWERS EXTENDED IN CERTAIN CASES.—In addition to the above limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall be applied to the purpose for which it was raised, and no other purpose whatever.

Cited in 12 Wash. 542; 74 Wash. 19—21; 91 Wash. 12, 13; 95 Wash. 238.

The majority required by this provision is a majority of those who vote upon the proposition, and not of those who may vote: *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010.

As to the validity of a proposed plan of the state capitol commission to issue warrants for the erection of a capitol building: See *State ex rel. Atty. General v. McGraw*, 13 Wash. 311, 43 Pac. 176.

The act of 1893 authorizing the excavation of public waterways, and providing for liens upon the tide-lands belonging to the state which are filled in thereby, does not violate this section: *Seattle & Lake Wash. Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845.

Laws of 1913, page 139, section 2, and

School bonds issued against one fund and sold to another fund of the state do not constitute an increase of indebtedness within the prohibition of this section: *State ex rel. Winston v. Rogers*, 21 Wash. 206, 57 Pac. 801.

Constitutional limit of state indebtedness as affected by indebtedness of political subdivisions. *Ann. Cas.* 1912C, 450.

As to what time is assessed valuation to be taken for purpose of determining debt limit of state. 28 *L. R. A. (N. S.)* 149.

Laws of 1911, page 323, section 5, providing that the state shall guarantee the principal and interest of the capitol building bonds to be issued against the capitol building fund, are unconstitutional: *State Capitol Commission v. State Board of Finance*, 74 Wash. 15, 132 Pac. 861.

Laws of 1915, page 700, section 3, of the act for bonding the capitol building lands for \$1,500,000, the principal payable only from the capitol building fund derived from the sale of the lands, which provides for the levy of an annual tax sufficient to meet the interest on the bonds, the same to be deemed a loan from the general fund and repaid from the proceeds of sales or leases of capitol building lands, is unconstitutional: *State ex rel. State Capitol Commission v. Lister*, 91 Wash. 9, 156 Pac. 858.

§ 3. SPECIAL INDEBTEDNESS, HOW AUTHORIZED.—Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people.

Cited in 1 Wash. 301; 22 Wash. 542; 25 Wash. 583; 35 Wash. 514; 49 Wash. 74; 74 Wash. 19, 21; 91 Wash. 12—15.

§ 4. MONEYS DISBURSED ONLY BY APPROPRIATIONS.—No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.

Cited in 3 Wash. 137; 7 Wash. 192; 13 Wash. 322; 19 Wash. 661; 51 Wash. 556; 52 Wash. 689; 74 Wash. 26, 27; 94 Wash. 172—174; 98 Wash. 255; 103 Wash. 321, 325.

Appropriations — Necessity.—The state treasurer may lawfully question the legality of any warrant issued by the state auditor: State ex rel. Pub. Co. v. Lindsey, 3 Wash. 125, 27 Pac. 1019.

Where the legislature designates the amount to be paid, and that it be paid out of any moneys in the state treasury not otherwise appropriated, it is a sufficient compliance with this section without using the formal words "there is hereby appropriated": State ex rel. Brainerd v. Grimes, 7 Wash. 191, 34 Pac. 833.

A proposed plan by the state capitol commission for the exchange at par for

cash of warrants on the state capitol building fund, which cash is to be held by the state treasurer and disbursed for services on such building, is not a violation of this section: State ex rel. Atty. Gen. v. McGraw, 13 Wash. 311, 43 Pac. 176.

Making and requisites of appropriation: See State ex rel. Helander v. Clausen, 98 Wash. 253, 167 Pac. 947.

An appropriation of moneys shall not be in any particular form of words, but the same may be made by a general act clearly showing the legislative intent: State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

This section does not apply to fees collected for forest fire protection under § 5804, infra: State ex rel. Sherman v. Pape, 103 Wash. 319, 174 Pac. 468.

§ 5. CREDIT NOT TO BE LOANED.—The credit of the state shall not, in any manner, be given or loaned to or in aid of any individual, association, company, or corporation.

Cited in 35 Wash. 513; 108 Wash. 136.

The act of 1893, authorizing the excavation of public waterways, and providing for liens upon the tide-lands belonging to

the state which are filled in under the contract, does not violate the constitution: Seattle & Lake Wash. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845.

§ 6. LIMITATIONS UPON MUNICIPAL INDEBTEDNESS. — No county, city, town, school district, or other municipal corporation shall for any purpose become indebted in any manner to an amount exceeding one and one-half per centum of the taxable property in such county, city, town, school district, or other municipal corporation, without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total indebtedness at any time exceed five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness, except that in incorporated cities the assessment shall be taken from the last assessment for city purposes: Provided, that no part of the indebtedness allowed in this section shall be incurred for any purpose other than strictly county, city, town, school district, or other municipal purposes: Provided, further, that any city or town, with such assent, may be allowed to become indebted to a larger amount, but not exceeding five per centum additional for supplying such city or town with

water, artificial light, and sewers, when the works for supplying such water, light, and sewers shall be owned and controlled by the municipality.

Cited in 1 Wash. 298, 318; 2 Wash. 675, 679; 4 Wash. 148, 150; 5 Wash. 146, 454; 6 Wash. 430, 435; 7 Wash. 271; 8 Wash. 397, 402; 12 Wash. 370, 526; 13 Wash. 698; 15 Wash. 11, 317, 375; 16 Wash. 570; 19 Wash. 448; 21 Wash. 208; 22 Wash. 410; 25 Wash. 310, 581; 26 Wash. 232, 239; 28 Wash. 12; 37 Wash. 16; 42 Wash. 302, 656; 43 Wash. 76; 45 Wash. 524; 48 Wash. 76; 49 Wash. 73; 62 Wash. 446; 64 Wash. 356; 67 Wash. 111, 112; 70 Wash. 291, 301—303; 72 Wash. 90; 75 Wash. 208—210; 80 Wash. 155, 353; 81 Wash. 185, 367, 404; 82 Wash. 138, 279, 283; 84 Wash. 673; 95 Wash. 132, 133; 98 Wash. 414; 105 Wash. 243; 111 Wash. 171, 174; 112 Wash. 471.

The county commissioners are not authorized to submit to a vote the question of ratifying or validating county indebtedness incurred in excess of the one and one-half per cent limitation in the absence of any statutory authority therefor: *Rehmke v. Goodwin*, 2 Wash. 676, 27 Pac. 473.

Under Laws of 1893, page 181, section 1, provision is made for the ratification of such invalid county indebtedness only as was incurred prior to March 9, 1893, and the submission to the voters for ratification of an indebtedness subsequent thereto, joined with prior indebtedness, vitiates the whole proceeding: *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318.

It is not necessary under this section that a proposition for increasing the county's indebtedness submitted at a general election should receive more than three-fifths of the votes cast by the voters who specially vote thereon: *Strain v. Young*, 25 Wash. 578, 66 Pac. 64; *Fox v. Seattle*, 43 Wash. 74, 86 Pac. 379, 117 Am. St. Rep. 1037.

Where a county has reached the constitutional limit of its indebtedness, it may thereafter issue its obligation for those expenses necessary to maintain its existence: *Duryce v. Friars*, 18 Wash. 55, 50 Pac. 583; *Rauch v. Chapman*, 16 Wash. 568, 48 Pac. 253, 58 Am. St. Rep. 52, 36 L. R. A. 407; *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717.

School districts are, within contemplation of the legislative and constitutional enactments of this state, municipal corporations: *Maxon v. School District No. 34*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; *State ex rel. School District No. 24 v. Grimes*, 7 Wash. 270, 34 Pac. 836.

An irrigation district is not a municipal corporation within the meaning of this section: *Board of Directors v. Peterson*, 4 Wash. 147, 29 Pac. 995.

An irrigation district is a municipal corporation within the meaning of § 7417, *infra*, conferring certain powers on such districts: *Peters v. Union Gap Irr. District*, 98 Wash. 412, 167 Pac. 1085; *Whitten v. Silverman*, 105 Wash. 238, 177 Pac. 737.

This provision is self-executing and sufficient, without further legislative sanction, to authorize the voters to give or withhold assent to the incurring of indebtedness: *Holmes v. Bull Furn. Co. v. Hedges*, 13 Wash. 696, 43 Pac. 944.

An act authorizing counties to condemn land for a ship canal, entirely within the county, does not violate the provisions of this section as to incurring debt for any other than county purposes: *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

The construction of a county road is a strictly county purpose within this section: *Rust v. Kitsap County*, 111 Wash. 170, 189 Pac. 994.

Current or Necessary Expenses: See *Remington's Digest*, Mun. Corp., § 485; *Hull v. Ames*, 26 Wash. 272, 66 Pac. 391, 90 Am. St. Rep. 743; *Gladwin v. Ames*, 30 Wash. 608, 71 Pac. 189; *Pilling v. Everett*, 67 Wash. 109, 120 Pac. 873; *Patterson v. Edmonds*, 72 Wash. 88, 129 Pac. 895.

Public improvements, property or works: See *Remington's Digest*, Mun. Corp., § 486; *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010; *Austin v. Seattle*, 2 Wash. 667, 27 Pac. 557; *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059.

Indebtedness Payable Out of Special Fund or from special assessments: See *Remington's Digest*, Mun. Corp., § 487; *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462; *Thomas & Co. v. Olympia*, 12 Wash. 465, 41 Pac. 191; *German-Amer. Sav. Bank v. Spokane*, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259; *Wilson v. Aberdeen*, 19 Wash. 89, 52 Pac. 524; *Northwestern Lumber Co. v. Aberdeen*, 22 Wash. 404, 60 Pac. 1115; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197; *Winston v. Spokane*, 12 Wash. 524, 41 Pac. 888; *Kenyon v. Spokane*, 17 Wash. 57, 48 Pac. 783; *Faulkner v. Seattle*, 19 Wash. 320, 53 Pac. 565; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612; *State ex rel. American Freehold-Land Mortgage Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107; *Scott v. Tacoma*, 81 Wash. 178, 142 Pac. 467; *Schooley v. Chehalis*, 84 Wash. 667, 147 Pac. 410; *Uhler v. Olympia*, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

Computation of Limit or Amount: See *Remington's Digest*, Mun. Corp., § 488; *Childs v. Anacortes*, 5 Wash. 452, 32 Pac.

ART. VIII, § 7 CONSTITUTION OF THE STATE OF WASHINGTON.

217; Seymour v. Tacoma, 6 Wash. 427, 33 Pac. 1059; Graham v. Spokane, 19 Wash. 447, 53 Pac. 714; State Sav. Bank v. Davis, 22 Wash. 406, 61 Pac. 43; West v. Chehalis, 12 Wash. 369, 41 Pac. 171; 50 Am. St. Rep. 896; Forsyth v. Seattle, 73 Wash. 515, 132 Pac. 224; Town of Woolley, In re, 75 Wash. 206, 134 Pac. 825; Seymour v. Ellensburg, 81 Wash. 365, 142 Pac. 875; Schooley v. Chehalis, 84 Wash. 667, 147 Pac. 410; Hansen v. Hoquiam, 95 Wash. 132, 163 Pac. 391.

See, also, Langdon v. Walla Walla, 112 Wash. 446, 193 Pac. 1.

Deduction of Uncollected Taxes: See Remington's Digest, Mun. Corp., § 489; State ex rel. Barton v. Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Graham v. Spokane, 19 Wash. 447, 53 Pac. 714; Rands v. Clarke County, 15 Wash. 697, 46 Pac. 1119; Kelley v. Pierce County, 15 Wash. 697, 46 Pac. 253; State ex rel. American Sav. Union v. Whittlesey, 17 Wash. 447, 50 Pac. 119.

Submission of question of expenditure to popular vote: See Remington's Digest, Mun. Corp., § 490; Metcalfe v. Seattle, 1 Wash. 297, 29 Pac. 1010; State ex rel. Baker v. Snodgrass, 1 Wash. 306, 25 Pac. 1014; Yesler v. Seattle, 1 Wash. 308, 25 Pac. 1014; Baker v. Seattle, 2 Wash. 576, 27 Pac. 462; De Mattos v. New Whatcom, 4 Wash. 127, 29 Pac. 933; Seymour v. Tacoma, 6 Wash. 138, 32 Pac. 1077; State ex rel. Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674; McBryde v. Montesano, 7 Wash. 69, 34 Pac. 559; Williams v. Shoudy, 12 Wash. 362, 41 Pac. 169; Petros v. Vancouver, 13 Wash. 423, 43 Pac. 361; State ex rel. Barton v. Hopkins, 14 Wash. 59, 44 Pac. 134, 550; Faulkner v. Seattle, 19 Wash. 320, 53 Pac. 365; Griffin v. Tacoma, 49 Wash. 524, 95 Pac. 1107; State ex rel. Craig v. Newport, 70 Wash. 286, 126 Pac. 637; Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239.

Contracts Involving Indebtedness or expenditures: See Remington's Digest, Mun. Corp., § 491; Richards v. Klickitat County, 13 Wash. 509, 43 Pac. 647; Phelps v. Tacoma, 15 Wash. 367, 46 Pac. 400; State ex rel. American Sav. Union v. Whittlesey, 17 Wash. 447, 50 Pac. 119.

Where a city is indebted in excess of its constitutional limit, the excess only requires ratification; and funding bonds for a portion of the debt, are valid without ratification, if the portion funded was within the constitutional limit: Fisher v. Seattle, 55 Wash. 396, 104 Pac. 655.

The city authorities have power to incur indebtedness within the one and one-half per cent limit at any and all times: State ex rel. Olympia v. Holmes, 81 Wash. 403, 142 Pac. 1148. See, also: Uhler v. Olympia, 87 Wash. 1, 151 Pac. 117, 152 Pac. 998.

A city cannot submit to the voters a bond issue to raise money for several distinct purposes, in no way related to each other, in such a way that the voters must vote for or against all the propositions: Blaine v. Seattle, 62 Wash. 445, 114 Pac. 164, Ann. Cas. 1912D, 315.

Laws of 1911, page 412 (section 9688, *infra*), authorizing the creation of port districts as municipal corporations, is not unconstitutional as creating municipal corporations not recognized by the constitution in view of this section referring to "other municipal corporations" than those specially mentioned: Paine v. Port of Seattle, 70 Wash. 294, 126 Pac. 628, 127 Pac. 580.

The bonding of the state capitol lands for the purpose of erecting buildings and creating a "debt" for interest charges, without submitting the same to a vote of the people, is a violation of this section: State ex rel. State Capitol Commission v. Lister, 91 Wash. 9, 156 Pac. 858.

Creation of indebtedness within meaning of debt limit provisions. 37 L. R. A. (N. S.) 1058; L. R. A. 1917E, 437.

Right of municipality to contract for periodical payments through term of years in aggregate exceeding authorized debt limit. 7 Ann. Cas. 150; Ann. Cas. 1913B, 1177.

Interest on municipal bonds as factor in determining whether municipality has exceeded constitutional limit. 17 Ann. Cas. 1243; Ann. Cas. 1918B, 598.

Two or more political bodies wholly or partly coincident in territory as separate bodies for purposes of constitutional debt limit. Ann. Cas. 1912A, 449; L. R. A. 1917E, 468.

Right of municipal corporation to secure public utilities by piecemeal to avoid constitutional debt limit. 12 L. R. A. (N. S.) 433.

Statute creating municipal liability for mob or riot as violating constitutional debt limitation. 13 L. R. A. 757.

§ 7. CREDIT NOT TO BE LOANED.—No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association, company, or corporation, except for the necessary support of the poor and infirm, or be-

come directly or indirectly the owner of any stock in or bonds of any association, company, or corporation.

Cited in 5 Wash. 146; 7 Wash. 271; 15 Wash. 11; 16 Wash. 574; 18 Wash. 624; 20 Wash. 537; 36 Wash. 454; 70 Wash. 322; 79 Wash. 156; 80 Wash. 353; 100 Wash. 508—510; 108 Wash. 136.

Bonds to be issued by a city for enlarging its municipal "lighting and power" plant and system and furnishing electricity for light, power and heat, are to be classified as "light bonds": *Chandler v. Seattle*, 80 Wash. 154, 141 Pac. 331.

Bonds issued for the purchase of waterworks, payable out of the city's general fund, may be considered as part of the five per cent additional indebtedness allowed by the constitution for water, light and sewer purposes, although the city had not reached its five per cent limit for general indebtedness: *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895.

Loan of credit: See *Remington's Digest*, Mun. Corp., § 493; *Moran v. Thompson*, 20 Wash. 525, 65 Pac. 29; *Fisher v. Seattle*, 55 Wash. 396, 104 Pac. 65; *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac.

628, 127 Pac. 580; *Washington-Oregon Corporation v. Chehalis*, 76 Wash. 442, 136 Pac. 681.

An act authorizing counties to condemn land for a right of way for a ship canal projected by the general government is not a violation of this section: *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

Limitation on use of funds or credit: See *Remington's Digest*, Counties, § 68; *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318; *Mason v. Purdy*, 11 Wash. 591, 40 Pac. 130; *State ex rel. Potter v. King County*, 45 Wash. 519, 88 Pac. 935; *Rands v. Clarke County*, 79 Wash. 152, 139 Pac. 1090; *Johns v. Wadsworth*, 80 Wash. 352, 141 Pac. 892; *Foster v. County Commissioners of Cowlitz County*, 100 Wash. 502, 171 Pac. 539.

The courts cannot inquire into legislative increases in compensation under state contracts: *State ex rel. Govan v. Clausen*, 108 Wash. 133, 183 Pac. 115.

ARTICLE IX.

Education.

§ 1. PREAMBLE.—It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

Cited in 13 Wash. 699; 16 Wash. 576; 17 Wash. 139; 40 Wash. 105; 90 Wash. 187.

§ 2. PUBLIC SCHOOL SYSTEM.—The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund, and the state tax for common schools, shall be exclusively applied to the support of the common schools.

Cited in 6 Wash. 121; 29 Wash. 595; 51 Wash. 501; 70 Wash. 300; 90 Wash. 187, 191.

Laws of 1915, page 239, providing an entrance and tuition fees to be charged to students of the university of Washington, is a valid exercise of legislative authority: *Litchman v. Shannon*, 90 Wash. 186, 155 Pac. 783.

Laws of 1887, page 15, requiring bonds to be taken by school districts as municipal corporations from contractors for payment of mechanics, etc., does not violate this section: *Pacific Mfg. Co. v. School District*, 6 Wash. 121, 33 Pac. 68.

A common school, within this section means one that is common to all children of proper age and capacity, free, and subject to, and under the control of the qualified voters of the district: *School District v. Bryan*, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033.

A model training department of a state normal school wherein a portion of the school children in a district are given instruction which they would otherwise receive in the district schools, is not a part of the common schools of the state: *School District v. Bryan*, 51 Wash. 498, 99 Pac. 28, 20 L. R. A. (N. S.) 1033.

§ 3. FUNDS FOR SUPPORT OF.—The principal of the common school fund shall remain permanent and irreducible. The said fund shall be de-

rived from the following named sources, to wit: Appropriations and donations by the state to this fund; donations and bequests by individuals to the state or public for common schools; the proceeds of lands and other property which revert to the state by escheat and forfeiture; the proceeds of all property granted to the state, when the purpose of the grant is not specified or is uncertain; funds accumulated in the treasury of the state for the disbursement of which provision has not been made by law; the proceeds of the sale of timber, stone, minerals, or other property from school and state lands, other than those granted for specific purposes; all moneys received from persons appropriating timber, stone, minerals or other property from school and state lands other than those granted for specific purposes, and all moneys other than rental recovered from persons trespassing on said lands; five per centum of the proceeds of the sale of public lands lying within the state which shall be sold by the United States subsequent to the admission of the state into the Union, as approved by section thirteen of the act of congress enabling the admission of the state into the Union; the principal of all funds arising from the sale of lands and other property which have been and hereafter may be granted to the state for the support of the common schools. The legislature may make further provisions for enlarging said fund. The interest accruing on said land, together with all rentals and other revenues derived therefrom, and from lands and other property devoted to the common school fund, shall be exclusively applied to the current use of the common schools.

Cited in 51 Wash. 501.

§ 4. SECTARIAN CONTROL OR INFLUENCE PROHIBITED.—All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Cited in 102 Wash. 370, 375.

This section prevents the giving of credits for Bible study done outside of

school: *State ex rel. Dearle v. Frazier*, 102 Wash. 369, 173 Pac. 35.

§ 5. LOSS OF PERMANENT FUND TO BECOME STATE DEBT.—All losses to the permanent common school or any other state educational fund which shall be occasioned by defalcation, mismanagement, or fraud of the agents or officers controlling or managing the same shall be audited by the proper authorities of the state. The amount so audited shall be a permanent funded debt against the state in favor of the particular fund sustaining such loss, upon which not less than six per cent annual interest shall be paid. The amount of liability so created shall not be counted as a part of the indebtedness authorized and limited elsewhere in this constitution.

See *infra* Art. XVI, investment of permanent school fund.

Cited in 21 Wash. 393.

ARTICLE X.

Militia.

Cited in 95 Wash. 226.

§ 1. WHO LIABLE TO MILITARY DUTY.—All able-bodied male citizens of this state between the ages of eighteen and forty-five years, ex-

cept such as are exempt by laws of the United States or by the laws of this state, shall be liable to military duty.

Under the article the legislature may distribute the burden upon its political subdivisions as it sees fit: State ex rel.

Board of Commissioners of Pierce County v. Clausen, 95 Wash. 214, 163 Pac. 744.

§ 2. ORGANIZATION — DISCIPLINE — OFFICERS — POWER TO CALL OUT.—The legislature shall provide by law for organizing and disciplining the militia in such manner as it may deem expedient, not incompatible with the constitution and laws of the United States. Officers of the militia shall be elected or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor. The governor shall have power to call forth the militia to execute the laws of the state to suppress insurrections and repel invasions.

Cited in 3 Wash. 397.

The governor is not bound in any case where, in his judgment, the danger of riot and bloodshed is imminent, to observe the antecedent formalities required by Laws

of 1889-90, page 627, section 1, subdivision 12, before calling forth the military power of the state: Chapin v. Ferry, 3 Wash. 386, 28 Pac. 754, 15 L. R. A. 116.

§ 3. SOLDIERS' HOME.—The legislature shall provide by law for the maintenance of a soldiers' home for honorably discharged Union soldiers, sailors, marines and members of the state militia disabled while in the line of duty, and who are bona fide citizens of the state.

§ 4. PUBLIC ARMS.—The legislature shall provide by law for the protection and safekeeping of the public arms.

§ 5. PRIVILEGE FROM ARREST.—The militia shall, in all cases, except treason, felony and breach of the peace, be privileged from arrest during the attendance at musters and elections of officers, and in going to and returning from the same.

§ 6. EXEMPTION FROM MILITARY DUTY.—No person or persons having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: Provided, such person or persons shall pay an equivalent for such exemption.

ARTICLE XI.

County, City and Township Organization.

§ 1. EXISTING COUNTIES RECOGNIZED.—The several counties of the territory of Washington existing at the time of the adoption of this constitution are hereby recognized as legal subdivisions of this state.

Cited in 108 Wash. 242.

§ 2. COUNTY SEATS—LOCATION AND REMOVAL.—No county seat shall be removed unless three-fifths of the qualified electors of the county voting on the proposition at a general election shall vote in favor of such removal, and three-fifths of all votes cast on the proposition shall be required to relocate a county seat. A proposition of removal shall not be re-submitted in the same county more than once in four years.

Cited in 1 Wash. 301; 8 Wash. 65; 12 Wash. 435; 25 Wash. 583; 49 Wash. 74.

Rem. Wash. Code, Vol. I—7

The majority required to carry the question submitted to the electors under this

section and section 6, article VIII, is a majority of those who vote upon that proposition: *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010.

The superior court has no jurisdiction of the subject matter of an action which seeks to enjoin the removal of a county seat on the ground of fraud committed in the election thereof: *Parmeter v. Bourne*; 8 Wash. 45, 35 Pac. 586, 757.

The removal of a county seat is a political question, the regulation and control of which are within the exclusive jurisdiction of the legislative department: *Id.* A private citizen and taxpayer has no such property interest in the location of a county seat as will give him a right of action to contest its removal: *Id.*; but in *Rickey v. Williams*, 8 Wash. 479, 36 Pac. 480, held, that an injunction will lie at the suit of a county officer to enjoin the removal of the county seat, when the

board of commissioners had never obtained jurisdiction by proper petition to order the submission of the question.

A board of county commissioners is not vested with exclusive discretion in the matter of declaring the result of an election for removal of the county seat, but an attempt on their part to declare a result contrary to law is sufficient to give the superior court jurisdiction to enjoin them: *Krieschell v. County Commissioners*, 12 Wash. 428, 41 Pac. 186.

The commissioners may go behind the returns and examine the ballots for the purpose of determining the result: *Heffner v. Board of County Commrs.*, 16 Wash. 273, 47 Pac. 430. Their decision cannot be reviewed by the courts: *Id.* The general act authorizing appeals from their decisions does not apply: *Lawry v. Board of County Commrs.*, 12 Wash. 446, 41 Pac. 190.

§ 3. NEW COUNTIES.—No new county shall be established which shall reduce any county to a population less than four thousand, nor shall a new county be formed containing a less population than two thousand. There shall be no territory stricken from any county unless a majority of the voters living in such territory shall petition therefor, and then only under such other conditions as may be prescribed by a general law applicable to the whole state. Every county which shall be enlarged or created from territory taken from any other county or counties shall be liable for a just proportion of the existing debts and liabilities of the county or counties from which such territory shall be taken: Provided, that in such accounting neither county shall be charged with any debt or liability then existing, incurred in the purchase of any county property or in the purchase or construction of any county buildings then in use or under construction which shall fall within and be retained by the county: Provided, further, that this shall not be construed to affect the rights of creditors.

Cited in 24 Wash. 551; 47 Wash. 462, 466; 54 Wash. 386; 72 Wash. 329; 108 Wash. 138.

Alteration and creation of new counties—Restrictions: See *Remington's Digest*, Counties, § 2: *Farquharson v. Yeargin*,

24 Wash. 549, 64 Pac. 717; *State ex rel. Chehalis County v. Superior Court*, 47 Wash. 453, 92 Pac. 345; *State ex rel. Lytle v. Superior Court*, 54 Wash. 378, 103 Pac. 464.

§ 4. COUNTY GOVERNMENT AND TOWNSHIP ORGANIZATION.—The legislature shall establish a system of county government, which shall be uniform throughout the state, and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county voting at a general election shall so determine; and whenever a county shall adopt township organization the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general law.

Cited in 49 Wash. 75; 54 Wash. 383; 58 Wash. 496, 497; 70 Wash. 300; 79 Wash. 231, 237; 82 Wash. 630; 88 Wash.

584; 92 Wash. 352; 97 Wash. 146; 100 Wash. 268.

This section does not authorize township organization upon a majority of those voting upon the question, although the legislature so construed the clause in Laws of 1895, page 473, but only upon a majority of the total votes cast at the election: *State ex rel. Milliken v. Board of Commrs.*, 49 Wash. 70, 94 Pac. 897.

Townships organized under this section

are made bodies corporate, and vested with full control over highways to the exclusion of the county proper, and liable for injuries caused by reason of the defective condition of its highways: *Orrock v. South Moran Township*, 97 Wash. 144, 165 Pac. 1096; *Nipges v. Mountain View Township*, 100 Wash. 268, 170 Pac. 560.

§ 5. ELECTION AND COMPENSATION OF COUNTY OFFICERS.

The legislature, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, prosecuting attorneys, and other county, township, or precinct and district officers, as public convenience may require, and shall prescribe their duties and fix their term of office. It shall regulate the compensation of all such officers, in proportion to their duties, and for that purpose may classify the counties by population. And it shall provide for the strict accountability of such officers for all fees which may be collected by them, and for all public moneys which may be paid to them, or officially come into their possession.

Cited in 5 Wash. 461; 6 Wash. 162, 163; 7 Wash. 114; 9 Wash. 378, 531; 14 Wash. 119; 16 Wash. 573; 24 Wash. 429, 554; 25 Wash. 266; 28 Wash. 498; 37 Wash. 430; 46 Wash. 273; 47 Wash. 701; 53 Wash. 552; 54 Wash. 153, 456; 59 Wash. 486; 63 Wash. 468, 469; 65 Wash. 418; 68 Wash. 190; 79 Wash. 237; 88 Wash. 584, 587; 91 Wash. 49; 92 Wash. 352, 353, 393, 394, 431; 113 Wash. 645.

This section should be construed with section 7, and when so construed, it seems clear that the "term" referred to in section 7 is the term authorized to be provided for in this section: *Smalley v. Snell*, 6 Wash. 161, 32 Pac. 1062.

Laws of 1903 creating the office of county fruit inspector, to be appointed by the county commissioners for a term of years, violates the mandatory provisions of this section: *State ex rel. Egbert v. Blumberg*, 46 Wash. 270, 89 Pac. 708.

The prosecuting attorney of a county is a county officer, and a vacancy in the office must be filled by appointment of the county commissioners and not by the governor: *State ex rel. McMartin v. Whitney*, 9 Wash. 377, 37 Pac. 473.

The power to fill county offices provisionally in new counties is a necessary incident of the legislative power to create new counties: *Farquharson v. Yeargin*, 24 Wash. 549, 64 Pac. 717.

Road supervisors are mere employees or deputies of the commissioners, and not county officers: *State ex rel. Griffith v. Newland*, 37 Wash. 428, 79 Pac. 983.

The act of March 26, 1899, providing that counties shall be divided into commissioner's districts and county commis-

sioners elected therein, and the act of February 28, 1891, fixing the term of office of county commissioners in the various districts, part of whom are to hold office for four years, does not violate this section: *State ex rel. Hays v. Twichell*, 9 Wash. 530, 38 Pac. 134.

The term "county officers" does not extend to clerks and deputies: *Nelson v. Troy*, 11 Wash. 435, 39 Pac. 974.

The board of eminent domain commissioners created by section 9235, *infra*, are city officials, and not within this section: *Blewett Street, Seattle, In re*, 59 Wash. 485, 110 Pac. 29.

Commissioners to equalize a county assessment for the construction of a ship canal are not county officers, and may be appointed: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

County game commissions and county game wardens are state and not county officers: *State ex rel. Lopas v. Shagren*, 91 Wash. 48, 157 Pac. 31.

The primary election law making a distinction in the method of nominating candidates between parties casting more and those casting less than ten per cent of the total vote at the last general election does not violate this section: *State ex rel. Rogers v. Howell*, 92 Wash. 381, 159 Pac. 118.

It is the duty of the county commissioners, in the absence of any law pointing out how population should be ascertained, to determine the fact by proof, and for this purpose the most recent federal census is competent evidence: *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135.

§ 6. VACANCIES IN COUNTY, ETC., OFFICES, HOW FILLED.—The board of county commissioners in each county shall fill all vacancies occurring in any county, township, precinct, or road district office of such county by appointment, and officers thus appointed shall hold office till the next general election, and until their successors are elected and qualified.

Cited in 5 Wash. 398; 7 Wash. 115; 9 Wash. 378; 11 Wash. 437; 37 Wash. 273; 89 Wash. 183.

Vacancies.—A vacancy in the office of justice of the peace shall be filled by appointment of the board of county commissioners: State ex rel. Moody v. Cronin, 5 Wash. 398, 31 Pac. 864.

The prosecuting attorney being a county officer, a vacancy in the office should be filled by appointment of the county commissioner and not by the governor: State

ex rel. McMartin v. Whitney, 9 Wash. 377, 37 Pac. 473.

Upon a vacancy occurring in the office of a county commissioner, the two remaining members have power to select a successor: State ex rel. Pendergast v. Fulton, 37 Wash. 271, 79 Pac. 779.

This section has no application to the filling of vacancies in the office of county commissioners where all three of the county commissioner's offices are vacant: State ex rel. Gilbert v. Dimmick, 89 Wash. 182, 154 Pac. 163.

§ 7. TENURE OF OFFICE LIMITED TO TWO TERMS.—No county officer shall be eligible to hold his office more than two terms in succession.

Cited in 6 Wash. 161, 163; 12 Wash. 59; 53 Wash. 551.

This section does not prohibit the holding of office for two full terms after the organization of the state: Smalley v. Snell, 6 Wash. 161, 32 Pac. 1062.

The fact that the incumbent has held office for two terms is immaterial, since his term does not end until his successor is elected and qualified: State ex rel. Meredith v. Tallman, 24 Wash. 426, 64 Pac. 759.

A duly elected and qualified road over-

seer does not become disqualified to hold his office by reason of the fact that the county commissioners have so changed the boundaries of the road district for which he was elected as to leave his residence outside thereof: State ex rel. O'Connell v. Nelson, 7 Wash. 114, 34 Pac. 562.

The incumbency of an office for a part of a term under the appointment of the county commissioners will not disqualify the officer from holding the office for two succeeding terms: Koontz v. Kurtzman, 12 Wash. 59, 40 Pac. 622.

§ 8. SALARIES AND LIMITATIONS AFFECTING. — The legislature shall fix the compensation by salaries of all county officers, and of constables in cities having a population of five thousand and upwards, except that public administrators, surveyors, and coroners may or may not be salaried officers. The salary of any county, city, town, or municipal officers shall not be increased or diminished after his election or during his term of office, nor shall the term of any such officer be extended beyond the period for which he is elected or appointed.

Cited in 4 Wash. 803; 6 Wash. 258; 9 Wash. 232; 11 Wash. 437; 13 Wash. 202; 14 Wash. 256, 483; 19 Wash. 398; 21 Wash. 84; 22 Wash. 268; 24 Wash. 429; 25 Wash. 265; 35 Wash. 175, 176; 47 Wash. 375; 48 Wash. 464; 54 Wash. 455, 456; 92 Wash. 431; 107 Wash. 610; 111 Wash. 251; 113 Wash. 653.

Increase or Reduction of Compensation: See Remington's Digest, Officers, § 43; Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; James v. Seattle, 2 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957; State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428; Heilig v. Puyallup City Council, 7 Wash. 29, 34 Pac. 164;

Nelson v. Troy, 11 Wash. 435, 39 Pac. 974; Mudgett v. Liebes, 14 Wash. 482, 45 Pac. 19; Young v. Millett, 19 Wash. 486, 53 Pac. 823; State ex rel. Eshelman v. Cheetham, 21 Wash. 437, 58 Pac. 771; State ex rel. Ross v. Clausen, 47 Wash. 607, 92 Pac. 453; State ex rel. Funke v. Board of Commrs., 48 Wash. 461, 93 Pac. 920.

Increase or Diminution of City Officers: See Remington's Digest, Mun. Corp., § 71; Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; James v. Seattle, 2 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957; State ex rel. Seattle v. Carson, 6 Wash. 250, 33 Pac. 428; Heilig v. City

Council of Puyallup, 7 Wash. 29, 34 Pac. 164; Ballard v. Keane, 13 Wash. 201, 43 Pac. 27; Mudgett v. Liebes, 14 Wash. 482, 45 Pac. 19; Bogue v. Seattle, 19 Wash. 396, 53 Pac. 548.

Offices and Officers Within Inhibition: See Remington's Digest, Officers, § 44; State ex rel. Thurston County v. Grimes, 7 Wash. 445, 35 Pac. 361; Ballard v. Keane, 13 Wash. 204, 43 Pac. 27; State ex rel. Eshelman v. Cheetham, 21 Wash. 437, 68 Pac. 771.

A county officer is entitled to the salary for the classification to which the county in fact belonged at the time of his election, although the county commissioners did not determine the fact until after the election: State ex rel. Maltbie v. Will, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797.

Rem. 1915 Code, section 680-1, subjecting the salary of county officers to garnishment does not diminish their salaries after election: Hanson v. Hodge, 92 Wash. 425, 159 Pac. 388.

The amendment to the city charter of Seattle creating a municipal plans commission, does not violate this section: Bussell v. Gill, 58 Wash. 468, 108 Pac. 1080, 137 Am. St. Rep. 1070.

One-half of the naturalization fees paid to a salaried county clerk, under 34 U. S. Stats. 596, and authorized by the act to be retained by the clerk for his own use, belong to the county and must be accounted for by the clerk: Franklin County v. Barnes, 68 Wash. 488, 123 Pac. 779.

§ 9. STATE TAXES NOT TO BE RELEASED OR COMMUTED.—No county, nor the inhabitants thereof, nor the property therein, shall be released or discharged from its or their proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatever.

Cited in 35 Wash. 38; 95 Wash. 221.

§ 10. INCORPORATION OF MUNICIPALITIES.—Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized and all charters thereof framed or adopted by authority of this constitution shall be subject to and controlled by general laws. Any city containing a population of twenty thousand inhabitants or more shall be permitted to frame a charter for its own government consistent with and subject to the constitution and laws of this state, and for such purpose the legislative authority of such city may cause an election to be had, at which election there shall be chosen by the

Where a county superintendent of schools was elected for a term to begin on the second Monday in January next succeeding his election and continue for two years and until his successor is elected and qualified and upon a change of the law during his term making the term "begin on the first Monday in August next succeeding his election," he is entitled to hold the office until the qualification of his successor for the term beginning in August: State ex rel. Meredith v. Tallman, 24 Wash. 426, 64 Pac. 759.

Constitutional prohibition against increase of compensation during term as applicable where new duties are imposed on officer after taking office. 18 Ann. Cas. 403; L. R. A. 1918E, 761.

Office held during pleasure of appointing power as within purview of constitutional provision against change of salary during term. Ann. Cas. 1913A, 316.

Constitutional prohibition against change of salary during term as affecting fees. 23 L. R. A. 609.

Change of salary of deputy or other subordinate as violation of constitutional provision against change of salary of public officer during term of office. 37 L. R. A. (N. S.) 388.

qualified electors of said city fifteen freeholders thereof, who shall have been residents of said city for a period of at least two years preceding their election, and qualified electors, whose duty it shall be to convene within ten days after their election, and prepare and propose a charter for such city. Such proposed charter shall be submitted to the qualified electors of said city, and if a majority of such qualified electors voting thereon ratify the same, it shall become the charter of said city, and shall become the organic law thereof, and supersede any existing charter, including amendments thereto, and all special laws inconsistent with such charter. Said proposed charter shall be published in two daily newspapers published in said city for at least thirty days prior to the day of submitting the same to the electors for their approval, as above provided. All elections in this section authorized shall only be had upon notice, which notice shall specify the object of calling such election, and shall be given for at least ten days before the day of election in all election districts of said city. Said elections may be general or special elections, and, except as herein provided, shall be governed by the law regulating and controlling general or special elections in said city. Such charter may be amended by proposals therefor submitted by the legislative authority of such city to the electors thereof at any general election, after notice of said submission published as above specified, and ratified by a majority of the qualified electors voting thereon. In submitting any such charter or amendment thereto, any alternate article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others.

See supra, Art. VIII, § 3, authority to incur and limit of indebtedness.

Cited in 1 Wash. 301, 486; 2 Wash. 138, 144, 585; 3 Wash. 8—11; 4 Wash. 86, 136, 145, 774, 775; 6 Wash. 146, 251; 7 Wash. 231, 232; 8 Wash. 279, 668; 13 Wash. 19; 14 Wash. 293, 606; 16 Wash. 386; 19 Wash. 41; 25 Wash. 304, 583; 26 Wash. 504; 28 Wash. 721; 35 Wash. 580; 42 Wash. 29; 48 Wash. 630; 50 Wash. 161, 162; 51 Wash. 178; 53 Wash. 435; 55 Wash. 239; 56 Wash. 230, 233; 58 Wash. 473; 62 Wash. 108, 315; 64 Wash. 73, 76, 79, 329; 67 Wash. 43, 61, 242; 68 Wash. 689; 69 Wash. 293, 294; 70 Wash. 300, 355, 356, 358, 546; 73 Wash. 58; 75 Wash. 655, 656; 76 Wash. 333; 77 Wash. 224; 78 Wash. 97, 207; 95 Wash. 615; 97 Wash. 262; 102 Wash. 107; 106 Wash. 98.

Power to provide a tribunal and clothe it with authority to contest election cases is not implied in the grant of authority: State ex rel. Fawcett v. Superior Court, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674.

Under this section a city may adopt the initiative and referendum plan of government: Hartig v. Seattle, 53 Wash. 432, 102 Pac. 408.

The constitutional provision authorizing cities of the first class to frame charters for themselves is not self-executing to such an extent as to render invalid an act of the legislature the object of which is

to further the exercise of the right and make it available: Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625.

This section requires a majority of the voters voting upon an amendment of a city charter and not a majority voting at the election: State ex rel. Wiesenthal v. Denny, 4 Wash. 135, 29 Pac. 791, 16 L. R. A. 214; Strain v. Young, 25 Wash. 578, 66 Pac. 64.

Under this section a city may provide for proposed amendments to its special charter to be submitted to the electors at a special election: State ex rel. Hindley v. Superior Court, 70 Wash. 352, 126 Pac. 920.

The power of cities of the first class to frame a charter for themselves is a continuing right vested in the voters of the city, and it does not become exhausted because once exercised: Reeves v. Anderson, 13 Wash. 17, 42 Pac. 625.

Laws of 1911, page 521, authorizing the adoption of the commission form of city government by any city now or hereafter having the required population, is not unconstitutional because of its optional features: State ex rel. Hunt v. Tausiek, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802.

Powers and Functions of Local Government in General: See Remington's Di-

gest, *Mun. Corp.*, § 22; *Cloherly, In re*, 2 Wash. 137, 27 Pac. 1064; *State ex rel. Winsor v. Mayor & Council*, 10 Wash. 4, 38 Pac. 761; *Howe v. Barto*, 12 Wash. 627, 41 Pac. 908; *James v. Seattle*, 22 Wash. 654, 62 Pac. 84, 79 Am. St. Rep. 957; *Linne v. Bredes*, 43 Wash. 540, 86 Pac. 858, 117 Am. St. Rep. 1068, 11 Ann. Cas. 238, 6 L. R. A. (N. S.) 707; *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994; *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639.

General laws cannot be affected by the adoption of a freeholders' charter, but they are binding upon the corporation: *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077.

The prohibition against special legislation in incorporating cities and towns is prospective in its operation, and does not affect existing special charters created under the territorial regime: *Tacoma Land Co. v. Pierce County*, 1 Wash. 482, 25 Pac. 904. See Art. II, § 28, subd. 8.

The act of March 9, 1893 (p. 183), validating de facto towns, ineffectually attempting to incorporate under prior void acts, is constitutional, and not special legislation: *Pullman v. Hungate*, 8 Wash. 519, 36 Pac. 483; *State ex rel. Bradley v. Berry*, 13 Wash. 708, 42 Pac. 622; *State ex rel. Rice v. Centralia*, 8 Wash. 659, 36 Pac. 484.

The act of March 27, 1890 (p. 135, § 6), authorizing reincorporation of void municipal corporations, violates the constitutional inhibition against creating municipal corporations by special laws: *Town of Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926.

The act of March 27, 1890 (p. 138), authorizing cities and towns to consolidate, and to hold special elections therefor in each of the cities and towns proposed to be consolidated, does not contravene the provisions of this section: *State ex rel. Cole v. New Whatcom*, 3 Wash. 7, 27 Pac. 1020.

The majority prescribed by this section requisite to carry a proposition authorized to be submitted to the electors is a majority of those who vote upon the proposition: *Metcalf v. Seattle*, 1 Wash. 297, 29 Pac. 1010; and the vote necessary for the ratification of a proposed amendment to a freeholders' charter is a majority of those voting on the specific proposition, if submitted at a general election: *State ex rel. Wiesenthal v. Denny*, 4 Wash. 135, 29 Pac. 991, 16 L. R. A. 214.

The act of February 26, 1890, requiring the incorporation, organization and classification of cities in proportion to population, does not violate this section, since the same authority was conferred upon municipal corporations to be thereafter organized by other legislation at the same

session: *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462.

This section must be construed to require the same publication of proposed amendments to a city charter as is required upon the adoption of the charter itself: *Wade v. Tacoma*, 4 Wash. 85, 92 Pac. 983.

The boundaries of a city, acting under a freeholders' charter cannot be extended by an amendment of its charter; for an extension to be valid under the constitution it must be consummated by virtue of action under the general laws: *State ex rel. Snell v. Warner*, 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263.

The constitution and statutes thereunder, authorizing the incorporation of cities and towns, do not confine the limits of the corporation to those of any pre-existing city or town, but the boundary may be established by the vote of the people within the limits of the proposed incorporation: *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795.

This section authorizes cities to frame their own charters for self-government within certain limitations, hence article IV, section 33, freeholders' charter of Seattle, providing that a claim for damages against the city shall be presented within six months after the claim accrues and that no action should be maintained until sixty days after such presentation, is not unconstitutional, although the general law of limitations prescribes a three years' limit: *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145.

Cities authorized by the constitution to frame their own charters have no authority to provide therein for the creation of municipal or police courts. Such power is delegated by the constitution to the legislature, which can alone exercise it: *Cloherly, In re*, 2 Wash. 137, 27 Pac. 1064.

A city cannot adopt a charter empowering it to fix the price of gas to be furnished its inhabitants, under this section, authorizing cities of a specific population to frame charters, etc., where a general law authorizes such cities to regulate and control the use of gas, but contains no provision as to price: *Tacoma Gas Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

Where the legislature has passed a general law upon the particular subject, the power to fix rates for lighting the city must be found therein, and not under section 11 of this article: *Id.*

The salary of elective officers must be provided for in the charter and cannot be redelegated by the charter framers to the legislative bodies of such cities: *Taylor v. Tacoma*, 8 Wash. 174, 35 Pac. 584; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524.

The legislature having no authority to pass laws partaking of the character of special legislation, it cannot delegate such power to a city council: *Tacoma v. Krech*, 15 Wash. 296, 46 Pac. 255, 34 L. R. A. 68.

The vacation of streets is a legislative function which may be delegated by the legislature to municipal corporations: *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316.

The constitutional authority to frame a freeholders' charter does not authorize a city to exercise the power of eminent domain: *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847. Nor to require registration at city elections: *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077. Nor to provide a tribunal and clothe it with authority to determine an election contest: *State ex rel. Fawcett v. Superior Court*, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674. Nor to decide all questions as to qualifications and election of members of the city council in cases of contest: *State ex rel. Navin v. Wier*, 26 Wash. 501, 67 Pac. 226.

The proper classification of municipal corporations may be determined by a census taken for that purpose by the local authorities: *Anderson v. Whatcom County*, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137; *State ex rel. Smith v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135.

A charter of the city of the first class may be amended by a general law which

affects every city of such class: *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428.

It is the evident policy of the state constitution that charters of cities of the first class and amendments thereto shall be subject to the control of general laws: *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *Benton v. Seattle Electric Co.*, 50 Wash. 156, 96 Pac. 1033. Permitting amendments to a charter to be adopted by a vote of the people is not an unwarranted delegation of legislative power: *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39.

The adoption of charter amendments requiring the submission of the matter of granting franchises to a vote of the people is not unconstitutional as an unlawful delegation of legislative power to the people: *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.

An ordinance fixing the minimum fine for a misdemeanor is not void, although the general law of the state fixes no minimum: *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 105. See, also, *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324.

This section does not permit the adoption of unreasonable charter limitations against claims and actions for damages against the city: *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938.

§ 11. POLICE AND SANITARY REGULATIONS.—Any county, city, town or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.

Cited in 14 Wash. 294; 16 Wash. 573; 26 Wash. 275; 28 Wash. 722; 58 Wash. 496, 497; 61 Wash. 445; 67 Wash. 46; 73 Wash. 58, 61; 75 Wash. 655, 656; 77 Wash. 224; 78 Wash. 207; 80 Wash. 106; 83 Wash. 326; 95 Wash. 35, 615; 102 Wash. 107; 103 Wash. 413; 112 Wash. 497.

POLICE POWER—Nature and Scope in General: See *Remington's Digest*, Const. Law, § 43; *Karasek v. Pier*, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; *State v. Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *State ex rel. Case v. Howell*, 85 Wash. 281, 147 Pac. 1162; *State v. Townesnute*, 89 Wash. 478, 154 Pac. 805; *State ex rel. Public Service Commission v. Spokane & Inland Empire R. Co.*, 89 Wash. 599, 154 Pac. 1110; *Raymond Lumber Co. v. Raymond Light & Water Co.*, 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574.

Public Safety and Welfare: See *Remington's Digest*, Const. Law, § 44; *Wilson*

v. Beyers, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 92 Am. St. Rep. 930, 59 L. R. A. 342; *Simpson v. Whatcom*, 33 Wash. 392, 74 Pac. 577, 99 Am. St. Rep. 951, 63 L. R. A. 815; *Seattle v. Hinckley*, 40 Wash. 468, 82 Pac. 747, 2 L. R. A. (N. S.) 392; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287; *State ex rel. Board of Commissioners of Pierce County v. Clausen*, 95 Wash. 214, 163 Pac. 744; *State v. Van Vlack*, 101 Wash. 503, 172 Pac. 563.

Public Health: See *Remington's Digest*, Const. Law, § 45; *Ah Lim v. Territory*, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395; *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *Thompson, In re*, 36 Wash. 377, 78 Pac. 899; *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889; *Smith*

v. Spokane, 55 Wash. 219, 104 Pac. 249, 19 Ann. Cas. 1220.

Public Morals: See Remington's Digest, Const. Law, § 46; State v. Considine, 16 Wash. 358, 47 Pac. 755; State v. Nichols, 28 Wash. 628, 69 Pac. 771; Donnellan, In re, 49 Wash. 460, 95 Pac. 1085; Ferguson, In re, 80 Wash. 102, 141 Pac. 322.

Prevention of Fraud: See Remington's Digest, Const. Law, § 47; McDaniels v. Connelly Shoe Co., 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947; O'Neill, In re, 41 Wash. 174, 83 Pac. 104, 6 Ann. Cas. 869, 3 L. R. A. (N. S.) 558.

Regulation of Occupations: See Remington's Digest, Const. Law, § 48; Fox v. Territory, 2 W. T. 297, 5 Pac. 603; State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Griener, 63 Wash. 46, 114 Pac. 897; State ex rel. Smith v. Board of Examiners, 31 Wash. 492, 72 Pac. 110; Thompson, In re, 36 Wash. 377, 78 Pac. 899, 2 Ann. Cas. 149; State v. Brown, 37 Wash. 106, 79 Pac. 638; State v. Sexton, 37 Wash. 110, 79 Pac. 634; State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; Aubrey, In re, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927; State v. Brown, 37 Wash. 97, 79 Pac. 635, 107 Am. St. Rep. 798, 68 L. R. A. 889; State v. Walker, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257; Ferguson-Hendrix Co. v. Fidelity & Deposit Co., 79 Wash. 528, 140 Pac. 700; Raymond Lumber Co. v. Raymond Light & Water Co., 92 Wash. 330, 159 Pac. 133, L. R. A. 1917C, 574; State v. Rossman, 93 Wash. 530, 161 Pac. 349, L. R. A. 1917B, 1276; Seattle v. Brookins, 98 Wash. 290, 167 Pac. 940.

Reasonableness of Regulations: See Remington's Digest, Const. Law, § 49; Ah Lim v. Territory, 1 Wash. 156, 24 Pac. 588, 9 L. R. A. 395; State v. Considine, 16 Wash. 358, 47 Pac. 755; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 92 Am. St. Rep. 930, 59 L. R. A. 342; Cawsey v. Brickey, 82 Wash. 653, 144 Pac. 938.

Invasion of Private Rights in General: See Remington's Digest, Const. Law, § 50; Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149, 53 Am. St. Rep. 868.

Deprivation of Property Without Compensation: See Remington's Digest, Const. Law, § 51; Askham v. King County, 9 Wash. 1, 36 Pac. 1097; Bowes v. Aberdeen, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709.

Concurrent and Conflicting Exercise of Power by State and Municipality.—The power conferred upon cities to regulate the traffic in intoxicating liquors within their limits, relates more especially to what are usually termed "police powers," and must be exercised consistently with the general laws of the state, one of which is that only pure liquors shall be sold: State ex rel. Christie v. Meek, 26 Wash. 405, 67 Pac. 76.

Police power to regulate the frequency of street-car service is conferred upon a city by this section: Tacoma v. Bontelle, 61 Wash. 434, 112 Pac. 661.

The right of a city to exercise the police power within its limits by regulations not in conflict with general laws ceases as to any particular subject matter when the state acts by passing a general law on the subject, unless there is room for the exercise of concurrent jurisdiction: Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892.

A city cannot adopt a charter empowering it to fix the price of gas to be furnished its inhabitants, where a general law authorizes such cities to regulate and control the use of gas, but contains no provision as to price: Tacoma Gas & Elec. Light Co. v. Tacoma, 14 Wash. 288, 44 Pac. 655.

This section delegates to the city police, power to legislate upon the subject of weights and measures to prevent frauds: Seattle v. Goldsmith, 73 Wash. 54, 131 Pac. 456.

The legislative body of a city of the first class has the power to prescribe a higher rate of wages than the prevailing rate, as a minimum of wages to be paid for common labor on public work to be paid for by special assessments against property specially benefited: Malette v. Spokane, 77 Wash. 205, 137 Pac. 496, Ann. Cas. 1915D, 225, 51 L. R. A. (N. S.) 686.

Sports or Amusements.—A city has authority under its police power, to prohibit the opening of theaters on Sunday, in the absence of any general law expressly permitting them to be opened: Ferguson, In re, 80 Wash. 102, 141 Pac. 322.

The action of the city in granting a franchise ordinance to a railway to construct bridges over certain streets is not ultra vires as being in excess of corporate powers: Detamore v. Hindley, 83 Wash. 322, 145 Pac. 462.

§ 12. ASSESSMENT AND COLLECTION OF TAXES IN MUNICIPALITIES.—The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal pur-

ART. XI, §§ 13-15 CONSTITUTION OF THE STATE OF WASHINGTON.

poses, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

Cited in 2 Wash. 586; 6 Wash. 255, 258, 369; 13 Wash. 53; 15 Wash. 317; 22 Wash. 574; 26 Wash. 276; 28 Wash. 45; 35 Wash. 584; 37 Wash. 16; 42 Wash. 28; 44 Wash. 354; 51 Wash. 17; 57 Wash. 623; 63 Wash. 468, 470; 65 Wash. 526; 81 Wash. 489; 82 Wash. 626, 627, 629; 88 Wash. 291; 95 Wash. 222; 106 Wash. 97; 108 Wash. 243.

This section is not violated by the enactment of the statute (Laws 1893, p. 301), providing for the establishment and improvement of highways in counties, and an assessment therefor is not a tax within the meaning of the constitution: *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552.

Section 9961, *infra*, et seq., as amended by Laws of 1911, page 180, which provides for a state bureau of inspection to secure a uniform system of accounts, empowered to make examinations of the accounts and records of all county and city officers at the expense of such local municipalities, does not violate this section: *State ex rel. Clausen v. Burr*, 65 Wash. 524, 118 Pac. 639.

Municipal Taxes and Other Revenue.—This provision is not violated by the enactment of the statute (Laws 1893, p. 301), providing for the establishment and improvement of highways in coun-

ties: *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552.

Laws of 1903, page 393, requiring the municipal authorities to submit to a vote of the people a charter amendment when petitioned so to do by fifteen persons of the qualified voters of the city, thereby compelling the city to incur expense of such election, does not violate this section: *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.

An act authorizing a county to levy a special assessment for benefits accruing from a public improvement is not the imposition of a tax upon the county by the state, prohibited by this section: *Bilger v. State*, 63 Wash. 457, 116 Pac. 19.

Section 4262, *infra*, is not unconstitutional in that it authorizes the exercise of extraterritorial jurisdiction and enables the taxing of land outside the district which may be within another district, since the charges are measurable only by the benefits resulting to the land charged: *State ex rel. Conner v. Superior Court*, 81 Wash. 480, 143 Pac. 112.

Laws of 1915, page 587, section 1, validating tax levies made by cities of the third class in excess of the legal limit, is not in violation of this section: *Owings v. Olympia*, 88 Wash. 289, 152 Pac. 1019.

§ 13. PRIVATE PROPERTY, WHEN MAY BE TAKEN FOR PUBLIC DEBT.—Private property shall not be taken or sold for the payment of the corporate debt of any public or municipal corporation, except in the mode provided by law for the levy and collection of taxes.

Cited in 4 Wash. 154.

§ 14. PRIVATE USE OF PUBLIC FUNDS PROHIBITED.—The making of profit out of county, city, town, or other public money, or using the same for any purpose not authorized by law, by any officer having the possession or control thereof, shall be a felony, and shall be prosecuted and punished as prescribed by law.

Cited in 12 Wash. 295; 18 Wash. 624.

The enactment of § 2812, Bal. Code, is in perfect harmony with this provision, and applies to public officers, such as city treasurer: *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. Boggs*, 16 Wash. 143, 47 Pac. 417.

Depositing funds of a city in a bank subject to repayment on demand, is neither a loan nor an investment of the funds: *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524.

§ 15. DEPOSIT OF PUBLIC FUNDS.—All moneys, assessments, and taxes belonging to or collected for the use of any county, city, town, or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depository, to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they belong.

Cited in 4 Wash. 154; 35 Wash. 515; 103 Wash. 321; 112 Wash. 335, 336.

Section 9603, *infra*, providing for the excavation of public waterways and for liens, does not violate this section; as

the claim for liens for the work is not a debt of any such corporation: *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845.

ARTICLE XII.

Corporations Other Than Municipal.

§ 1. CORPORATIONS, HOW FORMED.—Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended, or repealed by the legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited, or restrained by law.

Cited in 19 Wash. 498; 51 Wash. 390; 67 Wash. 44, 383; 80 Wash. 171; 104 Wash. 60.

§ 2. EXISTING CHARTERS.—All existing charters, franchises, special or exclusive privileges, under which an actual and bona fide organization shall not have taken place, and business been commenced in good faith, at the time of the adoption of this constitution, shall thereafter have no validity.

§ 3. EXISTING CHARTERS NOT TO BE EXTENDED NOR FORFEITURE REMITTED.—The legislature shall not extend any franchise or charter, nor remit the forfeiture of any franchise or charter of any corporation now existing, or which shall hereafter exist under the laws of this state.

Cited in 67 Wash. 383.

The striking of delinquent names for failure to pay license fees is not the forfeiture of a franchise or charter

within the meaning of this section: *State ex rel. Preston Mill Co. v. Howell*, 67 Wash. 377, 121 Pac. 861.

§ 4. LIABILITY OF STOCKHOLDERS.—Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon this liability.

Cited in 64 Wash. 299, 300; 78 Wash. 609; 80 Wash. 389.

Liabilities of stockholders, see *Remington's Digest, Corp.*, §§ 30—48, 212, and cases cited.

Section 8611, *infra*, permitting mining claims to be transferred to such corporation in full payment of the capital stock without the necessity of stock subscriptions, does not apply to coal mining companies, the stockholders of which are accordingly liable to creditors upon unpaid stock subscriptions: *Davies v. Ball*,

64 Wash. 292, 116 Pac. 833; *Ann. Cas.* 1914B, 750.

The stockholders of an insolvent corporation do not continue liable upon stock subscriptions as long as liability exists against the corporation: *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598.

This section is not a limitation upon the power of the stockholder to contract with the corporation in reference to a surplus fund: *Johns v. Clothier*, 78 Wash. 602, 139 Pac. 755.

§ 5. TERM "CORPORATION," DEFINED—RIGHT TO SUE AND BE SUED.—The term "corporations," as used in this article shall be construed to include all associations and joint stock companies having any powers or privileges of corporations not possessed by individuals or partner-

ships, and all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons.

§ 6. LIMITATIONS UPON ISSUANCE OF STOCK.—Corporations shall not issue stock, except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.

Cited in 69 Wash. 328; 74 Wash. 247; 78 Wash. 525; 98 Wash. 563.

A bond by a corporation guaranteeing dividends in a sum equal to the amount paid for the stock makes the stock subscription a fictitious one and violates this section: *Jorguson v. Apex Gold Mines Co.*, 74 Wash. 243, 133 Pac. 465, 46 L. R. A. (N. S.) 637.

There is a fraud upon creditors and a violation of this section, where stock was subscribed under an agreement to take a certain number of shares of preferred

stock at its par value for each of which three shares of common stock was to be given as a bonus: *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

A contract whereby a corporation agreed to sell and give an option on from three hundred thousand to five hundred thousand shares, of the par value of one dollar each, at the stated purchase price of seven cents, is ultra vires and unenforceable: *Fox v. Seattle Contact Copper Co.*, 98 Wash. 557, 168 Pac. 185.

§ 7. FOREIGN CORPORATIONS.—No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state.

Cited in 18 Wash. 454; 35 Wash. 343; 43 Wash. 375; 46 Wash. 493; 47 Wash. 119, 121; 51 Wash. 621; 76 Wash. 639; 79 Wash. 295; 80 Wash. 328.

Subjection to Laws Governing Domestic Corporations: See *Remington's Digest*, Corp., § 248; *State ex rel. Amalgamated Republic Mines Co. v. Nichols*, 47 Wash. 117, 91 Pac. 632; *State ex rel. Baker River & Shuiksan R. Co. v. Nichols*, 51 Wash. 619, 99 Pac. 876.

Alien companies cannot do business in this state without making the deposit re-

quired of domestic corporations, although not required by its home laws to make a deposit, in view of this section: *State ex rel. Leach v. Fishback*, 79 Wash. 290, 140 Pac. 387.

A foreign express company having an interstate business in this state is not free to renounce intrastate business, in the absence of any suggestion that the local business is done at a loss: *State v. Northern Express Co.*, 76 Wash. 636, 136 Pac. 1160.

§ 8. ALIENATION OF FRANCHISE NOT TO RELEASE LIABILITIES.—No corporation shall lease or alienate any franchise, so as to relieve the franchise, or property held thereunder, from the liabilities of the lessor or grantor, lessee or grantee, contracted or incurred in the operation, use, or enjoyment of such franchise or any of its privileges.

Cited in 8 Wash. 286, 287; 86 Wash. 322.

The transfer by an insolvent corporation of all its property to the mortgagee thereof is not inhibited by this section: *Klosterman v. Mason County etc. R. Co.*, 8 Wash. 281, 36 Pac. 136.

A telephone franchise is not violated and a cause of forfeiture does not arise

by the giving of a voluntary mortgage, followed by an involuntary foreclosure and sale under which another telephone company acquired the franchise and telephone system: *State ex rel. Tacoma v. Sunset Telephone & Telegraph Co.*, 86 Wash. 309, 150 Pac. 427, L. R. A. 1917F, 1178.

§ 9. STATE NOT TO LOAN ITS CREDIT OR SUBSCRIBE FOR STOCK.—The state shall not in any manner loan its credit, nor shall it subscribe to or be interested in the stock of any company, association or corporation.

Cited in 35 Wash. 513.

§ 10. EMINENT DOMAIN AFFECTING.—The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies, and subjecting them to public use the same as the property of individuals.

Cited in 32 Wash. 595; 57 Wash. 430.

The more extended and beneficial public use employed by a municipal corporation amounts to a reasonable necessity for and authorizes the taking of the

property of a public service corporation already devoted to the same public use under this section: *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

§ 11. PROHIBITION AGAINST ISSUANCE OF MONEY AND LIABILITY OF STOCKHOLDERS IN BANKS.—No corporation, association, or individual shall issue or put in circulation as money anything but the lawful money of the United States. Each stockholder of any banking or insurance corporation or joint stock association shall be individually and personally liable equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporation or association accruing while they remain such stockholders, to the extent of the amount of their stock therein at the par value thereof, in addition to the amount invested in such shares.

Cited in 13 Wash. 678; 19 Wash. 235; 21 Wash. 225, 613; 24 Wash. 381; 36 Wash. 266; 80 Wash. 389; 105 Wash. 257.

Liability for Debts and Acts of Bank—In General.—The double liability imposed by this section upon stockholders of a banking corporation in addition to the amount of their stock subscriptions, is a secondary, and not a primary liability. the stockholders occupying the position of sureties: *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *Watterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041.

But this rule has no application to the

limitation of actions, but only to the equitable application of the funds, and does not require that the primary assets be exhausted and applied before recourse be had against the stockholders: *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

The superadded liability of a stockholder of a bank, under this section, is personal, and does not follow the stock: *Shuey v. Holmes*, 21 Wash. 223, 57 Pac. 818; *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536.

§ 12. RECEIVING DEPOSITS BY BANK AFTER INSOLVENCY. Any president, director, manager, cashier, or other officer of any banking institution who shall receive or assent to the reception of deposits after he shall have knowledge of the fact that such banking institution is insolvent or in failing circumstances, shall be individually responsible for such deposits so received.

Cited in 35 Wash. 151; 60 Wash. 385.

Criminal Responsibility on Insolvency: See *Remington's Digest*, Banks, § 9; *State v. Oleson*, 35 Wash. 149, 76 Pac. 686; *State v. Dix*, 33 Wash. 405, 74 Pac. 570; *State v. Youngbluth*, 60 Wash. 383, 111 Pac. 240; *State v. Welty*, 65 Wash. 244, 118 Pac. 9.

When bank is insolvent. *Ann. Cas.* 1916C, 85.

Liability of officers for failure to close insolvent bank. 3 L. R. A. (N. S.) 438.

ART. XII, §§ 13-15 CONSTITUTION OF THE STATE OF WASHINGTON.

§ 13. COMMON CARRIERS, REGULATION OF.— All railroad, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. Any association or corporation organized for the purpose, under the laws of this state, shall have the right to connect at the state line with railroads of other states. Every railroad company shall have the right with its road, whether the same is now constructed or may hereafter be constructed, to intersect, cross, or connect with any other railroad, and when such railroads are of the same or similar gauge they shall, at all crossings, and at all points where a railroad shall begin or terminate at or near any other railroad, form proper connections so that the cars of any such railroad companies may be speedily transferred from one railroad to another. All railroad companies shall receive and transport each the other's passengers, tonnage, and cars, without delay or discrimination.

Cited in 31 Wash. 466; 36 Wash. 661; 76 Wash. 638; 80 Wash. 324, 325, 328.

§ 14. PROHIBITION AGAINST COMBINATIONS BY CARRIERS. No railroad company or other common carrier shall combine or make any contract with the owners of any vessel that leaves port or makes port in this state, or with any common carrier, by which combination or contract the earnings of one doing the carrying are to be shared by the other not doing the carrying.

Cited in 51 Wash. 349.

This section is not violated by an arrangement between two railroad companies operating competing lines between Spokane and Seattle, Washington, whereby each subscribed for one-half of the capital stock of a new and distinct railroad corporation and contributed one-

half of the cost of constructing a new railroad from Spokane to Portland, Oregon, opening up and serving new territory, each road continuing its individual identity and control: State ex rel. Cascade R. Co. v. Superior Court, 51 Wash. 346, 98 Pac. 739.

§ 15. PROHIBITION AGAINST DISCRIMINATING CHARGES.— No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates.

See *infra*, § 21.

Cited in 32 Wash. 225; 76 Wash. 639; 80 Wash. 328; 97 Wash. 601; 103 Wash. 75; 110 Wash. 401.

This section is not self-executing: *Northwestern Warehouse Co. v. Oregon R. & Nav. Co.*, 32 Wash. 218, 73 Pac. 388.

The state having no power to place a burden upon interstate commerce, an interstate express company doing business in this state is free to renounce its intrastate business, notwithstanding the constitutional and statutory provisions (overruling on rehearing *Id.*, 76 Wash.

636, 136 Pac. 1160): *State v. Northern Express Co.*, 80 Wash. 309, 141 Pac. 757.

Section 10433, *infra*, providing that all claims concerning transportation overcharges shall be filed with the public service commission within two years from the time the cause of action accrues is not unconstitutional or beyond the power of the legislature, as curtailing the common law, as declared by this section: *Hewitt Logging Co. v. Northern Pac. R. Co.*, 97 Wash. 597, 166 Pac. 1153.

§ 16. PROHIBITION AGAINST CONSOLIDATION OF COMPETING LINES.—No railroad corporation shall consolidate its stock, property, or franchises with any other railroad corporation owning a competing line.

Cited in 51 Wash. 349; 80 Wash. 170.

A private citizen cannot raise the question whether a railroad corporation in owning all the stock of other companies violated this section, or § 10463 infra,

since the question should be left open for the state for such action as it deems wise: Day v. Tacoma R. & Power Co., 80 Wash. 161, 141 Pac. 347, L. R. A. 1915B, 547.

§ 17. ROLLING STOCK, PERSONALTY FOR PURPOSES OF TAXATION.—The rolling stock and other movable property belonging to any railroad company or corporation in this state shall be considered personal property, and shall be liable to taxation and to execution and sale in the same manner as the personal property of individuals, and such property shall not be exempted from execution and sale.

Cited in 14 Wash. 361.

§ 18. MAXIMUM RATES FOR TRANSPORTATION.—The legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight, and to correct abuses and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the different railroads and other common carriers in the state, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established, and its powers and duties fully defined by law.

Cited in 67 Wash. 44; 94 Wash. 280, 286; 103 Wash. 76.

The constitutional provision requiring the legislature to establish reasonable maximum transportation rates does not

prevent the delegation of such power to a railroad commission: State ex rel. Great Northern R. Co. v. Railroad Commission, 52 Wash. 33, 100 Pac. 184.

§ 19. TELEGRAPH AND TELEPHONE COMPANIES.—Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and telephone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section.

See supra, Art. I, § 16, eminent domain.

Cited in 24 Wash. 57; 77 Wash. 33; 85 Wash. 42.

This section is not self-operative, but by its own terms imposes the duty on

the legislature of providing by general law reasonable regulations to give effect to the section, and hence confers no power to use the streets and highways

other than as the legislature may provide: State ex rel. Spokane & B. C. Tel. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116.

The provision in Ballinger's Code, section 4369, "that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone line can be erected

thereon," is valid: State ex rel. Spokane & B. C. Tel. Co. v. Spokane, 24 Wash. 53, 63 Pac. 1116.

Under this section and section 11342, infra, telegraph and telephone companies may condemn a strip of land privately owned, although it is adjacent to a railroad right of way: State ex rel. De Soucy v. Superior Court, 77 Wash. 31, 137 Pac. 311.

§ 20. PROHIBITION AGAINST FREE TRANSPORTATION FOR PUBLIC OFFICERS.—No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the legislature, or to any person holding any public office within this state. The legislature shall pass laws to carry this provision into effect.

Cited in 10 Wash. 312; 45 Wash. 584.

§ 21. EXPRESS COMPANIES.—Railroad companies, now or hereafter organized or doing business in this state shall allow all express companies organized or doing business in this state transportation over all lines of railroad owned or operated by such railroad companies upon equal terms with any other express company; and no railroad corporation organized or doing business in this state shall allow any express corporation or company any facilities, privileges, or rates for transportation of men or materials or property carried by them, or for doing the business of such express companies, not allowed to all express companies.

See supra, § 15.

Cited in 76 Wash. 639, 640.

§ 22. MONOPOLIES AND TRUSTS.—Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership, or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustees, or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their franchise.

Cited in 23 Wash. 20; 32 Wash. 225; 35 Wash. 515; 51 Wash. 349; 82 Wash. 294.

An ordinance granting a franchise for the construction and operation of a system of street railways, which authorizes the grantees to acquire existing railway lines and surrender their franchises, for the purpose of operating a new system under the proposed franchise, does not violate this section: Wood v. Seattle, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369.

The provision of the act of 1893, re-

lating to the excavation of public waterways, is not invalid or contrary to this section: Seattle & Lake Wash. Waterway Co. v. Seattle Dock Co., 35 Wash. 503, 77 Pac. 845.

A monopoly does not preclude a boom company from so locating its site as to control the booming on a certain river: Nicomen Boom Co. v. North Shore etc. Co., 40 Wash. 315, 82 Pac. 412.

A monopoly in the warehouse business in a locality is not shown by the fact that the business was restricted to locations upon the lands of a railway

company: Northwest Warehouse Co. v. Oregon R. & Nav. Co., 32 Wash. 218, 73 Pac. 388.

A contract between two steamship companies operating boats between the same points, whereby one, in consideration of \$1,500, agreed to withdraw its boats from the route for a period of three years, contravenes this provision: *Manson v. Hunt*, 82 Wash. 291, 144 Pac. 45.

Right of manufacturer, producer or wholesaler to control retail price. 7 A. L. R. 472; *Ann. Cas.* 1916A, 81; *Ann. Cas.* 1918A, 958, 965; *Ann. Cas.* 1918C, 451; 27 L. R. A. (N. S.) 396; L. R. A. 1917A, 1285.

Legality of combination among farmers. 11 A. L. R. 1185.

ARTICLE XIII.

State Institutions.

§ 1. EDUCATIONAL, REFORMATORY AND PENAL INSTITUTIONS.—Educational, reformatory, and penal institutions, those for the benefit of blind, deaf, dumb, or otherwise defective youth, for the insane or idiotic, and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this constitution, and of such as shall thereafter be established by law shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by ayes and noes, and entered upon the journal.

Cited in 9 Wash. 197; 95 Wash. 222.

This section is not violated by the Pierce County Army Post Act, L. '17, p. 2: State

ex rel. Board of Commrs. v. Clausen, 95 Wash. 214, 163 Pac. 744.

ARTICLE XIV.

Seat of Government.

§ 1. STATE CAPITAL, LOCATION OF.—The legislature shall have no power to change or to locate the seat of government of this state; but the question of the permanent location of the seat of government of the state shall be submitted to the qualified electors of the territory, at the election to be held for the adoption of this constitution. A majority of all the votes cast at said election, upon said question, shall be necessary to determine the permanent location of the seat of government for the state; and no place shall ever be the seat of government which shall not receive a majority of the votes cast on that matter. In case there shall be no choice of location at said first election, the legislature shall, at its first regular session after the adoption of this constitution, provide for submitting to the qualified electors of the state, at the next succeeding general election, thereafter, the question of choice of location between the three places for which the highest number of votes shall have been cast at the said first election. Said legislature shall provide further, that in case there shall be no choice of location at said second election, the question of choice between the two places for which the highest number of votes shall have been cast shall be submitted in like manner to the qualified electors of the state at the next ensuing general election: Provided, that until the seat

ART. XIV, §§ 2, 3 CONSTITUTION OF THE STATE OF WASHINGTON.

of government shall have been permanently located as herein provided the temporary location shall remain at the city of Olympia.

Cited in 25 Wash. 583; 49 Wash. 74; 55 Wash. 287.

§ 2. CHANGE OF STATE CAPITAL.—When the seat of government shall have been located as herein provided, the location thereof shall not thereafter be changed except by a vote of two-thirds of all the qualified electors of the state voting on that question, at a general election, at which the question of location of the seat of government shall have been submitted by the legislature.

Cited in 49 Wash. 74; 54 Wash. 383.

§ 3. RESTRICTIONS ON APPROPRIATIONS FOR CAPITOL BUILDINGS.—The legislature shall make no appropriations or expenditures for capitol buildings or grounds, except to keep the territorial capitol buildings and grounds in repair, and for making all necessary additions thereto, until the seat of government shall have been permanently located, and the public buildings are erected at the permanent capital in pursuance of law.

ARTICLE XV.

Harbors and Tide Waters.

Cited in 93 Wash. 134, 137; 95 Wash. 245—247.

§ 1. HARBOR LINE COMMISSION AND RESTRAINT ON DISPOSITION OF CERTAIN TIDE LANDS.—The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof on either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce.

See *infra*, Art. XVII, tide lands.

Cited in 1 Wash. 301; 2 Wash. 260; 4 Wash. 9; 7 Wash. 120, 152; 13 Wash. 65; 19 Wash. 46; 22 Wash. 100; 53 Wash. 219, 220; 54 Wash. 533—535, 539—541; 64 Wash. 321, 323, 324, 334; 71 Wash. 107; 76 Wash. 164; 81 Wash. 17; 91 Wash. 470—474.

“Tide lands” are “state” lands in a certain sense—that is, they belong to the state; but in all the nomenclature of our constitution and statutes the latter term does not include the former: *Seattle & M. Ry. Co. v. State*, 7 Wash. 150,

34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

Under this section a riparian proprietor within a mile of the corporate limits of any city, has no right to extend wharves in front of his land below highwater mark except by permission of the state: *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.

The territorial act, Ballinger's Code, section 4077, providing that cities may authorize the construction of a wharf at the terminus of a street, has been superseded by this section: *State ex rel. Port*

Angeles v. Morse, 56 Wash. 654, 106 Pac. 147.

The act of March 21, 1895 (Laws 1895, p. 406), authorizing the disestablishment of harbor lines in front of towns under certain conditions, is unconstitutional as being in conflict with this section, which contemplates that such lines, when once established, shall forever remain so: *Wilson v. Board of State Land Commrs.*, 13 Wash. 65, 42 Pac. 524.

The board of harbor line commissioners is authorized, under this section, to establish harbor lines in front of towns as well as cities: *State ex rel. Stimson Mill Co. v. Board of Harbor Line Commrs.*, 4 Wash. 6, 29 Pac. 938.

The duty and power prescribed does not constitute a limitation of power upon the legislature touching harbor lines in front of second-class tide lands: *Puget Mill Co. v. State*, 93 Wash. 128, 160 Pac. 310.

The term "commerce" must be construed as modified by the employment of the term "navigation," and the commercial use of such areas must be restricted to such as are aids to navigation; consequently the erection of structures on such areas for the "curing and canning

of fish maintaining retail and wholesale fish markets and the storage of ice for packing and handling fish," are not "conveniences of navigation and commerce," and hence not permissible under the constitution: *State ex rel. Denny v. Bridges*, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593.

This section applies to navigable rivers and lakes as well as tide waters: *State ex rel. Seattle v. Savidge*, 95 Wash. 240, 163 Pac. 738.

The state may establish pier-head lines beyond the harbor lines, whenever it pleases; and hence a lessee of the state of abutting tidelands cannot show the establishment of change of pier-head lines at locations advantageous to his leasehold for the purpose of enhancing the value thereof, in an action to recover for damages thereto: *Wilson v. Oregon-Washington R. & Nav. Co.*, 71 Wash. 102, 127 Pac. 847.

The term "other structures" is governed by the rule of ejusdem generis, and falls within the genus "conveniences of navigation and commerce," and the statute, § 7999, *infra*: *State ex rel. Denny v. Bridges*, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593.

§ 2. LEASING AND MAINTENANCE OF WHARVES, DOCKS, ETC.—The legislature shall provide general laws for the leasing of the right to build and maintain wharves, docks, and other structures, upon the areas mentioned in section one of this article, but no lease shall be made for any term longer than thirty years, or the legislature may provide by general laws for the building and maintaining upon such area wharves, docks, and other structures.

Cited in 1 Wash. 301; 13 Wash. 65; 22 Wash. 101; 54 Wash. 533—535, 539—541; 81 Wash. 17; 91 Wash. 470—474.

Classification: See *Remington's Digest*, Pub. Lands, § 90; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 Pac. 684; *State ex rel. Lehman v. Bridges*, 24 Wash. 363, 64 Pac. 518; *Pearl Oyster Co. v. Heuston*, 57 Wash. 533, 107 Pac. 349, 832, 135 Am. St. Rep. 1007.

Lease of Harbor Area: See *Remington's Digest*, Pub. Lands, § 91; *State ex rel.*

Denny v. Bridges, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 593; *State ex rel. Trimble v. Bridges*, 22 Wash. 98, 60 Pac. 66; *State ex rel. White v. Board of State Land Commrs.*, 23 Wash. 700, 63 Pac. 532.

Under this section the state may lease the right to build a railroad on the harbor area; "other structures" being equivalent to "other conveniences" of commerce in section 1: *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

§ 3. EXTENSION OF STREETS OVER TIDE LANDS.—Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.

Cited in 4 Wash. 9, 10; 6 Wash. 333, 334, 387; 7 Wash. 156; 10 Wash. 462; 11 Wash. 231; 13 Wash. 65; 17 Wash. 658; 19 Wash. 429; 53 Wash. 220; 56 Wash. 660; 64 Wash. 322, 324; 91 Wash. 456, 470—474.

Extension of Street Over Tide Lands: See *Remington's Digest*, Mun. Corp., § 346; *Columbia etc. R. Co. v. Seattle*, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725; *Globe Mill*

Co. v. Bellingham Bay Imp. Co., 10 Wash. 458, 38 Pac. 1112; *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 33 Pac. 1048; *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; *State ex rel. Bartlett v. Forrest*, 12 Wash. 483, 41 Pac. 194; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 Pac. 684; *Ilwaco v. Ilwaco R. & Nav. Co.*, 17 Wash. 652, 50 Pac. 572; *State ex rel. Gatzert etc. Land*

ART. XVI, §§ 1-3 CONSTITUTION OF THE STATE OF WASHINGTON.

Co. v. Bridges, 19 Wash. 428, 53 Pac. 547; Globe Mill Co. v. Bellingham Bay Imp. Co., 10 Wash. 458, 38 Pac. 1112; Barlow v. Gamwell, 12 Wash. 651, 42 Pac. 115; Lake Whatcom Logging Co. v. Callvert, 33 Wash. 126, 73 Pac. 1128; Percival

Application, No. 92, In re, 91 Wash. 470, 157 Pac. 1082.

This section carries with it the power to authorize the location of railway tracks upon such extended streets: Seattle v. Columbia & P. S. R. Co., 6 Wash. 379, 33 Pac. 1048.

ARTICLE XVI.

School and Granted Lands.

§ 1. DISPOSITION OF.—All the public lands granted to the state are held in trust for all the people, and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interests disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

Cited in 7 Wash. 152; 51 Wash. 55, 56; 57 Wash. 613; 63 Wash. 575; 71 Wash. 107; 74 Wash. 575, 576, 585; 97 Wash. 29; 110 Wash. 500.

Disposal of, in general: See Remington's Digest, Pub. Lands, §§ 75—83, and cases cited.

§ 2. MANNER AND TERMS OF SALE.—None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder; and the value thereof, less the improvements, shall, before any sale, be appraised by a board of appraisers, to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of improvements thereon shall be excluded: Provided, that the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners, when the purchase price has been paid in good faith, may be confirmed by the legislature.

Cited in 7 Wash. 217; 51 Wash. 55, 56; 57 Wash. 613; 74 Wash. 575, 576; 97 Wash. 29; 110 Wash. 500.

Waters of a non-navigable stream upon state lands granted for a scientific school cannot be appropriated by a nonriparian owner; since they are considered as part of the soil and as an incident to the owner's estate: Colburn v. Winchell, 97 Wash. 27, 165 Pac. 1078.

Lands deeded to the territorial board of regents of the university are "public

lands" within the constitution and laws of the state, empowering the state board of land commissioners to dispose of the same; State v. Hewitt Land Co., 74 Wash. 573, 134 Pac. 474.

The state's relinquishment of rights to unsurveyed school sections which had not vested because of national forest reservations or settler's rights, is not a disposition of public lands in violation of this section: Thompson v. Savidge, 110 Wash. 486, 188 Pac. 397.

§ 3. LIMITATIONS ON SALES.—No more than one-fourth of the land granted to the state for educational purposes shall be sold prior to January first, eighteen hundred and ninety-five, and not more than one-half prior to January first, nineteen hundred and five: Provided, that nothing herein shall be so construed as to prevent the state from selling the timber or stone off of any of the state lands in such manner and on

such terms as may be prescribed by law: And provided further, that no sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state.

Cited in 74 Wash. 588.

§ 4. HOW MUCH MAY BE OFFERED IN CERTAIN CASES—PLATTING OF.—No more than one hundred and sixty acres of any granted lands of the state shall be offered for sale in one parcel, and all lands within the limits of any incorporated city, or within two miles of the boundary of any incorporated city, where the valuation of such lands shall be found by appraisement to exceed one hundred dollars per acre shall, before the same be sold, be platted into lots and blocks of not more than five acres in a block, and not more than one block shall be offered for sale in one parcel.

Cited in 74 Wash. 584.

Sale and Conveyance by State in General: See Remington's Digest, Pub. Lands,

§ 75; Hart Lumber Co. v. Rucker, 15 Wash. 456, 46 Pac. 728; State v. Hewitt Land Co., 74 Wash. 573, 134 Pac. 474.

§ 5. INVESTMENT OF PERMANENT SCHOOL FUND.—None of the permanent school fund shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, or municipal bonds.

This section is amended: See 1st Amendment, *infra*.

Cited in 7 Wash. 271, 272; 21 Wash. 208, 392; 40 Wash. 100; 74 Wash. 17, 19.

School Funds—Investment and Administration: See Remington's Digest, Schools, § 3; State ex rel. Hellar v. Young, 21 Wash. 391, 58 Pac. 220; State ex rel. School District v. Grimes, 7 Wash. 270, 34 Pac. 836; State ex rel. Port Townsend v. Clausen, 40 Wash. 95, 82 Pac. 187;

State Capitol Commission v. State Board of Finance, 74 Wash. 15, 132 Pac. 861.

Bonds issued by a city under Laws of 1901, page 177, to defray the cost of the construction of waterworks, payable only out of a special fund derived from the revenues of the waterworks system, are not municipal bonds within the meaning of this section: State ex rel. Port Townsend v. Clausen, 40 Wash. 95, 82 Pac. 187.

ARTICLE XVII.

Tide Lands.

§ 1. DECLARATION OF STATE OWNERSHIP.—The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: Provided, that this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

See *supra*, Art. XV, Harbors and Tide Waters.

Cited in 2 Wash. 245, 259, 265, 279; 5 Wash. 159; 7 Wash. 152; 11 Wash. 233; 18 Wash. 499; 24 Wash. 644; 40 Wash. 373, 418, 419; 49 Wash. 68, 131; 54 Wash. 91; 60 Wash. 505; 63 Wash. 464; 64 Wash. 166; 70 Wash. 445, 448; 76 Wash. 163, 194; 77 Wash. 192, 193; 79 Wash. 90; 81 Wash. 548; 84 Wash. 255, 381; 86 Wash. 229; 89 Wash. 65; 90 Wash. 353; 95 Wash. 245; 98 Wash. 635, 638; 111 Wash. 499.

Ownership and Control of Tide Lands in General: See Remington's Digest, Navigation, § 21; Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; Board of Harbor Line Commrs. v. State, 2 Wash. 530, 27 Pac. 550; State ex rel. Stimson Mill Co. v. Harbor Line Commrs., 4 Wash. 6, 29 Pac. 938; State ex rel. Columbia etc. Co. v. Harbor Line Commrs., 4 Wash. 816, 30 Pac. 734; Morse v. O'Connell, 7 Wash. 117, 34 Pac. 426; Allen v. Forrest,

8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; Sullivan v. Callvert, 27 Wash. 600, 63 Pac. 363; McCue v. Bellingham Bay etc. Co., 5 Wash. 156, 31 Pac. 461; Watkins v. Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; Washougal etc. Trans. Co. v. Dalles etc. Nav. Co., 27 Wash. 490, 68 Pac. 74; Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. (N. S.) 745; Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 Pac. 278; Grays Harbor Boom Co. v. Lownsdale, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833; Gifford v. Horton, 54 Wash. 595, 103 Pac. 988.

The title to tide waters and beds of navigable streams is at common law and by this section, in the state, subject to the paramount right of the public use of navigable waters but this does not affect the rights of riparian owners on non-navigable streams, though their source is in navigable waters: New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190.

Under this section, the owner of upland under patents from the federal government has no riparian or littoral rights as against the state, which holds the title of the beds and shores in fee, free from encumbrances or easements of any kind: Bilger v. State, 63 Wash. 457, 116 Pac. 19.

Under this section the riparian owner on a navigable lake has no common-law right as such owner to the waters of the lake for the purposes of irrigation superior to the right of appropriation possessed by owners of land not bordering upon the lake under the laws of the state relating to the appropriation of water for irrigation: State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945.

A riparian owner upon a navigable stream has no title to the gravel in the bed of the stream, in view of this section: Commissioners Commerical Waterway District No. 2 v. Seattle Factory Sites Co., 76 Wash. 181, 135 Pac. 1042.

The state being the owner of the beds of navigable rivers, under this section, riparian owners are not, in eminent domain proceedings to establish a waterway district, entitled to damages from the fact that the state will divert the course of the stream and leave their property without access to the water: Newell v. Loeb, 77 Wash. 182, 137 Pac. 811.

A stream is not navigable, in contemplation of this section, where it merely appears that, for some distance, the tide ebbs and flows, and that, on various occasions, tugboats and small craft had gone up and down the stream at high tide for the purpose of towing logs: Wilson v. Prickett, 79 Wash. 89, 139 Pac. 754.

Where a stream is navigable only for the purpose of floating logs and shingle-bolts, and not in the general commercial sense, the title to the bed of the stream is in the owner of the adjacent land, as far as the thread of the stream, and not in the state: State ex rel. Davis v. Superior Court, 84 Wash. 252, 146 Pac. 609.

Under the federal grant to the state, and the assertion of title by this section, the title of the state is paramount and absolute, and not restricted to the power of regulation for the purposes of navigation: Hill v. Newell, 86 Wash. 227, 149 Pac. 951.

Shore lands on a navigable lake between ordinary high water and ordinary low water belong to the state, where they were unpatented at the time of the adoption of the state constitution: Kalez v. Spokane Valley Land & Water Co., 89 Wash. 514, 154 Pac. 1097.

The state, under this section, being the owners of the beds and shores of navigable streams, a railroad grant of designated lots across which there was an unmeandered navigable slough does not convey the title to the shores or bed of the slough, the limit of the grant being ordinary high water where there is no meander line: Washington Boom Co. v. Chehalis Boom Co., 90 Wash. 350, 156 Pac. 24.

A small lake of the average depth of eighteen feet, having no navigable inlet or outlet, upon which a small steamer is run for hire during the camping season, is navigable within this section: Madson v. Spokane Valley Land etc. Co., 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 257.

A small lake having an average depth of sixteen feet, upon which there is operated one steamboat and numerous small pleasure boats used mostly for pleasure in the summer season, is navigable: Kalez v. Spokane Val. Land etc. Co., 42 Wash. 43, 24 Pac. 395.

A meandered slough, which is dry except during high tide, when it is navigable for a short distance for small craft and floating logs, is not navigable: State ex rel. Matson v. Superior Court, 42 Wash. 491, 85 Pac. 264.

Findings that a lowland lake covering 275 acres is not a navigable lake within this section, sustained: Neterer v. State, 98 Wash. 65, 168 Pac. 170.

Title to land between high and low water marks. 45 L. R. A. 227.

Meaning of term "ordinary" as applied to high and low water mark of tides. 17 Ann. Cas. 149.

Power of state to grant title to land under navigable water. Ann. Cas. 1918B, 1107.

Right of owner of upland to make a use, not connected with navigation, of the shore between high and low

water mark, which excludes the general public. 10 A. L. R. 1053.

§ 2. **DISCLAIMER OF CERTAIN LANDS.**—The state of Washington disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided, the same is not impeached for fraud.

Cited in 2 Wash. 245, 259, 279, 615; 4 Wash. 469; 11 Wash. 233; 14 Wash. 3; 19 Wash. 302; 27 Wash. 497; 32 Wash. 613; 40 Wash. 362, 364, 365, 371, 374; 42 Wash. 49; 65 Wash. 221, 222; 70 Wash. 451; 79 Wash. 91; 81 Wash. 550; 90 Wash. 355; 111 Wash. 499; 113 Wash. 433.

Disclaimer of Tide Lands Patented by United States: See Remington's Digest, Pub. Lands, § 86; Scurry v. Jones, 4 Wash. 468, 30 Pac. 726; State ex rel. McKenzie v. Forrest, 11 Wash. 227, 39 Pac. 684; Cogswell v. Forrest, 14 Wash. 1, 43 Pac. 1098; Denny v. Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341; Jones v. Callvert, 32 Wash. 610, 73 Pac. 701; Kneeland v. Korter, 40 Wash. 359, 82 Pac. 608, 1 L. R. A. (N. S.) 745.

Title to the beds of unnavigable lakes is not, and never has been, in the state, in view of the construction, of section 143,

infra, declaring the common law to be the rule of decision in the courts of this state; the state recognizing the conditions by its disclaimer of all right and title to the unappropriated public lands within the boundaries of the state, upon its admission to the Union: Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, 290.

Rights of Abutting Owner: See Remington's Digest, Pub. Lands, § 96; West Coast Imp. Co. v. Winsor, 8 Wash. 490, 36 Pac. 441; Denny v. Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341; Seattle & M. R. Co. v. Carraher, 21 Wash. 491, 58 Pac. 570; Hays v. Merchants' Nat. Bank, 14 Wash. 192, 44 Pac. 137; Bleakley v. Lake Washington Mill Co., 65 Wash. 215, 118 Pac. 5; Wilson v. Prickett, 79 Wash. 89, 139 Pac. 754.

ARTICLE XVIII.

State Seal.

§ 1. **SEAL OF THE STATE.**—The seal of the state of Washington shall be a seal encircled with the words, "The seal of the state of Washington," with the vignette of General George Washington as the central figure, and beneath the vignette the figures "1889."

ARTICLE XIX.

Exemptions.

Cited in 66 Wash. 167; 87 Wash. 360.

§ 1. **EXEMPTIONS—HOMESTEADS, ETC.**—The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.

Cited in 20 Wash. 7; 14 Wash. 520; 43 Wash. 182; 78 Wash. 548; 55 Wash. 516.

This section has no application when the homestead has been voluntarily encumbered: Oregon Mortgage Co. v. Hersner, 14 Wash. 515, 45 Pac. 40.

The territorial act (Bal. Code, § 5254), providing that a mortgagor may waive the benefit of all his exemptions, is repugnant to and annulled by this section: Slyfield v. Willard, 43 Wash. 179, 86 Pac. 392.

ARTICLE XX.

Public Health and Vital Statistics.

§ 1. **BOARD OF HEALTH AND BUREAU OF VITAL STATISTICS.**—There shall be established by law a state board of health and a

bureau of vital statistics in connection therewith, with such powers as the legislature may direct.

Cited in 103 Wash. 413.

A city may pass health ordinances and create the office of health commissioner,

notwithstanding this section: State ex rel. McBride v. Superior Court, 103 Wash. 409, 174 Pac. 973.

§ 2. REGULATIONS CONCERNING MEDICINE, SURGERY AND PHARMACY.—The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines.

ARTICLE XXI.

Water and Water Rights.

§ 1. PUBLIC USE OF WATER.—The use of the waters of this state for irrigation, mining, and manufacturing purposes shall be deemed a public use.

Cited in 20 Wash. 458; 39 Wash. 668; 59 Wash. 628; 67 Wash. 558; 81 Wash. 558.

This section is in conflict with the due process clause of the federal constitution in so far as it may be construed to extend the right of eminent domain to take private property for uses essentially private: State ex rel. Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648,

82 Pac. 150, 4 Ann. Cas. 987, 2 L. R. A. (N. S.) 842.

The use of waters for irrigation is a public use, under this section: State ex rel. Golden Valley Irr. Co. v. Superior Court, 67 Wash. 556, 122 Pac. 19.

This section was intended to destroy riparian rights in unnavigable waters: Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, 290.

ARTICLE XXII.

Legislative Apportionments.

§ 1. SENATORIAL APPORTIONMENT.—Until otherwise provided by law, the state shall be divided into twenty-four senatorial districts, and said districts shall be constituted and numbered as follows: The counties of Stevens and Spokane shall constitute the first district, and be entitled to one senator; the county of Spokane shall constitute the second district, and be entitled to three senators; the county of Lincoln shall constitute the third district, and be entitled to one senator; the counties of Okanogan, Lincoln, Adams, and Franklin shall constitute the fourth district, and be entitled to one senator; the county of Whitman shall constitute the fifth district, and be entitled to three senators; the counties of Garfield and Asotin shall constitute the sixth district, and be entitled to one senator; the county of Columbia shall constitute the seventh district, and be entitled to one senator; the county of Walla Walla shall constitute the eighth district, and be entitled to two senators; the counties of Yakima and Douglas shall constitute the ninth district and be entitled to one senator; the county of Kittitas shall constitute the tenth district, and be entitled to one senator; the counties of Klickitat and Skamania shall constitute the eleventh district, and be entitled to one senator; the county of Clarke shall constitute the twelfth district, and be entitled to one senator; the county of Cowlitz shall constitute the thirteenth district, and be entitled to one senator; the county of Lewis shall constitute the fourteenth district, and be entitled to one senator; the counties of Pacific and Wahkiakum shall constitute the fifteenth

district, and be entitled to one senator; the county of Thurston shall constitute the sixteenth district, and be entitled to one senator; the county of Chehalis shall constitute the seventeenth district, and be entitled to one senator; the county of Pierce shall constitute the eighteenth district, and be entitled to three senators; the county of King shall constitute the nineteenth district, and be entitled to five senators; the counties of Mason and Kitsap shall constitute the twentieth district, and be entitled to one senator; the counties of Jefferson, Clallam, and San Juan shall constitute the twenty-first district, and be entitled to one senator; the county of Snohomish shall constitute the twenty-second district, and shall be entitled to one senator; the counties of Skagit and Island shall constitute the twenty-third district, and be entitled to one senator; the county of Whatcom shall constitute the twenty-fourth district, and be entitled to one senator.

Cited in 92 Wash. 541.

§ 2. APPORTIONMENT OF REPRESENTATIVES.—Until otherwise provided by law, the representatives shall be divided among the several counties of the state in the following manner: The county of Adams shall have one representative; the county of Asotin shall have one representative; the county of Chehalis shall have two representatives; the county of Clarke shall have three representatives; the county of Clallam shall have one representative; the county of Columbia shall have two representatives; the county of Cowlitz shall have one representative; the county of Douglas shall have one representative; the county of Franklin shall have one representative; the county of Garfield shall have one representative; the county of Island shall have one representative; the county of Jefferson shall have two representatives; the county of King shall have eight representatives; the county of Klickitat shall have two representatives; the county of Kittitas shall have two representatives; the county of Kitsap shall have one representative; the county of Lewis shall have two representatives; the county of Lincoln shall have two representatives; the county of Mason shall have one representative; the county of Okanogan shall have one representative; the county of Pacific shall have one representative; the county of Pierce shall have six representatives; the county of San Juan shall have one representative; the county of Skamania shall have one representative; the county of Snohomish shall have two representatives; the county of Skagit shall have two representatives; the county of Spokane shall have six representatives; the county of Stevens shall have one representative; the county of Thurston shall have two representatives; the county of Walla Walla shall have three representatives; the county of Wahkiakum shall have one representative; the county of Whatcom shall have two representatives; the county of Whitman shall have five representatives; the county of Yakima shall have one representative.

ARTICLE XXIII.

Amendments.

Cited in 88 Wash. 468, 480, 483.

§ 1. HOW MADE.—Any amendment or amendments to this constitution may be proposed in either branch of the legislature; and if the same shall be agreed to by two-thirds of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the ayes and noes thereon, and be submitted to the qualified electors of the state for their approval, at the next general election; and if the people approve and ratify such amendment or amendments, by a majority of the electors voting thereon, the same shall become part of this constitution, and proclamation thereof shall be made by the governor: Provided, that if more than one amendment be submitted, they shall be submitted in such a manner that the people may vote for or against such [each] amendment separately. The legislature shall also cause the amendments that are to be submitted to the people to be published for at least three months next preceding the election, in some weekly newspaper, in every county where a newspaper is published throughout the state.

Cited in 1 Wash. 301; 25 Wash. 583; 49 Wash. 74; 76 Wash. 320, 325; 77 Wash. 580; 88 Wash. 467, 492.

The majority required for an amendment to the constitution under this and the next section is three-fifths of those voting on the question submitted: Met-

calfe v. Seattle, 1 Wash. 297, 29 Pac. 1010.

The above remark was made in construing other sections of the constitution, and not this section, and in *Strain v. Young*, 25 Wash. 578, 66 Pac. 64, it is implied that the language of this section is susceptible to another construction.

§ 2. CONSTITUTIONAL CONVENTIONS.—Whenever two-thirds of the members elected to each branch of the legislature shall deem it necessary to call a convention to revise or amend this constitution, they shall recommend to the electors to vote at the next general election for or against a convention; and if a majority of all the electors voting at said election shall have voted for a convention, the legislature shall at the next session provide by law for calling the same; and such convention shall consist of a number of members, not less than that of the most numerous branch of the legislature.

Cited in 1 Wash. 301; 49 Wash. 75.

§ 3. SUBMISSION TO THE PEOPLE.—Any constitution adopted by such convention shall have no validity until it has been submitted to and adopted by the people.

ARTICLE XXIV.

Boundaries.

§ 1. STATE BOUNDARIES.—The boundaries of the state of Washington shall be as follows: Beginning at a point in the Pacific ocean one marine league due west of and opposite the middle of the mouth of the north ship channel of the Columbia river; thence running easterly to and up the middle channel of said river and where it is divided by islands up the middle of the widest channel thereof to where the forty-sixth parallel or north latitude crosses said river, near the mouth of the Walla Walla

river; thence east on said forty-sixth parallel of latitude to the middle of the main channel of the Shoshone or Snake river; thence follow down the middle of the main channel of Snake river to a point opposite the mouth of the Kooskooskia or Clear Water river; thence due north to the forty-ninth parallel of north latitude; thence west along said forty-ninth parallel of north latitude to the middle of the channel which separates Vancouver's island from the continent, that is to say to a point in longitude one hundred and twenty-three degrees, nineteen minutes, and fifteen seconds west; thence following the boundary line between the United States and British possessions through the channel which separates Vancouver's island from the continent to the termination of the boundary line between the United States and British possessions at a point in the Pacific ocean equidistant between Bonnilla point, on Vancouver's island, and Tatoosh island lighthouse; thence running in a southerly course and parallel with the coast line, keeping one marine league off shore, to place of beginning.

ARTICLE XXV.

Jurisdiction.

§ 1. **AUTHORITY OF THE UNITED STATES.**—The consent of the state of Washington is hereby given to the exercise by the congress of the United States of exclusive legislation in all cases whatsoever over such tract or parcels of land as are now held or reserved by the government of the United States for the purpose of erecting or maintaining thereon forts, magazines, arsenals, dockyards, lighthouses, and other needful buildings, in accordance with the provisions of the seventeenth paragraph of the eighth section of the first article of the constitution of the United States: Provided, that a sufficient description by metes and bounds, and an accurate plat or map of each such tract or parcel of land be filed in the proper office of record in the county in which the same is situated, together with copies of the orders, deeds, patents, or other evidences in writing of the title of the United States: And provided, that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime in cases arising outside of such reservations, may be served and executed thereon in the same mode and manner and by the same officers as if the consent herein given had not been made.

Cited in 40 Wash. 246.

ARTICLE XXVI.

Compact With the United States.

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public

ART. XXVII, §§ 1-2 CONSTITUTION OF THE STATE OF WASHINGTON.

lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, that nothing in this ordinance shall preclude the state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

Third. The debts and liabilities of the territory of Washington, and payment of the same, are hereby assumed by this state.

Fourth. Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control, which shall be open to all the children of said state.

Cited in 26 Wash. 672; 32 Wash. 613; 38 Wash. 129; 90 Wash. 187, 190.

ARTICLE XXVII.

Schedule.

In order that no inconvenience may arise by reason of a change from a territorial to a state government, it is hereby declared and ordained as follows:—

§ 1. EXISTING RIGHTS, ACTIONS AND CONTRACTS SAVED.—No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; and all process which may have been issued under the authority of the territory of Washington previous to its admission into the Union shall be as valid as if issued in the name of the state.

§ 2. LAWS IN FORCE CONTINUED.—All laws now in force in the territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: Provided, that this section shall not be so construed as to validate any act of the legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation.

Cited in 2 Wash. 258; 4 Wash. 26; 8 Wash. 472; 11 Wash. 233; 13 Wash. 362; 14 Wash. 310; 22 Wash. 132, 548; 28 Wash. 498; 43 Wash. 182; 47 Wash. 206; 51 Wash. 56; 88 Wash. 268.

Where the highest judicial authority of the territory has decided a law invalid because its object was not clearly expressed in the title, the above section does not continue it as a law "then in force":

State v. Halbert, 14 Wash. 306, 44 Pac. 538; State v. Smith, 15 Wash. 698, 46 Pac. 1119.

This section cannot be construed as reenacting a statute, but merely as continuing in force all valid laws which were then in existence: State v. Ellis, 22 Wash. 129, 60 Pac. 136.

The constitution and laws have abrogated the act of the territorial legislature of 1884 authorizing certain owners to build wharves in front of their premises: Eisenbach v. Hatfield, 2 Wash. 26, 26 Pac. 539, 12 L. R. A. 632.

Session Laws 1869, page 408, and Bal. Code, §§ 155-164, regarding the payment of interest on warrants, were carried forward and made a part of the statutes by virtue of this section: State ex rel. Capital Nat. Bank v. Young, 22 Wash. 547, 61 Pac. 725.

As to the duties of the attorney general, under territorial laws, kept in force by this section, see State ex rel. Atty. Gen. v. Seattle Gas & Elec. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

§ 3. DEBTS, FINES, ETC., TO INURE TO THE STATE.—All debts, fines, penalties, and forfeitures which have accrued or may hereafter accrue to the territory of Washington shall inure to the state of Washington.

Cited in 97 Wash. 147.

§ 4. RECOGNIZANCES.—All recognizances heretofore taken or which may be taken before the change from a territorial to a state government shall remain valid, and shall pass to and may be prosecuted in the name of the state, and all bonds executed to the territory of Washington, or to any county or municipal corporation, or to any officer or court in his or its official capacity, shall pass to the state authorities and their successors in office, for the uses therein expressed, and may be sued for and recovered accordingly; and all the estate, real, personal, and mixed, and all judgments, decrees, bonds, specialties, choses in action, and claims or debts, of whatever description belonging to the territory of Washington shall inure to and vest in the state of Washington, and may be sued for and recovered in the same manner and to the same extent by the state of Washington as the same could have been by the territory of Washington.

§ 5. CRIMINAL PROSECUTIONS AND PENAL ACTIONS.—All criminal prosecutions and penal actions which may have arisen, or which may arise, before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the state. All offenses committed against the laws of the territory of Washington, before the change from a territorial to state government, and which shall not be prosecuted before such change, may be prosecuted in the name and by the authority of the state of Washington, with like effect as though such change had not taken place; and all penalties incurred shall remain the same as if this constitution had not been adopted. All actions at law and suits in equity which may be pending in any of the courts of the territory of Washington at the time of a change from a territorial to a state government shall be continued and transferred to the court of the state having jurisdiction of the subject matter thereof.

Cited in 2 Wash. 3; 6 Wash. 159.

Where an action was commenced in justice court before the admission of the state when the justice had jurisdiction up to \$300, and judgment was not rendered until after the admission of the state, when the justice had jurisdiction for only \$100, in a sum over that amount, the jus-

tice's only authority was to transfer the case to the superior court; and an appeal having been taken and the case transferred by the justice under the appeal, it will be considered as a proper transfer of the case, within this section: Moore v. Perrott, 2 Wash. 1, 25 Pac. 900.

§ 6. RETENTION OF TERRITORIAL OFFICERS.—All officers now holding their office under the authority of the United States, or of the territory of Washington, shall continue to hold and exercise their respective offices until they shall be superseded by the authority of the state.

Cited in 6 Wash. 161, 163; 8 Wash. 472; 28 Wash. 16, 498.

§ 7. CONSTITUTIONAL OFFICERS, WHEN ELECTED.—All officers provided for in this constitution, including a county clerk for each county, when no other time is fixed for their election, shall be elected at the election to be held for the adoption of this constitution on the first Tuesday of October, eighteen hundred and eighty-nine.

Cited in 102 Wash. 475.

§ 8. CHANGE OF COURTS—TRANSFER OF CAUSES.—Whenever the judge of the superior court of any county, elected or appointed under the provisions of this constitution, shall have qualified, the several causes then pending in the district court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States district court, had such court existed at the time of the commencement of such causes within such county, and the records, papers, and proceedings of said district court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the superior court of such county. And where the same judge is elected for two or more counties, it shall be the duty of the clerk of the district court having custody of such papers and records to transmit to the clerk of such county or counties other than that in which such records are kept the original papers in all cases pending in such district court and belonging to the jurisdiction of such county or counties, together with transcript of so much of the records of said district court as relate to the same; and until the district courts of the territory shall be superseded in manner aforesaid, the said district courts and the judges thereof shall continue with the same jurisdiction and powers, to be exercised in the same judicial districts respectively, as heretofore constituted under the laws of the territory. Whenever a quorum of the judges of the supreme court of the state shall have been elected and qualified, the causes then pending in the supreme court of the territory, except such causes as would have been within the exclusive jurisdiction of the United States circuit court had such court existed at the time of the commencement of such causes, and the papers, records, and proceedings of said court, and the seal and other property pertaining thereto, shall pass into the jurisdiction and possession of the supreme court of the state, and until so superseded the supreme court of the territory and the judges thereof shall continue with like powers and jurisdiction as if this constitution had not been adopted.

§ 9. SEALS OF COURTS AND MUNICIPALITIES.—Until otherwise provided by law, the seal now in use in the supreme court of the territory shall be the seal of the supreme court of the state. The seal of the superior courts of the several counties of the state shall be, until otherwise provided by law, the vignette of General George Washington, with the words "Seal of the superior court of — county" surrounding the vig-

nette. The seal of municipalities and of all county officers of the territory shall be the seals of such municipalities and county officers, respectively, under the state, until otherwise provided by law.

§ 10. PROBATE COURT, TRANSFER OF.—When the state is admitted into the Union, and the superior courts in their respective counties organized, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration pending therein shall, upon the expiration of the term of office of the probate judges, on the second Monday in January, eighteen hundred and ninety-one, pass into the jurisdiction and possession of the superior court of the same county created by this constitution, and the said court shall proceed to final judgment or decree, order, or other determination in the several matters and causes as the territorial probate court might have done if this constitution had not been adopted. And until the expiration of the term of office of the probate judges, such probate judges shall perform the duties now imposed upon them by the laws of the territory. The superior courts shall have appellate and revisory jurisdiction over the decisions of the probate courts as now provided by law until such latter courts expire by limitation.

Cited in 34 Wash. 308.

Under this section, the superior court would have jurisdiction to review a judgment of the old probate court for apparent error or fraud by bill of review, under

its general equity jurisdiction, whether expressly authorized by statute or not: Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

§ 11. DUTIES OF FIRST LEGISLATURE.—The legislature, at its first session, shall provide for the election of all officers whose election is not provided for elsewhere in this constitution, and fix the time for the commencement and duration of their term.

§ 12. ELECTION CONTESTS FOR SUPERIOR JUDGES, HOW DECIDED.—In case of a contest of election between candidates at the first general election under this constitution for judges of the superior courts, the evidence shall be taken in the manner prescribed by the territorial laws, and the testimony so taken shall be certified to the secretary of state, and said officer together with the governor and treasurer of state, shall review the evidence and determine who is entitled to the certificate of election.

§ 13. REPRESENTATION IN CONGRESS.—One representative in the congress of the United States shall be elected from the state at large at the first election provided for in this constitution, and thereafter at such times and places and in such manner as may be prescribed by law. When a new apportionment shall be made by congress, the legislature shall divide the state into congressional districts, in accordance with such apportionment. The vote cast for representative in congress at the first election shall be canvassed and the result determined in the manner provided for by the laws of the territory for the canvass of the vote for delegate in congress.

§ 14. DURATION OF TERM OF CERTAIN OFFICERS.—All district, county, and precinct officers who may be in office at the time of the adoption of this constitution, and the county clerk of each county elected at the first election, shall hold their respective offices until the second Monday of January, A. D. eighteen hundred and ninety-one, and until such time as their successors may be elected and qualified, in accordance with the provisions of this constitution; and the official bonds of all such officers shall continue in full force and effect as though this constitution had not been adopted, and such officers shall continue to receive the compensation now provided until the same be changed by law.

Cited in 5 Wash. 459, 460.

Under this section, the term of office of county officers is for two years, commencing on the second Monday of January next succeeding their election; and the act of February 4, 1886, entitled "an act to prescribe the tenure of office, etc.," has been abrogated by such constitutional pro-

visions: *McMurray v. Hollis*, 5 Wash. 458, 32 Pac. 293.

By virtue of this section the office of district attorney ceased to exist on the first Monday in January, 1891, and the office of county attorney being a new office created by the constitution, the former officer could not succeed or hold over in the latter: *Humason, In re*, 46 Fed. 392.

§ 15. ELECTION ON ADOPTION OF CONSTITUTION, HOW TO BE CONDUCTED.—The election held at the time of the adoption of this constitution shall be held and conducted in all respects according to the laws of the territory; and the votes cast at said election for all officers (where no other provisions are made in this constitution), and for the adoption of this constitution, and the several separate articles, and the location of the state capital, shall be canvassed and returned in the several counties in the manner provided by territorial laws, and shall be returned to the secretary of the territory in the manner provided by the Enabling Act.

§ 16. WHEN CONSTITUTION TO TAKE EFFECT.—The provisions of this constitution shall be in force from the day on which the president of the United States shall issue his proclamation declaring the state of Washington admitted into the Union, and the terms of all officers elected at the first election under the provisions of this constitution shall commence on the Monday next succeeding the issue of said proclamation, unless otherwise provided herein.

Cited in 2 Wash. 3.

The provisions of the constitution were in force from November 11, 1889, when the proclamation of the President of the United States was issued admitting the

state of Washington into the Union, consequently the terms of all officers thereunder began on Monday, Nov. 18, 1889: *Moore v. Perrott*, 2 Wash. 1, 25 Pac. 906.

§ 17. SEPARATE ARTICLES.—The following separate articles shall be submitted to the people for adoption or rejection at the election for the adoption of this constitution:—

Separate article No. 1. "All persons, male and female, of the age of twenty-one years or over, possessing the qualifications provided by this constitution, shall be entitled to vote at all elections."

Separate article No. 2. "It shall not be lawful for any individual, company, or corporation, within the limits of this state, to manufacture, or cause to be manufactured, or to sell, or offer for sale, or in any manner

dispose of any alcoholic, malt, or spirituous liquors, except for medicinal, sacramental, or scientific purposes.”

If a majority of the ballots cast at said election on said separate articles be in favor of the adoption of either of said separate articles, then such separate article so receiving a majority shall become a part of this constitution, and shall govern and control any provision of the constitution in conflict therewith.

§ 18. BALLOT.—The form of ballot to be used in voting for or against this constitution, or for or against the separate articles, or for the permanent location of the seat of government, shall be,—

1. For the constitution, —.
- Against the constitution, —.
2. For woman suffrage article, —.
- Against woman suffrage article, —.
3. For prohibition article, —.
- Against prohibition article, —.

[The result of the election was against both woman suffrage and prohibition.]

4. For the permanent location of the seat of government. [Name of place voted for.]

§ 19. APPROPRIATION.—The legislature is hereby authorized to appropriate from the state treasury sufficient money to pay any of the expenses of this convention not provided for by the Enabling Act of congress.

CONSTITUTION OF THE STATE OF WASHINGTON.

CERTIFICATE.

We, the undersigned, members of the convention to form a constitution for the state of Washington, which is to be submitted to the people for their adoption or rejection, do hereby declare this to be the constitution formed by us, and in testimony thereof, do hereunto set our hands, this the twenty-second day of August, Anno Domini one thousand eight hundred and eighty-nine.

JOHN P. HOYT, President.

J. J. BROWNE.

N. G. BLALOCK.

JOHN F. GOWEY.

FRANK M. DALLAM.

JAMES Z. MOORE.

E. H. SULLIVAN.

GEORGE TURNER.

AUSTIN MIRES.

M. M. GODMAN.

GWIN HICKS.

WM. F. PROSSER.

LOUIS SOHNS.

A. A. LINDSLEY.

J. J. WEISENBURGER.

P. C. SULLIVAN.

R. S. MORE.

THOMAS T. MINOR.

J. J. TRAVIS.

ARNOLD J. WEST.

CHARLES T. FAY.

CHARLES T. COEY.

ROBT F. STURDEVANT.

JOHN A. SHOUDY.

ALLEN WEIR.

W. B. GRAY.

TRUSTEN P. DYER.

GEO. H. JONES.

B. L. SHARPSTEIN.

H. M. LILLIS.

J. F. VAN NAME.

ALBERT SCHOOLEY.

H. C. WILSON.

T. M. REED.

S. H. MANLY.

RICHARD JEFFS.

FRANCIS HENRY.

GEORGE COMEGYS.

OLIVER H. JOY.

DAVID E. DURIE.

D. BUCHANAN.

JOHN R. KINNEAR.

GEORGE W. TIBBETTS.

H. W. FAIRWEATHER.

THOMAS C. GRIFFITTS.

C. H. WARNER.

J. P. T. McCROSKEY.

S. G. COSGROVE.

THOS. HAYTON.

SAM'L H. BERRY.

D. J. CROWLEY.

J. T. McDONALD.

JOHN M. REED.

EDWARD ELDRIDGE.

GEORGE H. STEVENSON.

SILVIUS A. DICKEY.

HENRY WINSOR.

THEODORE L. STILES.

JAMES A. BURK.

JOHN McREAVY.

R. O. DUNBAR.

MORGAN MORGANS.

JAS. POWER.

B. B. GLASCOCK.

O. A. BOWEN.

HARRISON CLOTHIER.

MATT. J. McELROY.

J. T. ESHELMAN.

ROBERT JAMIESON.

HIRAM E. ALLEN.

H. F. SUKSDORF.

Attest:

JNO. I. BOOGE, Chief Clerk.

[The signatures of seventy-one members are appended to the constitution. The four whose signatures are not attached are James Hungate of Whitman County, Lewis Neace of Walla Walla County, J. C. Kellogg of Island County, and W. L. Newton of King County.]

CONSTITUTIONAL AMENDMENTS.

AMENDMENT 1.

ART. 16, § 5. INVESTMENT OF SCHOOL FUND.—None of the permanent school fund of this state shall ever be loaned to private persons or corporations, but it may be invested in national, state, county, municipal, or school district bonds.

Adopted November, 1894.

AMENDMENT 2.

ART. 6, § 1. QUALIFICATIONS OF VOTERS.—All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward, or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided, that Indians not taxed shall never be allowed the elective franchise. And further provided, that this amendment shall not affect the right of franchise of any person who is now a qualified elector of this state. The legislature shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provisions of this section.

Approved November, 1896.

See Amendment 5, *infra*.

AMENDMENT 3.

ART. 7, § 2, was amended by adding the following proviso: "And provided further, that the legislature shall have power, by appropriate legislation, to exempt personal property to the amount of \$300 for each head of a family liable to assessment and taxation under the provisions of the laws of this state of which the individual is the actual bona fide owner."

Approved November, 1900.

AMENDMENT 4.

ART. I, § 11. RELIGIOUS FREEDOM.—Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or be disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No

CONSTITUTIONAL AMENDMENTS.

public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or support of any religious establishment. Provided, however, that this article shall not be so construed as to forbid the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

Approved November, 1904.

AMENDMENT 5.

ART. VI, was amended by striking from said article all of sections one (1) and two (2) and inserting in lieu thereof the following, to be known as section one (1):

§ 1. QUALIFICATION OF ELECTORS.—All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided that Indians not taxed shall never be allowed the elective franchise. And further provided, that this amendment shall not affect the rights of franchise of any person who is now a qualified elector of this state. The legislative authority shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provision of this section. There shall be no denial of the elective franchise at any election on account of sex. [L. 1909, p. 26, § 1.]

Approved November, 1910.

AMENDMENT 6.

ART. III, § 10. VACANCY IN.—In case of the removal, resignation, death or disability of the governor, the duties of the office shall devolve upon the lieutenant-governor; and in case of a vacancy in both the offices of governor and lieutenant-governor, the duties of the governor shall devolve upon the secretary of state. In addition to the line of succession to the office and duties of governor as hereinabove indicated, if the necessity shall arise, in order to fill the vacancy in the office of governor, the following state officers shall succeed to the duties of governor, and in the order named, viz.: Treasurer, auditor, attorney general, superintendent of public instruction and commissioner of public lands. In case of the death, disability, failure or refusal of the person regularly elected to the office of governor to qualify at the time provided by law, the duties of the office shall devolve upon the person regularly elected to and qualified for the

CONSTITUTIONAL AMENDMENTS.

office of lieutenant-governor who shall act as governor until the disability be removed, or a governor be elected; and in case of the death, disability, failure or refusal of both the governor and the lieutenant-governor elect to qualify, the duties of the governor shall devolve upon the secretary of state; and in addition to the line of succession to the office and duties of governor as hereinabove indicated, if there shall be the failure or refusal of any officer named above to qualify, and if the necessity shall arise by reason thereof, then in that event in order to fill the vacancy in the office of governor, the following state officers shall succeed to the duties of governor in the order named, viz.: Treasurer, auditor, attorney general, superintendent of public instruction and commissioner of public lands. Any person succeeding to the office of governor as in this section provided, shall perform the duties of such office until the disability be removed, or a governor be elected and qualified; and if a vacancy occur more than thirty days before the next general election occurring within two years after the commencement of the term, a person shall be elected at such election to fill the office of governor for the remainder of the unexpired term. [L. 1909, p. 642, § 1.]

Approved November, 1910.

AMENDMENT 7.

ART. II, § 1. LEGISLATIVE POWERS, WHERE VESTED.—The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section or part of any bill, act or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Ten per centum, but in no case more than fifty thousand, of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure as proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall transmit the same to the legislature as soon as it convenes and organizes. Such initiative measure shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measure shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it

CONSTITUTIONAL AMENDMENTS.

by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted. Six per centum, but in no case more than thirty thousand, of the legal voters shall be required to sign and make a valid referendum petition.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections or parts of any act, law or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular elections, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: Provided, that the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the state of

CONSTITUTIONAL AMENDMENTS.

Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. The whole number of electors who voted for governor at the regular gubernatorial election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the constitution referred to the people with arguments for and against the laws and amendments so referred, so that each voter of the state shall receive the publication at least fifty days before the election at which they are to be voted upon. [L. '11, p. 136, § 1.]

Approved November, 1912.

Cited in 88 Wash. 468, 479, 483, 499, 500, 501, 509; 107 Wash. 168.

Construction of provision in constitution, statute or municipal charter for initiative or referendum. *Ann. Cas.* 1916B, 819, 855, 860, 865; *Ann. Cas.* 1917E, 739, 985.

Legislation by initiative or referendum. 50 *L. R. A. (N. S.)* 196; *L. R. A.* 1917B, 16.

Ratification of amendments to federal constitution, or other acts of the state legislature under provisions of federal constitution as subject to state referendum. 5 *A. L. R.* 1417.

AMENDMENT 8.

ART. I was amended by adding the two following sections:

§ 33. RECALL OF ELECTIVE OFFICERS.—Every elective public officer in the state of Washington except judges of courts of record is subject to recall and discharge by the legal voters of the state, or of the political subdivision of the state, from which he was elected whenever a petition demanding his recall, reciting that such officer has committed some act or acts of malfeasance or misfeasance while in office, or has violated his oath of office, stating the matters complained of, signed by the percentages of the qualified electors thereof, hereinafter provided, the percentage required to be computed from the total number of votes cast for all candidates for his said office to which he was elected at the preceding election, is filed with the officer with whom a petition for nomination, or certificate for nomination, to such office must be filed under the laws of this state, and the same officer shall call a special election as provided by the general election laws of this state, and the result determined as therein provided.

Laws of 1913, page 454, intended to provide for the recall of elective officers, as required by this section, is not defective in carrying out the provisions of the amendment, in that while the amendment provides for a recall upon the filing of charges against an officer, the law fails to make any provision for determining the truth of the charges upon which

the officer is to be recalled; and this section does not give any right to a judicial hearing upon the charges: *Cudihoe v. Phelps*, 76 Wash. 314, 136 Pac. 367.

Laws of 1913, page 454 (3 Rem. & Bal. Code, § 4940-1 et seq.), providing the method of procedure for recalling elective officers, pursuant to the constitutional amendment adopted at the general elec-

CONSTITUTIONAL AMENDMENTS.

tion in November, 1912, is remedial and retroactive in effect, to the extent that it authorizes the recall of an officer elected in November, 1912, for subsequent official misconduct committed, however, prior to the taking effect of the law in June, 1913: *Cudihee v. Phelps*, 76 Wash. 314, 136 Pac. 367.

Sections 33 and 34 supersede the recall provisions of special charters adopted by cities of the first class; since such special charters are controlled by general laws: *State ex rel. Lynch v. Fairley*, 76 Wash. 332, 136 Pac. 374; *Tabor v. Walla Walla*, 77 Wash. 579, 137 Pac. 1040.

The words "for his said office to which he was elected at the preceding election," must be construed as meaning the number of votes cast at the next preceding election held for the election of such officer; the words "his office to which he was

elected," being considered as a general designation of the office held by him and his associates, the evident purpose of the provision being to determine the question of recall by the required percentage of present qualified voters: *Mills v. Nickeus*, 81 Wash. 409, 142 Pac. 1145.

The percentage of signatures will be computed upon the vote cast at the election next previous to the time of filing petitions with the city clerk, although formal charges against the officer may have been filed prior to such election: *Mills v. Nickeus*, 81 Wash. 409, 142 Pac. 1145.

The recall of public officers. 50 L. R. A. (N. S.) 227; L. R. A. 1916D, 1103.

Validity of statute providing for recall of public officers. 21 Ann. Cas. 808; Ann. Cas. 1916A, 1155.

§ 34. SAME.—The legislature shall pass the necessary laws to carry out the provisions of section thirty-three (33) of this article, and to facilitate its operation and effect without delay: Provided, that the authority hereby conferred upon the legislature shall not be construed to grant to the legislature any exclusive power of lawmaking nor in any way limit the initiative and referendum powers reserved by the people. The percentages required shall be state officers, other than judges, senators and representatives, city officers of cities of the first class, school district boards in cities of the first class; county officers of counties of the first, second and third classes, twenty-five per cent. Officers of all other political subdivisions, cities, towns, townships, precincts and school districts not herein mentioned, and state senators and representatives, thirty-five per cent. [L. '11, p. 504, § 1.]

Approved November, 1912.

Cited in 81 Wash. 411; 102 Wash. 456.

INDEX TO STATE CONSTITUTION.

By EUGENE G. KREIDER.

(References are to Articles and Sections.)

Absconding Debtors.			
imprisonment of, for debt.....i	17	Advice and Consent of Senate (Cont'd).	
Absence.		determined by ayes and nays and entered on journal.....xiii	1
of citizens does not affect residence, for purpose of voting.....vi	4	Affirmation.	
of governor, duties devolve on lieutenant-governor .....iii	10	mode of administering.....i	6
of judicial officer works forfeiture		Agriculture.	
		bureau of, to be established.....ii	34

AMENDMENT 9.

ART. I, § 16. EMINENT DOMAIN.—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: Provided, that the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

Approved November, 1920.

Pending in territorial, to be transferred to state courts.....xxvii	5, 8	separate amendments, to be separately voted on.....xxiii	1
transfer to superior court, when to take place.....xxvii	8	vote proposing amendment or revision, two-thirds of each house necessary .....xxiii	1, 2
(see Civil Actions; Criminal Actions)		yeas and nays to be taken and entered .....xxiii	1
Adjournment of Legislature.		Amendments to Constitution: Ratified.	
from day to day, for want of quorum .....ii	8	No. 1 to sec. 5 of art. 16, p. 131.	
restrictions on each house as to time and place.....ii	11	No. 2 to sec. 1 of art. 6, p. 131.	
Adoption of Children.		No. 3 to sec. 2 of art. 7, p. 131.	
special act forbidden.....ii	28(16)	No. 4 to sec. 11 of art. 1, p. 131.	
Advice and Consent of Senate.		No. 5 to secs. 1 and 2, art. 6, p. 132.	
appointment of officers for state institutions to be by and with .....xiii	1	No. 6 to sec. 10, article 3, p. 132.	
		No. 7 to sec. 1, article 7, p. 133.	
		No. 8 to article 8, p. 135.	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Amount in Controversy.		
appellate jurisdiction of supreme court, limited by.....iv	4	
original jurisdiction of superior court .....iv	6	
Annulment of Marriage.		
appellate jurisdiction of supreme court .....iv	4	
original jurisdiction of superior court .....iv	6	
(see Divorce)		
Appeal.		
appellate jurisdiction of superior court .....iv	6	
appellate jurisdiction of supreme court .....iv	4	
probate courts, appeal from to superior court .....xxvii	10	
rights of accused in criminal cases .....i	22	
Appellate Jurisdiction.		
of superior court....iv, § 6; xxvii	10	
of supreme court .....iv	4	
Appointment.		
of clerk of supreme court.....iv	22	
of reporter of supreme court....iv	18	
of regents of state institutions..xiii	1	
to fill vacancy in state office, by governor .....iii	13	
to office under United States, vacates seat in legislature.....ii	14	
Apportionment.		
of legislators, when and how regulated .....ii	3	
of senators and representatives among counties of state....xxii	1, 2	
of school fund, by special act, prohibited .....ii	28(7)	
Appropriation of Private Property.		
for public or private use, prior compensation required.....i	16	
for right of way of corporations .....i	16	
(see Eminent Domain)		
Appropriations.		
capitol buildings, when may be made for .....xiv	3	
expenses of constitutional convention .....xxvii	19	
money from state treasury can be paid out by.....viii	4	
revert, unless paid out within two years .....viii	4	
sum and object to be specified .....viii	4	
when act providing for, to take effect .....ii	31	
Area Reserved.		
between harbor lines and line of high tide .....xv	1	
lease of by state for wharves..xv	2	
sale of, restrictions on.....xv	1	
streets over, authorized.....xv	3	
(see Harbors; Navigable Waters; Wharves)		
Arms.		
right of people to bear arms guaranteed .....i	24	
private armed bodies prohibited .....i	24	
safekeeping of public arms to be provided .....x	4	
scruples against bearing arms, excuses from militia duty in time of peace .....x	6	
Army.		
standing, not to be kept in time of peace .....i	31	
(see Militia)		
Arrest.		
debtors privileged from, except..i	17	
electors privileged from at elections, except .....vi	5	
legislators, when privileged from .....ii	16	
militia, when privileged from...x	5	
Artificial Light.		
power of cities to contract for .....viii	6	
Assemblages of People.		
right of peaceable assembly not to be abridged .....i	4	
Assessment.		
imposition by special act prohibited .....ii	28(5)	
jurisdiction of superior court, original .....iv	6	
jurisdiction of supreme court, appellate .....iv	4	
property of corporations, how assessed .....vii	3	
special, for local improvements, authorized .....vii	9	
uniform and equal rate of, to be established .....vii	2	
(see Taxation)		
Assignment.		
of superior judges and judicial business .....iv	5	
Association.		
combination in restraint of trade prohibited .....xii	22	
included in term "corporations" .....xii	5	
issuance of money by, prohibited .....xii	11	
organization authorized, for construction of telegraph and telephone lines .....xii	19	
Assumption.		
of territorial debts by state .....xxvi	3	
Attainder.		
bills of, prohibited .....i	23	
Attestation.		
of commissions, by secretary of state .....iii	15	
Attorney General.		
duties .....iii	3	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Attorney General (Cont'd).

election of	iii	1
impeachment, liability to.....	v	2
records of office, to be kept at seat of government.....	iii	24
removal from office for incompe- tency or corruption.....	iv	9
rights of accused.....	iv	9
salary	iii	21
succession (amend. 6) [p. 132]..	iii	10
term of office.....	iii	3

Auditor.

duties	iii	20
election of	iii	1
impeachment, liability to.....	v	2
office may be abolished by legis- lature	iii	25
residence at seat of govern- ment required	iii	24
succession (amend. 6) [p. 132]..	iii	10
salary	iii	20
term of office.....	iii	3

Ayes and Noes.

when to be taken and entered on journal—		
on amendments to constitution proposed	xxiii	1
on demand of one-sixth of members of either house	ii	21
on emergency clauses.....	ii	31
on final passage of bills.....	ii	22
on removal of public officer by legislature	iv	9
on senate's confirmation or re- jection of governor's ap- pointees	xiii	1
on suspension of the prohibi- tion against introduction of bills	ii	36
(see Yeas and Nays)		

Bail.

allowable on sufficient sureties...i	20
except in capital offenses, where guilt evident.....	i
excessive, not to be required....i	14

Ballot.

elections to be by.....	v	6
form of, in voting for state con- stitution and on separate arti- cles	xxvii	18
form of, in voting for location of capital	xxvii	18
form of, initiated measures (amend. 7) [p. 133].....	ii	(a)1
secrecy of, provision to be made for	vi	6

Banking Corporations.

double liability of stockholders.xii	11
officers of, when liable for de- posits	xii

Banks.

liability of stockholders.....	xii	11
liability of officers for deposits.xii		12

Beds and Shores of Navigable Waters.

disclaimer of title by state where patented	xvii	2
exception in cases of fraud	xvii	2
ownership of, asserted by state	xvii	1

Biennial.

sessions of legislature held bi- ennially	ii	12
except may be specially con- vened	ii	12
times of meeting may be changed by legislature	ii	12

Bill.

amendment of, may be made by either house after passage by other	ii	20
either house may originate bills..ii		20
final passage, requisites of.....	ii	22
initiated and referred measures (amend. 7) [p. 133].....	ii	1
introduction of, limitation on time of	ii	36
laws to be enacted by.....	ii	18
passage by one house, subject to amendment in other.....	ii	20
passage by either house, requisite proceedings	ii	22
passage over governor's veto...iii		12
presentation to governor for ap- proval	iii	12
governor may sign or veto...iii		12
passage over veto.....	iii	12
when becomes law without ap- proval	iii	12
referendum of (amend. 7) [p. 133]	ii	1
signature by presiding officers of both houses necessary.....	ii	32
scope of, not to be changed by amendment	ii	38
subject restricted to one object..ii		19
subject to be expressed in title..ii		19
time of taking effect.....	ii	31
title of, to express subject.....	ii	19
veto of, power of governor.....	iii	12
initiated or referred (amend. 7) [p. 133].....	ii	1
separate items or sections sub- ject to	iii	12
vote on, by interested legislators prohibited	ii	30
vote on, how taken.....	ii	22
(see Acts; Laws)		

Bill of Attainder.

enactment of, prohibited.....	i	23
-------------------------------	---	----

Bonds.

corporations can issue only for money, labor or property re- ceived	xii	6
county and municipal corporations not to own bonds of private corporations	viii	7

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Bonds (Cont'd).			
executed to territory to pass to state	xxvii	4	
investment of school funds in (amend. 1) [p. 131].....	xvi	5	
Boundaries.			
of county, change by division or enlargement	xi	3	
change by special legislation..	ii 28(18)		
of existing counties recognized..	xi	1	
of state, defined.....	xxiv	1	
Bribery.			
criminating evidence compul- sory	ii	30	
disqualifies for holding office..	ii	30	
legislature to define and provide punishment for.....	ii	30	
Bureau of Statistics, Agriculture and Immigration.			
legislature to provide for.....	ii	34	
Bureau of Vital Statistics.			
to be established by legislature..	xx	1	
Canal Companies.			
common carriers, subject to legis- lative control	xii	13	
discrimination in charges pro- hibited	xii	15	
Capital of State.			
(see Seat of Government)			
Capital Offenses.			
bailable, when	i	20	
(see Crime)			
Capitol Buildings.			
appropriation for, only after per- manent location	xiv	3	
exception as to repairs.....	xiv	3	
not affected by change in govern- ment	xxvii	1	
Causes.			
transfer of, from territorial to state courts	xxvii	8, 10	
(see Actions)			
Census.			
apportionments of legislative mem- bers based on state and fed- eral census	ii	3	
exclusion of certain persons....	ii	3	
enumeration to be made in de- cennial periods	ii	3	
Certiorari.			
jurisdiction of superior court....	iv	6	
jurisdiction of supreme court....	iv	4	
Cession of Jurisdiction.			
exclusive legislation over certain lands given to United States	xxv	1	
retention by state of jurisdic- tion for service of pro- cess	xxv	1	
Change of Name.			
special legislation prohibited....	ii 28(1)		
Changing County Lines.			
special legislation prohibited....	ii 28(18)		
except on creation of new county	ii 28(18)		
Changing County Seats.			
special legislation prohibited....	ii 28(18)		
Chaplain.			
for state penitentiary and re- formatories (amend. 4) [p. 131]	i	11	
Charter.			
Corporate.			
creation by special legislation forbidden	xii	1	
extension of by legislature pro- hibited	xii	3	
forfeiture of, not to be re- mitted	xii	3	
void for want of organization, when	xii	2	
Municipal.			
creation or amendment by spe- cial law, prohibited.....	ii 28(8)		
grant of, to be under general laws	xi	10	
power of certain cities to frame	xi	10	
elections for, how conducted..	xi	10	
how amended	xi	10	
publication, prior to submission	xi	10	
subject to general laws.....	xi	10	
submission of alternate proposi- tions	xi	10	
Chief Justice of Supreme Court.			
method of determining.....	iv	3	
presides on trial of impeachments, when	v	1	
Children.			
adoption of, by special act, for- bidden	ii 28(16)		
duty of state to educate all....	ix	1	
(see Minors)			
Citizens.			
all entitled to equal privileges and immunities	i	12	
City.			
Charter of.			
amendment by special law pro- hibited	ii 28(8)		
freeholder's charter, what cities may frame	xi	10	
alternative propositions, sub- mission of.....	xi	10	
amendments of, how effected	xi	10	
election of freeholders.....	xi	10	
publication of election notices and of proposed charter..	xi	10	
submission of the charter pro- posed	xi	10	
vote on, majority necessary to ratify.....	xi	10	
constables in cities of over 5,000 salary of.....	xi	8	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

City (Cont'd).			
corporate stock or bonds, not to be owned by .....viii	7		
creation by special act prohibited .....ii	28(8)		
credit of, not to be loaned....viii	7		
incorporation of, must be under general laws .....xi	10		
indebtedness, limitation on....viii	6		
increase over limitation, vote necessary .....viii	6		
basis of limitation, last assessment for taxes.....viii	6		
debt limited to 5 per cent of valuation .....viii	6		
restricted to purely public purposes .....viii	6		
increase for water, light and sewer purposes .....viii	6		
limitation based on 10 per cent of valuation.....viii	6		
justice of peace in, legislature to prescribe powers, duties, jurisdiction and number.....iv	10		
may act as police justice.....iv	10		
salary of, in cities of over 5,000 .....iv	10		
local improvements may be made by special assessment.....vii	9		
special taxation of property benefited .....vii	9		
Officers of.			
must deposit public moneys with treasurer .....xi	15		
recall of, percentages (amend. 8) [p. 135] .....i	34		
salary not to be changed during term .....xi	8		
term of office not to be extended .....xi	8		
use of public money by, a felony .....xi	14		
police and sanitary regulations to be enforced .....xi	11		
police justice, justice of peace may act as.....iv	10		
reincorporation under general laws permitted to cities under special charter .....xi	10		
Taxation.			
authorized to assess and collect general .....vii	9		
local taxes not to be imposed by legislature .....xi	12		
power to assess and collect rests in city.....xi	12		
uniformity in respect to persons and property required .....vii	9		
(see Municipal Corporations; Municipal Courts; Municipal Fine)			
Civil Actions.			
limitation of, by special act prohibited .....ii	28(17)		
number of jurors in.....i	21		
Civil Actions (Cont'd).			
number of jurors necessary for verdict .....i	21		
parties may waive jury.....i	21		
(see Actions)			
Civil Power.			
elections to be free from interference by .....i	19		
military subordinate to.....i	18		
Classification.			
of cities and towns in proportion to population .....xi	10		
of counties .....xi	5		
of judges of supreme court by lot .....iv	3		
Clerk.			
of supreme court, judges to appoint .....iv	22		
office may be made elective...iv	22		
salary and term of office.....iv	22		
of superior court, county clerk is ex officio .....iv	26		
Collection of Taxes.			
time not to be extended by special acts .....ii	28(5)		
(see Taxation)			
Color.			
no distinction on account of, in education .....ix	1		
Combinations.			
by common carriers to share earnings, prohibited .....xii	14		
to affect prices, production or transportation of commodities, prohibited .....xii	22		
(see Monopolies)			
Commander-in-chief.			
governor to be, when militia in state service .....iii	8		
(see Militia)			
Comment on Facts.			
judge not to make, in charging jury .....iv	16		
Commission.			
to establish harbor lines.....xv	1		
to regulate railroad and transportation lines .....xii	18		
Commissions.			
attested by secretary of state...iii	15		
signed by governor.....iii	15		
Commissioner of Public Lands.			
duties of, to be prescribed by legislature .....iii	23		
election .....iii	1		
office may be abolished by legislature .....iii	25		
records of, to be kept at state capitol .....iii	24		
salary to be regulated by legislature .....iii	23		
term of office .....iii	3		
Common Carriers.			
canal companies are.....xii	13		
combination between prohibited .....xii	14		

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Common Carriers (Cont'd).		
discrimination in charges or service prohibited	xii	15
maximum rate of charges, legislature may regulate.....	xii	18
railroad companies are.....	xii	13
regulation of, by commission, authorized	xii	18
subject to legislative control...	xii	13
telegraph and telephone companies are	xii	19
transportation companies are...	xii	13
(see Canal, Railroad, Transportation, Telegraph and Telephone Companies)		
Common School Fund.		
enlargement of, legislature may provide	ix	3
income from, to be applied to common schools	ix	2
interest to be expended for current expenses	ix	3
invested, in what securities (amend. 1) [p. 131].....	xvi	5
loans from, prohibited (amend. 1)	xvi	5
losses occasioned by default, fraud, etc., to become permanent debt against state	ix	5
principal of, to remain irreducible	ix	3
sources of, from what derived..	ix	3
(see School Fund)		
Common Schools.		
general and uniform system to be established	ix	2
special legislation affecting, prohibited	ii	28(15)
superintendent of public instruction to supervise.....	iii	22
(see Education; Public Schools)		
Commutation of Sentence.		
report by governor to legislature	iii	11
with reasons for granting....	iii	11
Commutation of Taxes.		
prohibition against state granting	xi	9
Commutation Tickets.		
carrier may grant, at special rates	xii	15
Compact with United States.		
irrevocable without mutual consent	xxvi	1-4
Compensation.		
appropriation of private property	i	16
for right of way for corporations	i	16
jury to ascertain compensation due	i	16
change of, during term of public officer, prohibited	xi, § 8; ii, § 25; iii	25
constables in cities of over 5,000	xi	8
Compensation (Cont'd).		
county, township, precinct and district officers	xi	5, 8
extra, not to be granted public officers	ii	25
judges of supreme and superior courts	iv	13, 14
justice of peace in cities of over 5,000	iv	10
member of legislature.....	ii	23
Conditions.		
on foreign corporations doing business	xii	7
Confession in Open Court.		
effect in treason.....	i	27
Congress.		
exclusive power of legislature over lands of United States in state	xxv	1
subject to state's right to serve process	xxv	1
Indian lands under jurisdiction of	xxvi	2
legislator elected to, vacates seat	ii	14
member of, ineligible to legislature	ii	14
representatives in, election of	xxvii	13
Congressional Districts.		
division of state into.....	xxvii	13
Conscience, Freedom of.		
guaranteed to every individual....	i	11
Consent of Governed.		
source of governmental powers..	i	1
Consolidation.		
of competing lines of railroad prohibited	xii	16
Constables.		
salaries, in cities of over 5,000, legislature to fix.....	xi	8
Constitution.		
amendment, how effected....	xxiii	1
election for voting on, how conducted	xxvii	15
form or ballot.....	xxvii	18
existing rights not affected..	xxvii	1
in effect, when.....	xxvii	16
mandatory	i	29
revision	xxiii	2
submission to people.....	xxiii	3
United States, supreme law of land	i	2
(see amendments to)		
Contempt.		
each house may punish for....	ii	9
Contested Elections.		
(see Elections)		
Contracts.		
affecting price, production or transportation, prohibited....	xii	22
combination between common carriers prohibited	xii	14
impairment of obligation prohibited	i	23

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Convention.			Corporations (Cont'd).	
to revise or amend constitution	2		loan of school funds to, prohibited	5
.....xiii			.....xvi	11
Conveyance.			money, issuance prohibited.....xii	22
of lands to aliens invalid.....ii	33		monopolies and trusts forbidden	9
Conviction.			.....xii	4
no corruption of blood nor forfeit-	15		state not to subscribe to nor own	7
ure of estate .....i			stock .....xii	6 ✓
on impeachment, two-thirds sena-	1		not to surrender power to tax	6
tors must concur.....v			.....vii	4
Convict Labor.			stock not to be owned by coun-	7
contracts for, prohibited.....ii	29		ties or cities.....vii	6 ✓
working for benefit of state au-	29		increase, consent and notice	6
thorized .....ii			necessary .....xii	6
Copartnerships.			restrictions on issuance.....xii	4
combination to affect price, pro-	22		stockholders, ordinary liability..xii	11
duction or transportation pro-			liability in banking insurance	4
hibited .....xii			and joint stock companies.xii	4
Coroners.			may be joined as parties defend-	5
may or may not be salaried.....xi	8		ant .....xii	3
Corporate Powers.			sue and be sued, right and lia-	19
not to be granted by special act	28(6)		bility .....xii	5
.....ii			taxation of property, method of	4
Corporate Property.			.....vii	5
appropriation by eminent domain	10		telephone and telegraph lines, or-	3
authorized .....xii			ganization to construct.....xii	19
taxation of, power not to be sur-	4		term includes associations and	5
rendered .....vii			joint stock companies.....xii	
Corporations.			(see Franchise)	
alien, when .....ii	33		Corruption in Office.	
appropriation of right of way....i	16		judges, attorney general and prose-	
compensation to be paid.....i	16		cuting attorneys removable by	
bonds, restriction on issuance..xii	6		legislature .....iv	9
not to be owned by counties or	7		Corruption of Blood.	
cities .....viii			conviction not to work.....i	15
business, may be regulated by law	1		Corrupt Solicitation.	
.....xii	3		compulsory testimony in cases of	
charter not to be extended.....xii	2		.....ii	30
invalid, if unorganized when con-	22		disqualification for holding office	30
stitution adopted .....xii			.....ii	30
combinations affecting price, pro-	28(6)		punishment to be provided by	30
duction, or transportation pro-			legislature .....ii	
hibited .....xii			County.	
creation by special act pro-	28(10)		allotment of representatives among	
hibited .....ii			.....xxii	2
debts, relief by special act pro-	10		of senators .....xxii	1
hibited .....ii	12		assignment of superior court	5
eminent domain, property subject	7		judges .....iv	5
to .....xii	22		classification .....xi	7
equal privileges and immunities..i	3		corporate bonds or stocks not to	2
foreign, not to be favored.....xii	1 ✓		be owned .....viii	28(18)
forfeiture of franchise for unlaw-	22		county seat removal.....xi	7
ful combinations .....xii	8		not to be changed by special act	7
not to be remitted.....xii	22		.....ii	3
formation, by general and not by	6		credit not to be loaned.....viii	6
special laws.....xii	6		debts, apportionment on division	6
franchise may be forfeited.....xii	13		or enlargement.....xi	6
alienation or lease not to relieve	3		limit of .....viii	13
liability .....xii	3		power to contract.....viii	3
laws relating to may be amended	3		private property not to be taken	3
or repealed .....xii	12		in satisfaction of.....xi	3
legislative control .....xii	8		division, how effected.....xi	3
liability for receipt of bank de-	1		majority of voters necessary to	3
posits after insolvency.....xii	8		reduce territory .....xi	1
not relieved by alienation or			existing to be legal subdivision of	
lease of franchise.....xii			state .....xi	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

County (Cont'd).		County Officers.	
government, legislature to provide system	xi 4	accountability for fees.....	xi 5
indebtedness, limit of	viii 6	bonds unaffected by change in government	xxvii 14
additional, assent of voters necessary	viii 6	compensation to be regulated....	xi 5
assessment as basis of, how ascertained	viii 6	duties and term to be prescribed	xi 5
restriction as to purpose....	viii 6	election, legislature to provide for	xi 5
lines, not to be changed by special act	ii 28(18)	biennial	vi 8
location of county seat not to be changed by special act.....	ii 28(18)	time of	vi 8
moneys to be deposited with treasurer	xi 15	eligibility restricted to two terms in succession	xi 7
use of, by official, a felony..	xi 14	fees, accountability for	xi 5
new county, formation by special act allowed.....	ii 28(18)	use of, a felony.....	xi 14
restrictions on	xi 3	public money, use of, felonious..	xi 14
officers, election, duties, terms, compensation	xi 5	recall of, percentages (amend. 8)..	i 34
recall of, percentages (amend. 8) [p. 135].....	i 34	salaries, legislature to fix.....	xi 8
police and sanitary regulations, power to enforce.....	xi 11	who may or may not be salaried	xi 8
school funds may be invested in bonds of	xvi 5	term of office not to be extended	xi 8
seal	xxvii 9	territorial, how long to hold office	xxvii 14
stock or bonds of corporation not to be owned.....	viii 7	vacancies, how filled.....	xi 6
taxation, power to assess and collect	xi 12	County Seat.	
taxes, liability for proportionate share of state.....	xi 9	change or location by special act prohibited	ii 28(18)
local, legislature not to impose	xi 12	removal, proceedings for.....	xi 2
township organization in.....	xi 4	proposal for, only once in four years	xi 2
County Attorney.		three-fifths vote necessary....	xi 2
(see Prosecuting Attorney)		County Treasurer.	
County Clerk.		election, compensation, duties and accountability, legislature to prescribe	xi 5
accountability	xi 5	Court Commissioners.	
clerk of superior court, ex officio	iv 26	appointment and powers.....	iv 23
duties, term and salary, legislature to provide.....	xi 5	Courts.	
election to be provided for.....	xi 5	inferior, legislature to provide for	iv 1
first under constitution, time of	xxvii 7	jurisdiction to be prescribed..	iv 12
County Commissioners.		judicial power vested in specified courts	iv 1
election and compensation, legislature to provide.....	xi 5	officers to be salaried, exceptions	iv 13
vacancies in county, township, precinct and road district offices filled by	xi 6	of record, what are.....	iv 11
County Indebtedness.		judges not to practice law....	iv 19
apportionment, when county divided or enlarged.....	xi 3	(see District Courts; Inferior Courts; Justice of Peace; Municipal Courts; Probate Courts; Superior Court; Supreme Court)	
rights of creditors not affected	xi 3	Credit.	
increase permitted for water, light and sewers	viii 6	of county or municipal corporations not to be given or loaned	viii 7
limit of	viii 6	of state not to be given or loaned	viii, § 5; xii 9
private property not to be taken in satisfaction of	xi 13	Crimes.	
County Lines.		accused not required to criminate self	i 9
change by special act prohibited	ii 28(18)	rights of	i 22
		conviction shall not work corruption of blood.....	i 15
		cruel punishment prohibited.....	i 14

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Crimes (Cont'd).			
ex post facto laws not to be passed	i	23	
persons charged with to be bailable	i	20	
prosecution may be by information	i	25	
in name of state.....	iv	27	
Criminal Actions.			
evidence, accused not required to criminate self	i	9	
jurisdiction, appellate of supreme court	iv	4	
original of superior court....	iv	6	
limitation by special act prohibited	ii	28(17)	
process, style of.....	iv	27	
prosecution by information allowed	i	25	
in name of state.....	iv	27	
on change from territorial to state government	xxvii	5	
rights of accused.....	i	22	
Cruel Punishment.			
not to be inflicted.....	i	14	
Damage.			
to private property for public or private use to be compensated.i		16	
Dangerous Employments.			
protection to persons engaged in	ii	35	
Debate.			
members of legislature not liable for words spoken	ii	17	
Debts.			
corporate, fictitious increase void	xii	6	
liability of stockholders.....	xii	4, 11	
due territory to inure to state	xxvii	3	
imprisonment for, not allowed....	i	17	
absconding debtors excepted.....	i	17	
municipal corporations, limitation on	viii	6	
extinguishment by special act forbidden	ii	28(10)	
state, power to contract.....	viii	1-3	
in case of invasion, insurrection, etc.....	viii	2	
limitation on power.....	viii	1, 3	
release by special act forbidden	ii	28(10)	
territorial, assumed by state....	xxvi	3	
(see City; County Indebtedness; Indebtedness of Corporations; State Indebtedness)			
Decisions.			
superior court judge, within what time	iv	20	
supreme court, in writing and grounds stated	iv	2	
publication, free to anyone..	iv	21	
reporter for, appointment....	iv	18	
Declaration of Rights.			
statement in constitution.....	i	1-32	
Deeds.			
cannot be validated by special law	ii	28(9)	
Defects and Omissions in Law.			
report to governor by supreme judges	iv	25	
to supreme by superior judges	iv	25	
Defense.			
rights of accused in criminal actions	i	22	
of officer removed on charges	iv	9	
Deficits in Revenue.			
state may contract debts to meet	viii	1	
tax may be levied to pay.....	vii	8	
Delinquency in Office.			
(see Corruption in Office)			
Deposits.			
bank officers liable for, when..	xii	12	
public moneys with treasurer required	xi	15	
Disability.			
property of person under, cannot be affected by special laws....	ii	28(11)	
Disapproval of Bills.			
by governor	iii	12	
veto denied when (amend. 7) [p. 133]	ii	1	
Discipline.			
of state militia, legislature to prescribe	x	2	
Disclaimer.			
state's title to patented lands	xvii	2	
unappropriated public and Indian lands	xxvi	2	
Discrimination.			
common carrier prohibited..	xii	15, 18, 19	
railroad prohibited from favoring one express company	xii	21	
favoring one telegraph company prohibited	xii	19	
telegraph and telephone companies in handling messages prohibited	xii	19	
Disorderly Behavior.			
each house may punish for.....	ii	9	
Disqualification.			
on conviction for bribery.....	ii	30	
on impeachment	v	2	
District Court.			
duty of clerk in transmitting papers to county clerk.....	xxvii	8	
exists until superseded by superior court	xxvii	8	
records in actions to be transferred to superior court....	xxvii	8	
District Officers.			
duties, term, compensation, legislature to prescribe	xi	5	
election, legislature to provide for	xi	5	
biennial	vi	8	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

District Officers (Cont'd).	
time of .....vi	8
recall of, percentages (amend. 8)	
.....i	34
territorial, to hold office until	
when .....xxvii	14
official bonds unaffected by	
change in government...xxvii	14
Divorce.	
jurisdiction of superior court...iv	6
legislature not to grant.....ii	24
(see Annulment of Marriage)	
Docks.	
legislature may authorize lease of	
harbor areas .....xv	2
limit of term of lease.....xv	2
(see Area Reserved; Harbors)	
Drugs and Medicines.	
legislature to regulate sale.....xx	2
Due Process of Law.	
life, liberty, property not to be	
taken without .....i	3
Earnings.	
combinations by common carriers	
to share, prohibited .....xii	14
Education.	
provision for, to be made by state	
.....ix	1
no distinction on account of race,	
color or sex .....ix	1
sale of lands for purposes of....ix	3
(see Common Schools; Public	
Schools)	
Elections.	
ballot required .....vi	6
form, initiated measures (amend.	
7) .....ii	1
biennial .....vi	8
constitution, amendment of, sub-	
mission to vote.....xxiii	1
calling convention to revise	
.....xxiii	2
revision, submission of instru-	
ment .....xxiii	3
vote on adoption of first, under	
territorial laws .....xxvii	15
contest for office of superior	
judge (first election).....xxvii	12
criminals, insane persons, idiots	
excluded from elective franchise	
.....vi	3
electors, qualifications .....vi	1
first election according to terri-	
torial laws .....xxvii	15
of representative to Congress	
.....xxvii	13
free, equal and undisturbed.....i	19
freeholders to frame city charter	
.....xi	10
initiative and referendum (amend.	
7) [p. 133] .....ii	1
judges of supreme court.....iv	3
of superior court .....iv	5
legislative, to be viva voce.....ii	27
legislature, each house judge of its	
own .....ii	8

Elections (Cont'd).	
biennial .....ii	5
representatives .....ii	5
senators .....ii	6
military interference prohibited..i	19
officers not regulated by constitu-	
tion, legislature to provide for	
.....xxvii	11
under constitution, time of first	
.....xxvii	7
privilege of voters from arrest	
.....vi	5
recall of officers (amend. 8)	
[p. 135] .....i	33
referendum (amend. 7) [p. 133]..ii	1
registration law to be enacted..vi	7
school, women may be accorded	
franchise .....vi	2
seat of government, determination	
.....xiv	1
secrecy of ballot required.....vi	6
state officers, time and place...iii	1
certificates of election to be	
given .....iii	4
contests, legislature to decide	
.....iii	4
equal vote, legislature to choose	
.....iii	4
returns to secretary of state...iii	4
declaration of result.....iii	4
time of, for state, county and dis-	
trict officers .....vi	8
(see Vote; Voter)	
Elective Franchise.	
denial on account of sex prohibited	
in school elections .....vi	2
idiots, insane persons and con-	
victed felon excluded from...vi	3
(see Elections; Electors; Voter)	
Electors.	
exempt from military duty, when	
.....vi	5
Indians not taxed disqualified	
(amend. 5) [p. 132].....vi	1
initiative, percentages required	
(amend. 7) [p. 133].....ii	1
privilege from arrest .....vi	5
qualifications (amend. 5) [p. 132]	
.....vi	1
residence not lost in certain cases	
.....vi	4
secrecy in voting, legislature to se-	
cure .....vi	6
voters required to read and speak	
English (amend. 5) [p. 132].vi	1
(see Elective Franchise; Voter)	
Eligibility.	
judges of supreme and superior	
courts, qualifications .....iv	17
ineligible to other than judicial	
offices .....iv	15
members of legislature, qualifica-	
tions .....ii	7
ineligible to offices created by	
them .....ii	13
state officers, qualifications.....iii	25
treasurer, ineligible for succeed-	
ing term .....iii	25

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Emergency Clause.					
reduces time of taking effect of act	ii	31	Execution.	private property not to be taken for public debt.....	xi 13
two-thirds vote of each house necessary	ii	31		rolling stock of railroad liable..	xii 17
Eminent Domain.			Executive Department.	consists of certain officers.....	iii 1
compensation to be first made in taking or damaging property for public use.....	i	16		election of officers of.....	iii 1
for rights of way taken by corporations	i	16		records of to be kept by secretary of state	iii 17
corporate property and franchises subject to	xii	10	Executive Power.	supreme, vested in governor....	iii 2
rights of way to be compensated for	i	16		(see Governor)	
telegraph and telephone companies granted right	xii	19	Exemptions.	homestead, from forced sale...	xix 1
Emoluments, Privileges and Powers.				military duty, to whom.....	x 6
hereditary, prohibited	i	28		taxation, what property free from	vii 2
Employments Dangerous to Life.				Indian lands exempt, when,	xxvi 2
legislature to protect persons in..	ii	35		lands and property of United States	xxvi 2
Enacting Clause.				personal property of heads of families (amend. 3) [p. 131]	vii 2
of statutes, terms of.....	ii	18	Existing Rights.	change in government not to affect	xxvii 1
referred acts (amend. 1) [p. 133]	ii	1	Expenses.	constitutional convention to be provided for	xxvii 19
Enumeration of Inhabitants.				state may contract debts to meet	viii 1
basis of apportionment for legislature	ii	3	Ex post Facto Law.	passage prohibited	i 23
time of taking.....	ii	3	Express Companies.	railroads to grant equal terms to all	xii 21
who excepted from.....	ii	3	Expulsion of Members.	powers of each house.....	ii 9
Enumeration of Rights.				restrictions on	ii 9
not to deny others reserved.....	i	30	Extension of Time for Collection of Taxes.	special legislation prohibited....	ii 28(5)
Equal Suffrage	vi	1	Extinguishment of Debt.	special legislation prohibited....	ii 28(10)
Equity.			Extra Compensation.	prohibited to public officers, etc.	ii 25
appellate jurisdiction of supreme court	iv	4	Extra Session.	legislature, when to be convened	iii 7
original jurisdiction of superior court	iv	6	Factories.	employees to be protected.....	ii 35
Evidence.			Fares and Freights.	(see Railroads)	
contested election for superior judge (first election), manner of taking	xxvii	12	Federal Officers.	not eligible to legislature, except	ii 14
criminating, person not compelled to give against himself.....	i	9	Fees.	accountability of county and local officers	xi 5
except in bribery cases.....	ii	30		judicial officers prohibited from receiving	iv 13
treason, what necessary for conviction	i	27		justices of the peace not to receive	iv 10
(see Testimony)					
Excessive Bail and Fines.					
not to be imposed.....	i	14			
Exclusive Legislation.					
Congress has over certain lands of United States	xxv	1			
over unallotted Indian lands	xxvi	2			
subject to state's right to serve process	xxv	1			
Exclusive Privileges.					
invalid, when	xii	2			
prohibited	i	12			
Excursion and Commutation Tickets.					
carrier may grant special rates.	xii	15			

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Felony.			Freedom of Speech and Press.	
original jurisdiction of superior court .....iv	6		guaranteed to every person (amend. 4) [p. 131].....i	5
use of public money by officer .....xi	14		legislators not liable for words in debate .....ii	17
Ferries.			Free Passes.	
authorization by special legislation forbidden .....ii	28(3)		grant of, to state officers prohibited .....xii	20
Fictitious Issue.			public officers forbidden to accept .....ii	39
of stock or indebtedness void..xii	6		Freight Rates.	
Fines.			regulation by legislature authorized .....xii	18
accrued to territory inure to state .....xxvii	3		Fundamental Principles.	
excessive, not to be imposed.....i	14		frequent recurrence to, essential..i	32
governor has power to remit...iii	2		Funds.	
to report remissions to legislature .....iii	2		investment of permanent school (amend. 1) [p. 131].....xvi	5
remission by special act prohibited .....ii	28(14)		(see Common School Fund; School Fund)	
Fiscal Statement.			Government.	
annual publication required....vii	7		change of, completion of pending actions .....xxvii	5, 8
Forcible Entry and Detainer.			continuance of existing laws and rights .....xxvii	1, 2
appellate jurisdiction of supreme court .....iv	4		perpetuity of, what essential....i	32
original jurisdiction of superior court .....iv	6		purposes of .....i	1
Foreign Corporations.			source of powers .....i	1
not to be favored.....xii	7		Governor.	
Forfeiture.			appointment of regents, etc., of state institutions .....xiii	1
accrued to territory inures to state .....xxvii	3		approval of laws.....iii	12
corporate charter or franchise, no remission .....xii	3		assignment of superior judge to other county .....iv	5, 7
estate, conviction not to work....i	15		commander-in-chief of state militia .....iii	8
franchise, for combination in restraint of trade .....xii	22		commissions issued by state, signed by .....iii	15
governor has power to remit...iii	2		election of .....iii	1
must report to legislature...iii	2		execution of laws.....iii	5
judicial office, absence causes...iv	8		extension of leave of absence of judicial officer .....iv	8
remission by special act prohibited .....ii	28(14)		extra session of legislature may convene .....iii	7
Forts, Dockyards, etc.			impeachment .....v	2
Congress to have exclusive control .....xxv	1		information in writing may be required from state officers...iii	5
Franchise.			laws, may call militia to execute .....x	2
corporate, creation by special act forbidden .....xii	1		messages to legislature.....iii	6
alienation or lease not to relieve liability .....xii	8		militia officers, commissioned by..x	2
extension by legislature prohibited .....xii	3		pardoning power vested in.....iii	9
forfeiture not to be remitted..xii	3		restrictions prescribed by law .....iii	9
for unlawful combinations..xii	22		report to legislature of pardons, etc., granted .....iii	11
invalid, if unorganized.....xii	2		records kept at seat of government .....iii	24
irrevocable grant prohibited...i	8		remission of fines and forfeitures .....iii	11
liability not relieved by lease, etc.....xii	8		report to legislature with reasons .....iii	11
subject to eminent domain...xii	10		removal or disability, who to act .....iii	10
taxation, state not to surrender .....vii	4		residence at seat of government .....iii	24
elective, who entitled to (amend. 5) [p. 132] .....vi	1		salary .....iii	14
(see Corporations; Elections)				
Freedom of Conscience.				
guaranteed to every individual (amend. 4) [p. 131].....i	11			

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Governor (Cont'd).		
supreme executive power vested in	iii	2
succession (amend. 6) [p. 132]	iii	10
term of office	iii	2
vacancies in office filled by	iii	13
in legislature, writs of election issued	ii	15
in superior court, filled by	iv	5
in supreme court, filled by	iv	3
veto and return of bill with objections	iii	12
of one or more items or sections	iii	12
power denied when (amend. 7) [p. 133]	ii	1
Grand Jury.		
summoned only on order of superior court	i	26
Granted Lands.		
sale of for educational purposes	xvi	1-4
(see Lands; Public Lands)		
Habeas Corpus.		
jurisdiction, original and appellate of supreme court	iv	4
original, of superior court	iv	6
judges of supreme court may issue	iv	4
suspension of writ prohibited, except	i	13
writs, issuance and service on non-judicial days	iv	6
returnable before whom	iv	4
Harbors.		
area to be reserved for landings, etc.	xv	1
commission to establish harbor lines	xv	1
restrictions on sale by state of lands or rights	xv	1
(see Area Reserved; Wharves)		
Health.		
(see Public Health)		
Heir at Law.		
not to be determined by special law	ii	28(1)
High Crimes or Misdemeanors.		
impeachment for	v	2
High Schools.		
included in public school system	ix	2
Highways.		
opening or altering by special legislation prohibited, except state and military roads	ii	28(2)
(see State Roads; Streets and Roads)		
Holiday.		
(see Legal Holidays)		
Home.		
privacy of, guaranteed	i	7
soldiers not to be quartered in	i	31
Homestead.		
exemption from forced sale	xix	1
House of Representatives.		
elections, biennial after 1890	ii	5
members, how and when chosen	ii	4
number of representatives	ii	2
powers, legislative vested in	ii	1
impeachment, sole power vested in	v	1
majority necessary to order	v	1
quorum of house	ii	8
reapportionment after each census, state or national	ii	3
(see Legislature; Representatives)		
Idiots.		
excluded from elective franchise	vi	3
Immigration.		
bureau of, provision for establishment	ii	34
Immunities.		
electors privileged from arrest	vi	5
equal to all citizens and corporations	i	12
imprisonment for debt prohibited	i	17
irrevocable grant of, prohibited	i	8
loss or damage to property prohibited without just compensation	i	16
members of legislature privileged from arrest	ii	16
privileged from service of civil process	ii	16
militia privileged from arrest at muster	x	5
soldiers not to be quartered in homes	i	31
special grant of, prohibited	i	12
twice in jeopardy, accused not to be put	i	9
Impeachment.		
house of representatives has sole power	v	1
trial by senate	v	1
chief justice presides, when	v	1
officers liable to	v	2
judgment effects removal and disqualification for office	v	2
liability to criminal prosecution	v	2
recall by people (amend. 8) [p. 135]	i	33
Imposts.		
appellate jurisdiction of supreme court	iv	4
original jurisdiction of superior court	iv	6
Imprisonment for Debt.		
prohibited, except in case of absconding debtors	i	17
Incompetency in Office.		
officers removable by legislature	iv	9
rights of accused to be heard	iv	9
three-fourths of each house to concur	iv	9

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Indebtedness of Corporations.		
fictitious increase void.....xii	6	
liability of stockholders.....xii	4	
double, in bank, insurance and joint stock companies.....xii	11	
relief from, by lease or alienation of franchise prohibited....xii	8	
by special legislation prohibited	ii	28(10)
(see Corporations)		
Indian Lands.		
disclaimed by state of title	xxvi	2
subject to jurisdiction of United States	xxvi	2
taxation of, when state may impose	xxvi	2
exemption from	xxvi	2
Indians.		
exempt from taxation, when...xxvi	2	
not taxed, not allowed elective franchise	vi	1
excluded from enumeration of inhabitants	ii	3
Initiative and Referendum.		
initiated measures (amend. 7) [p. 133]	ii	1(a)
amendment of	ii	1(c)
duties of legislature.....ii	1(a)	
duties of secretary of state....ii	1(a)	
elections on	ii	1(a)
referred measures [p. 134].....ii	1(b)	
amendment of	ii	1(c)
duties of legislature.....ii	1(b)	
duties of secretary of state....ii	1(b)	
elections on	ii	1(d)
percentage of signatures.....ii	1(d)	
time of taking effect.....ii	1(c)	
veto power withheld.....ii	1(d)	
Indictment.		
prosecutions of offenses by.....i	25	
Individual Rights.		
government to protect and maintain	i	1
secured by recurrence to fundamental principles	i	32
Individual Security.		
private affairs not to be disturbed	i	7
Infants.		
(see Children; Minors)		
Inferior Courts.		
appeal lies to superior court....iv	6	
legislature to provide.....iv	1	
jurisdiction and powers, legislature to prescribe.....iv	10, 12	
Information.		
offenses may be prosecuted by...i	25	
Injunction.		
issuance and service on nonjudicial days	iv	6
original jurisdiction of superior court	iv	6
Insane Person.		
excluded from elective franchise	vi	3
Insolvency.		
appellate jurisdiction of supreme court	iv	4
original jurisdiction of superior court	iv	6
receipt of bank deposits, liability of officers	xii	12
Instruments.		
affecting title, validation by special act forbidden.....ii	28(9)	
Insurance Companies.		
double liability of stockholders	xii	11
Interest.		
application of school fund interest	ix	3
on certain state debts to be provided for	viii	3
regulation by special law prohibited	ii	28(13)
private interest in bills to be disclosed by legislators.....ii		30
Intoxicating Liquors.		
(see Prohibition)		
Invasion.		
state may contract debts above limit to repel.....viii		2
suspension of habeas corpus allowed	i	13
Irrigation.		
use of waters for, deemed public use	xxi	1
Jeopardy.		
no person to be twice put in....i		9
Joint Stock Companies.		
term corporation includes.....xii		5
double liability of stockholders	xii	11
combinations by, affecting price, etc., of commodities forbidden	xii	22
Journal.		
each house to keep.....ii		11
entry of yeas and nays on nominations of officers for state institutions	xiii	1
on proposed constitutional amendments	xxiii	1
yeas and nays, on demand of one-sixth	ii	21
on passage of bill.....i		22
on passage of emergency clause	ii	31
on introduction of bills later than ten days before close of session	ii	36
publication of, except portions requiring secrecy	ii	11
votes on elections by legislature entered	ii	27
on removal of judges, etc., entered	iv	9
Judge Pro Tempore.		
in superior court, provision for..iv		7

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Judges.

absence from state vacates office	8
not to charge juries as to matters of fact	16
but to declare the law	16
practice of law prohibited	19
removal for incompetency	9
rights of accused	9
salaries payable quarterly	13
(see Judge pro Tempore; Judges of Superior Court; Judges of Supreme Court)	

Judges of Superior Court.

court commissioners, appointment of	23
decisions within ninety days after submission	20
disqualified unless admitted to practice in state	17
each judge invested with powers of all	5
may sit in any county	5
elections of	5
ineligible to other than judicial office	15
not to charge juries as to matters of fact	16
but to declare the law	16
oath of office prescribed for	28
practice of law prohibited	18
pro tempore judge	7
recall, not subject to (amend. 8)	33
[p. 135]	33
report defects in law to supreme court	25
rules of court, may establish	24
salaries and apportionment of	13, 14
sessions of court may be held in any county on request	7
term of office and when begins	5
writs may be issued by	6
(see Judges; Superior Court)	

Judges of Supreme Court.

chief justice, how determined	3
classification by lot	3
clerk to be appointed by	22
disqualified, unless admitted to practice in state	17
election of	3
ineligible to other than judicial office	15
issuance of writs authorized	4
oath of office prescribed	28
practice of law prohibited	19
recall, not subject to (amend. 8)	33
[p. 135]	33
reporter, appointment of	18
reports of defects in laws to governor	25
salaries and payment	13, 14
term of office	3
(see Judges; Supreme Court)	

Judgment.

belonging to territory inures to state	4
extent of, on impeachment	2

Judgment (Cont'd).

of one judge of superior court to be of same force as of all	5
of superior court to be given within ninety days after submission	20

Judicial Administration.

must be open and without delay	10
--------------------------------	----

Judicial Decisions.

all supreme court decisions to be in writing and grounds stated	2
concurrence by majority of court necessary	2
publication required	21
free to anyone	21
reporter for, to be appointed	18

Judicial Officers.

absence forfeits office, when	8
compensation by fees prohibited, except	13
impeachment, liable to, except courts not of record	2
oath of office prescribed	28
recall, not subject to (amend. 8)	33
removal by legislature	9
(see Court Commissioners; Judges; Judges of Supreme and Superior Courts; Justice of Peace)	

Judicial Power.

vested in what courts	1
-----------------------	---

Judicial Question.

public use in eminent domain	16
------------------------------	----

Jurisdiction.

actions pending before change of government	1
inferior courts, legislature to prescribe	12
justice of peace, as legislature may fix	10
not to trench on courts of record	10
superior court	6
supreme court	4
United States over reserved lands	1

Juror.

not incompetent because of religious opinion	11
number necessary for verdict	21

Jury.

ascertainment by, of compensation for right of way	16
charging, duty of judge	16
number in courts not of record	21
right of trial by remains inviolate	21
waiver in civil cases may be had	21
verdict by less than twelve may be authorized	21
(see Grand Jury; Juror)	

Justice.

administration must be open and without delay	10
---	----

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Justice of Peace.			
appeal lies to superior court....iv	6		
cannot be made court of record..iv	11		
duties to be prescribed by legisla- ture	10		
fees prohibited, when.....iv	10		
jurisdiction, legislature to deter- mine	10		
not to trench on courts of rec- ord	10		
number, legislature to determine.....iv	10		
police justice in cities may be chosen from	10		
salary, when	10		
vacancy in office, how filled....xi	6		
vested with judicial power....iv	1		
(see Judicial Officers)			
Land Commissioner.			
(see Commissioner of Public Lands)			
Lands.			
alien ownership prohibited.....ii	33		
confirmation of prior sales for edu- cational purposes by county com- missioners	2		
granted lands, restrictions on sale	1		
for educational purposes, sold.....xvi	2, 3		
plat of state lands in cities re- quired before sale.....xvi	4		
limit on amount offered in one parcel	4		
quantity of state land that may be sold in one parcel as acreage.....xvi	4		
restrictions on selling school lands.....xvi	3		
timber and stone may be sold, how	3		
taxation of Indian lands.....xxvi	2		
nonresidents	2		
United States, none to be im- posed	2		
Law of the Land.			
constitution of United States supreme	2		
Laws.			
bills of attainder prohibited.....i	23		
corporations, statutory regulations may be amended or repealed.....xii	1		
defects and omissions to be re- ported to governor.....iv	25		
exception from (amend. 7) [p. 133]	1		
enacting clause	18		
referendum (amend. 7) [p. 133] .....ii	1		
ex post facto, prohibited.....i	23		
governor's approval, presentation for	12		
passage over veto.....iii	12		
without approval, how becomes effective	12		
impairing obligation of contracts prohibited	23		
Laws (Cont'd).			
initiative and referendum (amend. 7) [p. 133].....ii	1		
legislative enactments to be by bill	18		
requisites on final passage of bill	22		
referendum of (amend. 7) [p. 133] .....ii	1		
special legislation prohibited in certain cases	28		
state debt authorized for some single work	3		
object of tax must be stated.....viii	3		
publication required	3		
territorial, to remain in force until altered	2		
proviso as to tide lands....xxvii	2		
time of taking effect.....ii	31		
initiative and referendum (amend. 7) [p. 133].....ii	1		
(see Acts; Bill; Statutes)			
Lease.			
of corporate franchise not to re- lieve from liability.....xii	1		
of harbor areas for building wharves	2		
limit of term of lease.....xv	2		
Legal Holiday.			
superior courts not open.....iv	6		
writs that may be issued and served	6		
Legislature.			
Organization and Membership.			
adjournment, restrictions on.....ii	11		
apportionment of members...xxii	1, 2		
new, when made	3		
attendance of absentee, less than quorum may compel.....ii	8		
bribery of members, how pun- ished	30		
compensation and mileage of mem- bers	23		
consists of senate and house of representatives	1		
contempts punishable by each house	9		
convening in extra session at call of governor	7		
eligible to membership, who are..ii	7		
election of members, each house judge of	8		
expulsion of member requires two-thirds vote	9		
journal, each house to keep and publish	11		
members, from what civil offices excluded	13		
not liable for words spoken in private interest in bill to be disclosed	30		
privilege from arrest, except..ii	16		
from civil process, when....ii	16		
number of members.....ii	2		
office accepted under United States vacates seat	14		

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Legislature (Cont'd).

officers, each house to elect its own	ii	10
ineligible to membership.....	ii	14
quorum, majority to constitute..	ii	8
reapportionment after each census	ii	3
recall (amend. 8) [p. 135].....	i	33
percentages required (amend. 8)	i	34
records, secretary of state to keep	iii	17
rules of proceedings, each house to determine	ii	9
sessions to be open.....	ii	11
biennial	ii	12
special, may be convened by governor	ii	12
time of meeting.....	ii	12
vacancies, how filled.....	ii	15
vote on elections to be viva voce	ii	27
none when member has private interest in bill	ii	30

Enactment of Laws.

act, how revised or amended....	ii	37
amendment of bill.....	ii	38
bill to contain but one subject..	ii	19
when not to be considered....	ii	36
enacting clause	ii	18
initiative and referendum (amend. 7) [p. 133].....	ii	1
laws to be enacted by bill.....	ii	18
take effect, when.....	ii	31
presiding officer of each house to sign bills	ii	32
rules for signing bills may be prescribed	ii	32
style of laws	ii	18
title of bill to disclose object....	ii	19
veto of bill, and passage over...iii	iii	12
yeas and nays, entry on journal required, when	ii	21, 22

Duties.

accountability of county and local officers to be provided for....	xi	5
accounting for state receipts and expenditures to be prescribed	vii	7
appropriation for expenses of constitutional convention to be made	xxvii	19
bureau of statistics to be established	ii	34
cities, incorporation by general laws to be provided.....	xi	10
combinations affecting prices, etc., punishment to be provided..	xii	22
compensation of county and local officers to be regulated.....	xi	5
of officers not to be changed during term	ii	25
congressional districts, state to be divided into	xxvii	13
contested elections of state officers to be decided	iii	4
convict labor to be provided for	ii	29

Legislature (Cont'd).

county government, system of to be established	xi	4
divorces not to be granted by....	ii	24
drugs and medicines, sale to be regulated	xx	2
elections, qualifications of voters to be regulated	vi	1
certificates of, to be given state officers	iii	4
county, township, precinct, and district to be provided for..	xi	5
secrecy of ballot to be secured	vi	6
employees in mines and factories to be protected by law.....	ii	35
enumeration of inhabitants to be provided for	ii	8
harbor lines, commission to establish to be appointed.....	xv	1
health, board of to be established	xx	1
homesteads to be protected from forced sale	xix	1
initiative and referendum (amend. 7) [p. 133]	ii	1
justices of peace, number, powers and duties to be prescribed...iv	iv	10
lease of harbor areas for wharves to be provided	xv	2
medicine and surgery, practice of, to be regulated	xx	2
militia, organization and discipline to be provided for.....	x	2
officers of counties and municipal corporations, duties and terms of office to be prescribed....	xi	5
not provided for in constitution, legislature to provide for election and terms.....	xxvii	11
passes, use by public officers to be prohibited	ii	39
grant to public officers to be prevented	xii	20
private interest in bill, members to declare	ii	30
public arms, safekeeping and protection required	x	4
publication of opinions of supreme court to be provided for.....	iv	21
rates for freights and passengers, discrimination to be prevented	xii	18
maximum, to be established..	xii	18
referendum (amend. 7) [p. 133]..	ii	1
registration law to be enacted..	vi	7
salaries of county officers and certain constables to be fixed...	xi	5
sale of school and university lands, confirmation to be made....	xvi	2
seat of government, choice of location to be provided for....	xiv	1
soldiers' home, maintenance to be provided	x	3
suits against state, manner of bringing, to be directed.....	ii	26
system of public schools to be established	ix	2

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Legislature (Cont'd).

taxation, annual expenses to be met by	vii	1
corporate property to be under general law	vii	3
deficiencies and expenses to be met by	vii	8
exemption of limited amount of personalty to be secured...	vii	2
state debt to be liquidated by	vii	1
uniform and equal rate to be secured	vii	2
valuation of property on just basis to be insured.....	vii	2
vital statistics, bureau of, to be established	xx	1
voters, laws respecting, to be enacted (amend. 2) [p. 131]..	vi	1
Powers.		
abolition of certain state offices permitted	iii	25
capitol building, appropriation restricted until permanent location	xiv	3
chaplain for penal and reformatory institutions may be employed (amend. 4) [p. 131]....	i	11
charters of corporations cannot be extended	xii	3
clerk of supreme court, election may be provided for.....	iv	22
constitution, amendment may be proposed in either house..	xxiii	1
revision, convention for may be agreed on	xxiii	2
corporate property and franchises may be taken for public use..	xii	10
corporations not to be created by special act	xii	1
counties may be classified by population	xi	5
courts of record, power to establish	iv	11
divorces not to be granted by...	ii	24
elective franchise may be granted to women in school elections..	vi	2
extra compensation to officers for past services prohibited.....	ii	25
forfeitures of corporate franchises may be declared for unlawful combinations	xii	22
remission of, prohibited.....	xii	3
harbor areas, building on, may be provided for by general law..	xv	2
inferior courts, powers of may be prescribed	iv	12
irrevocable privilege or franchise, power to grant denied.....	i	8
jury, number for panel and for verdict may be fixed at less than twelve	i	21
lotteries, no power to authorize	ii	24
municipal corporations may be vested with power to make local improvements	vii	9
number of judges of supreme court may be increased.....	iv	2

Legislature (Cont'd).

private or special laws prohibited	ii	28
public corporations not to be created by special act.....	xi	10
railroad commission may be established	xii	18
removal of judges, etc., for incompetency	iv	9
reservations to people (amend. 7 [p. 133]).....	ii	1
salaries of judges may be increased	iv	14
school fund (common) may be enlarged	ix	3
seat of government cannot be changed by	xiv	1
separate departments of supreme court may be provided.....	iv	2
taxation, corporate authorities may be vested with power by general laws	xi	12
exemption of personal property allowed (amend. 3) [p. 131]	vii	2
local cannot be imposed by...	xi	12
Liabilities.		
corporate, not relieved by alienation or lease of franchise....	xii	8
extinguishment by special legislation prohibited	ii	28(10)
Liberty.		
depriving of, without due process of law, forbidden	i	3
Lieutenant-governor.		
acts as governor, when.....	iii	10
deciding vote, in case of tie in senate	ii	10
election of	iii	1
office may be abolished by legislature	iii	25
presiding officer of senate.....	iii	16
in absence, who presides.....	ii	10
salary of	iii	16
succession (amend. 6) [p. 132]..	iii	10
term of office	iii	3
Life.		
deprivation of, without due process of law, prohibited.....	i	3
Limitation of Actions.		
special legislation prohibited....	ii	28(17)
Limiting Production.		
combination for, prohibited....	xii	22
Loans.		
state may incur to meet debts	viii	1
Local Improvements.		
authority of cities to levy special taxes for	vii	9
Local Officers.		
eligible to legislature.....	ii	14
Lotteries.		
legislature prohibited from authorizing	ii	24

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Majority.			Money.		
necessary in impeachment.....v	1		corporations not to issue anything		
passage of bills requires.....ii	22		but lawful money of United		
petition for division of county			States .....xii	11	
requires .....xi	3		disbursement from state treasury		
quorum of each house constituted			.....viii	4	
by .....ii	8		municipal officers to deposit with		
special act cannot declare a per-			treasurer .....xi	15	
son of age.....ii	28(11)		state taxes payable in.....vii	6	
Malfeasance.			using public money by officer a		
officers liable to impeachment for			felony .....xi	14	
.....v	2		(see Public Money)		
removal by law, if not subject			Monopolies.		
to impeachment .....v	3		forbidden .....xii	22	
Mandamus.			forfeiture of franchise and property		
original and appellate jurisdiction			may be declared .....xii	22	
of supreme court .....iv	4		penalties to be provided by law..xii	22	
original jurisdiction of superior			Municipal Corporations.		
court .....iv	6		cities of 20,000 or over may frame		
Mandatory.			own charter .....xi	10	
constitutional provisions are.....i	29		corporate stock or bonds not to be		
Manufacturing Purposes.			owned by .....viii	7	
use of waters for, deemed public			credit or money not to be loaned		
use .....xxi	1		.....viii	7	
Medicine.			debts, power to incur.....viii	6	
practice and sale, legislature to			limit of power .....viii	6	
regulate .....xx	2		improvements, power to make by		
Messages.			special taxation or assessment		
governor to communicate with			.....vii	9	
legislature by .....iii	6		local affairs controlled by.....xi	11	
Mileage.			organization to be under general		
members of legislature entitled to			laws .....xi	10	
.....ii	23		police and sanitary regulations en-		
Military.			forced by .....xi	11	
not to interfere with elections...i	19		private property not to be taken for		
subordinate to civil power.....i	18		debt of .....xi	13	
(see Army; Militia)			public money to be deposited with		
Militia.			treasurer .....xi	15	
citizens subject to duty in.....x	1		salary of officers not to be changed		
who exempt .....x	1		.....xi	8	
exemption to persons having con-			of certain constables to be regu-		
scientious scruples, on payment			lated by law.....xi	8	
of equivalent .....x	6		seals of .....xxvii	9	
governor to be commander in chief			special act to create or amend		
.....iii	8		charter, prohibited .....ii	28(8)	
members entitled to admission to			streets, power to extend over tide		
soldiers' home, when.....x	3		lands .....xv	3	
officer of, eligible to legislature,			taxation, assessment and levy,		
when .....ii	14		power of .....vii	9	
organization and discipline.....x	2		imposition for local purposes pro-		
privilege from arrest, when.....x	5		hibited to legislature .....xi	12	
(see Arms; Army; Military)			local power to assess and levy,		
Mines.			where .....xi	12	
protection of employees, laws to			term of officers not to be extended		
be passed .....ii	35		.....xi	8	
Mining Purposes.			use of public money by official,		
use of water for deemed public			a felony .....xi	14	
use .....xxi	1		(see City; Municipal Courts; Mu-		
Minors.			nicipal Fines; Towns and Vil-		
sale or mortgage of property not			lages)		
to be authorized by special			Municipal Courts.		
act .....ii	28(4, 11)		legislature may provide for.....iv	1	
(see Children; Majority)			Municipal Fine.		
			appellate jurisdiction of supreme		
			court .....iv	4	
			original jurisdiction of superior		
			court .....iv	6	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Municipal Indebtedness.			Office (Cont'd).		
limitations and restrictions on..viii	6		legislature may abolish certain offices	iii	25
(see City; Towns and Villages)			religious qualification not to be required	i	11
Names.			removal from, by joint resolution of legislature	iv	9
change of, by special legislation prohibited	ii	28(1)	vacancy in, how filled.....	iii	13
Naturalization.			(see Officers)		
power of, vested in superior court	iv	6	Officers.		
Navigable Waters.			abolition of certain state offices authorized	iii	25
harbor lines, commission to be established to locate.....	xv	1	accountability for fees and money collected	xi	5
ownership of state in beds and shores asserted	xvii	1	county officer ineligible for more than two terms.....	xi	7
New County.			township, precinct and district election and compensation to be regulated by legislature.....	xi	5
formation may be by special act	ii	28(18)	who may or may not be salaried	xi	8
restrictions on	xi	3	election of, when no provision in constitution	xxvii	11
Nonjudicial Days.			first, under constitution.....	xxvii	7
certain writs may be issued and served on	iv	6	extra compensation prohibited....	ii	25
superior courts not open on.....	iv	6	guilty of felony, when uses public money	xi	14
Nonresidents.			impeachment of	v	2
taxation of lands of citizens of United States	xxvi	2	legislative, each house to elect....	ii	10
Normal Schools.			local, may be members of legislature	ii	14
included in public school system..ix	ix	2	militia, appointment or election of	x	2
Nuisances.			without salary eligible to legislature	ii	14
appellate jurisdiction of supreme court	iv	4	passes, use or acceptance by, forbidden	ii	39
original jurisdiction of superior court	iv	6	public moneys to be deposited with treasurer	xi	15
Oath of Office.			recall (amend. 8) [p. 135].....	i	33
prescribed for judges	iv	28	percentages required (amend. 8)	i	34
where to be filed	iv	28	removable by law, when not impeachable	v	3
Oaths.			salary not to be changed during term	ii	25
administered in most binding manner	i	6	territorial and United States, how long to hold	xxvii	6, 14
of senators in impeachment trials	v	1	trustees of state institutions, appointment of	xiii	1
Obligation of Contracts.			use of passes prohibited.....	xii	20
not to be impaired by legislation..i	i	23	(see Appointment; County Officers; District Officers; Precinct Officers; Recall of Officers; Salaries; State Officers; Term of Office)		
Offenses.			Official Acts.		
bailable, when not capital.....	i	20	validation by special laws prohibited	ii	28(12)
existing, to be prosecuted in name of state	xxvii	5	Omissions.		
impeachment of public officers for	v	2	in laws, report to governor by supreme judges	iv	25
jeopardy, twice in, for same offense, forbidden	i	9	Opinions.		
prosecution by information or indictment	i	25	of supreme court to be reported..iv		18
rights of accused	i	22	publication authorized	iv	21
trial by jury, right of.....	i	20	free for publication by any person	iv	21
Office.					
acceptance of, under United States vacates seat in legislature....	ii	14			
certain postmasters exempt.....	ii	14			
bribery, a disqualification for.....	ii	30			
disqualification of legislators for certain civil offices.....	ii	13			
ineligibility for legislature.....	ii	14			
judge, open to whom.....	iv	17			
ineligible to other than judicial office	iv	15			

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Original Jurisdiction.			
superior court	iv	6	
supreme court	iv	4	
Ownership of Lands.			
prohibited to aliens, except.....	ii	83	
Pardoning Power.			
governor vested with, subject to re-			
strictions	iii	9	
to report pardons granted to legis-			
lature	iii	11	
Partnership.			
(see Copartnerships)			
Pass.			
grant of, to public officers, pro-			
hibited	xii	20	
use of, by public officers, pro-			
hibited	ii	39	
Passenger Tariffs.			
abuses and extortions to be pro-			
hibited	xii	18	
regulation by legislature authorized			
.....	xii	18	
Penalties.			
accrued to territory, inure to state			
.....	xxvii	3	
incurred, not affected by change in			
government	xxvii	5	
remission by special act prohibited			
.....	ii	28(14)	
violation of provisions against			
monopolies	xii	22	
Penitentiary.			
chaplain may be employed for			
(amend. 4) [p. 131].....	i	11	
People.			
political power inherent in.....	i	1	
power to initiate laws (amend. 7)			
[p. 133]	ii	1	
public lands held in trust for...xvi		1	
right of petition and peaceful as-			
semblage	i	4	
to religious liberty	i	11	
to security in home.....	i	7	
rights retained not affected by			
grants in constitution	i	30	
toleration of religious sentiment se-			
cured to	xxvi	1	
Percentages.			
of electors to initiate laws (amend.			
7) [p. 133]	ii	1	
to recall officers (amend. 8)			
[p. 135]	i	34	
Permanent School Fund.			
investment of (amend. 1).....	xvi	5	
(see Common School Fund;			
School Fund)			
Personal Property.			
appellate jurisdiction of supreme			
court	iv	4	
exemption from taxation (amend.			
3)	vii	2	
Persons.			
convicted of infamous crimes, ex-			
cluded from elective franchise.vi		3	
school funds not to be loaned to			
.....	xvi	5	
Persons Under Disability.			
sale or mortgage of property forbid-			
den to be authorized by special			
law	ii	28(4)	
Petition.			
right of, not to be abridged.....	i	4	
Police Justice.			
justice of peace may be made....	iv	10	
Police Power.			
counties, cities, towns, townships			
may exercise	xi	11	
Political Power.			
inherent in people.....	i	1	
Pooling.			
by common carriers prohibited			
.....	xii	14	
(see Combinations)			
Postmaster.			
eligible to legislature, when.....	ii	14	
Powers.			
executive, vested in governor....	iii	2	
judicial, where vested	iv	1	
legislative, where vested.....	ii	1	
reserved by people (amend. 7)			
[p. 133]	ii	1	
pardoning, where vested.....	iii	9	
Precinct Officers.			
election, duties, terms and compen-			
sation to be provided for by legis-			
lature	xi	5	
official bonds unaffected by change			
in government	xxvii	14	
territorial, hold office until when			
.....	xxvii	14	
vacancies, how filled.....	xi	6	
President of Senate.			
lieutenant-governor shall be....	iii	16	
temporary presiding officer, when			
chosen	ii	10	
Press.			
liberty of, secured.....	i	5	
Prices.			
combinations to fix, prohibited..	xii	22	
Private Corporations.			
(see Corporations)			
Private Legislation.			
prohibited in enumerated cases..	ii	28	
Private Property.			
not to be taken for public debts			
.....	xi	13	
taken for public or private use, just			
compensation to be made.....	i	16	
Privilege.			
electors not to be arrested on elec-			
tion day	vi	5	
irrevocable grant of, prohibited...	i	8	
legislative members not subject to			
arrest or civil process.....	ii	16	
militia not to be arrested at			
musters	x	5	
Privileges.			
equal to all citizens and corpora-			
tions	i	12	
hereditary, grant of by state pro-			
hibited	i	28	
special, prohibited	i	12	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Probate Court.

merger in superior court, when	10
probate judge to perform duties until term expires.....xxvii	10

Probate Matters.

appellate jurisdiction of supreme court	iv
jurisdiction of superior court	xxvii
original jurisdiction of superior court	iv

Process.

authority of superior court extends throughout state	iv
legislators privileged from when..ii	16
state courts may have served on lands of United States.....xxv	1
style of	iv
territorial to be valid.....xxvii	1

Proclamation of President.

state constitution to go into effect upon	xxvii
---	-------

Prohibition.

appellate and revisory jurisdiction of supreme court.....iv	4
original jurisdiction of superior court	iv
sale of liquors, separate article (rejected)	xxvii
writs may be issued and served on nonjudicial days	iv

Property.

corporate, subject to eminent domain	xii
deprivation without due process of law prohibited	i
personal, exemption from taxation allowed (amend. 3) [p. 131]..vii	2
private, not to be taken to pay public debts	xi
taking for private use prohibited, except	i
or damaging for public use, not without just compensation...i	16
taxation to be in proportion to value	vii
territorial, to vest in state....xxvii	4

Prosecuting Attorney.

election, duties, term, compensation, legislature to provide for.....xi	5
removal for incompetency, corruption, etc.....iv	9
rights of one accused.....iv	9

Prosecutions.

commenced before statehood, how conducted	xxvii
conducted in name of state.....iv	27
may be by information, or indictment	i
unaffected by change in government	xxvii

Protection.

life, liberty and property entitled to	i
--	---

Protection (Cont'd).

persons engaged in dangerous employments, provisions for.....ii	35
public arms, provision for safekeeping	x

Public Administrator.

may or may not be salaried.....xi	8
-----------------------------------	---

Public Arms.

protection and safekeeping to be provided	x
---	---

Publication.

amendments proposed to constitution	xxiii
liberty of, guaranteed.....i	5
opinions of supreme court.....iv	21
proposed law authorizing state to contract debt	viii
receipts and expenditures of public money	vii

Public Corporations.

(see Municipal Corporations)

Public Debts.

private property not to be taken in payment of.....xi	13
---	----

Public Health.

laws regulating deleterious occupations to be passed.....ii	35
state board of, shall be created..xx	1

Public Indebtedness.

municipal limit of.....viii	6
state, limit of.....viii	1
exceptions to	viii
territorial, assumed by state...xxvi	3
(see City; County Indebtedness; State Indebtedness; Towns and Villages)	

Public Lands.

disclaimer by state of title to unappropriated	xxvi
granted to state held in trust for people	xvi
sale only for full market value	xvi
unappropriated to be subject to control of United States.....xxvi	2
(see Lands; Granted Lands; School Lands)	

Public Money.

accountability of public officers..xi	5, 15
appropriation for religious worship prohibited	i
deposit with treasurer required..xi	15
statements of receipts and expenditures to be published.....vii	7
using or making a profit out of, a felony	xi
(see Money)	

Public Office.

religious qualification not to be required	i
--	---

Public Officer.

change of compensation during term forbidden	ii
extra compensation to, prohibited	ii
(see Officers)	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Public Property.				
not to be applied to religious wor- ship	i	11		
Public Safety.				
ground for suspension of habeas corpus	i	13		
referendum, bills not subject to (amend. 7) [p. 133]	ii	1		
Public Schools.				
establishment and maintenance guaranteed	xxvi	4		
free from sectarian control	ix, § 4; xxvi	4		
open to all children of state	ix, § 1; xxvi	4		
superintendent of public instruc- tion to have supervision	iii	22		
system to be established by state	ix	2		
including what	ix	2		
(see Common Schools; Education; High Schools; Normal Schools; Technical Schools)				
Public Use.				
a judicial question	i	16		
property not to be taken for, with- out compensation	i	16		
Punishment.				
cruel, not to be inflicted	i	14		
bribery and corrupt solicitation, how punished	ii	30		
Qualifications.				
electors (amend. 2) [p. 131]	vi	1		
judges of supreme and superior courts	iv	17		
members of legislature	ii	7		
each house to be judge of	ii	8		
religious, not to be required for public office	i	11		
state officers	iii	25		
Quorum.				
majority of each house to consti- tute	ii	8		
less number may adjourn and compel attendance	ii	8		
supreme court, majority of judges necessary	iv	2		
Quo Warranto.				
appellate and original jurisdiction of supreme court	iv	4		
original jurisdiction of superior court	iv	6		
Race.				
discrimination in education on ac- count of, prohibited	ix	1		
Railroad and Transportation Com- mission.				
may be established by legislature	xii	18		
Railroad Companies.				
charges to any point not to exceed those to more distant station	xii	15		
combinations to regulate produc- tion or transportation of com- modities prohibited	xii	22		
Railroad Companies (Cont'd).				
sharing earnings forbidden	xii	14		
commission to control may be es- tablished	xii	18		
common carriers, subject to legisla- tive control	xii	13		
connection at state line with for- eign railroads authorized	xii	13		
consolidation with competing lines prohibited	xii	16		
delay in receipt and transportation of connecting cars forbidden	xii	13		
discrimination between telegraph companies forbidden	xii	19		
in charges between persons and places prohibited	xii	15		
excursion and commutation tickets may be granted	xii	15		
express companies to be allowed equal terms	xii	21		
extortion and discrimination in rates to be prevented	xii	18		
grant of passes to public officers forbidden	xii	20		
intersecting crossing or connecting with other railroads authorized	xii	13		
maximum rates of fare and freight to be established by law	xii	18		
passes, acceptance and use by pub- lic officers unlawful	ii	39		
rolling stock subject to taxation and execution sale	xii	17		
telegraph and telephone companies to be allowed to use right of way	xii	19		
transfer of cars, when shall form connections for	xii	13		
Ratification.				
constitutional amendments	xxiii	1		
revision	xxiii	3		
Real Property.				
appellate jurisdiction of supreme court	iv	4		
original jurisdiction of superior court	iv	6		
Rebellion or Invasion.				
suspension of writ of habeas cor- pus	i	13		
Recall of Officers.				
elective, subject to (amend. 8) [p. 135]	i	33		
number of signatures	i	33		
percentages required	i	34		
petition for	i	33		
power not exclusive	i	34		
Receipts and Expenditures.				
account of, to be published	vii	7		
Recognizances.				
territorial inure to state	xxvii	4		
valid and unaffected by change in government	xxvii	4		
Records.				
of state officers to be kept at capi- tal	iii	24		
of territorial courts transferred to superior courts	xxvii	8		

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Regents.		Representatives (Cont'd).	
appointment for state institutions	1	recall, percentages required	34
.....xiii		(amend. 8) [p. 135].....i	4, 5
Registration Law.		term of office .....ii	
enactment by legislature required,	7	(see House of Representatives)	
when .....vi		Representative Districts.	
compliance with by elector neces-	7	allotment among counties.....xxii	2
sary .....vi		Reprives.	
Release of Debt or Obligation.		report of, by governor to legisla-	11
special legislation prohibited....ii	28(10)	ture .....iii	
Religion.		Residence.	
freedom of conscience guaranteed	11	absence in public service or at cer-	4
(amend. 4) [p. 131].....i		tain institutions, not to affect..vi	
juror not to be incompetent on ac-	11	eligibility to office and right of vot-	4
count of (amend. 4) [p. 131]...i		ing, how affected by.....vi	24
no person to be molested on ac-	11	state officers, where.....iii	
count of (amend. 4) [p. 131]...i	1	Revenue.	
toleration in, secured.....xxvi	11	failure in, state may incur debt to	1
witness not incompetent because		meet .....viii	8
of (amend. 4) [p. 131].....i		tax may be levied to pay....vii	
Religious Qualification.		Revenue and Taxation.	
not required for public office or em-	11	corporate property subject same as	3
ployment (amend. 4) [p. 131]..i		individual .....vii	2
Religious Worship.		deduction of debts from credits	
mode of, not to be interfered with	1	allowed .....vii	
.....xxvi		exemption of limited amount of per-	2
public money not to be expended	11	sonal property (amend. 3)	
for (amend. 4) [p. 131].....i		[p. 131] .....vii	4
except in case of chaplains for	11	power to tax not to be suspended	1
penitentiary and reformatories		or surrendered .....vii	2
(amend. 4) [p. 131].....i		property to be taxed in proportion	
Removal from Office.		to value .....vii	2
of governor, who to act.....iii	10	uniform and equal rate required	
and lieutenant-governor, who to	10	.....vii	
act .....iii	1	(see Taxation)	
impeachment .....v	9	Review, Writ of.	
joint resolution of legislature for	3	appellate and revisory jurisdiction	4
removal .....iv	33	of supreme court.....iv	6
officers not liable to impeachment,	34	original jurisdiction of superior	
how removed .....v		court .....iv	
recall (amend. 8) [p. 135].....i		Revision of Constitution.	
percentages required .....i		convention called, to consist of how	2
Reporter of Supreme Court.		many .....xxiii	2
judges to appoint.....iv	18	two-thirds vote of each house neces-	2
salary to be prescribed by law..iv	18	sary .....xxiii	2
Reports.		vote on, how provided for.....xxiii	
decisions of supreme court.....iv	21	Right of Petition.	4
defects and omissions in the laws	25	not to be abridged.....i	
.....iv		Right to Assemble.	4
Representatives.		not to be abridged.....i	
apportionment among counties	2	Right to Bear Arms.	24
.....xxii	23	not to be impaired.....i	24
compensation and mileage.....ii	13	restriction on employment of armed	
congressional, how and when to be	13	men by private persons .....i	
elected .....xxvii	13	Right of Way.	16
vote at first election under ter-	4, 5	appropriation of property for....i	
ritorial law .....xxvii	2	Rights.	1-32
election of .....ii	16	declaration of .....i	30
number of .....ii	16	enumerated, not to affect others re-	1
privilege from arrest.....ii	7	tained .....i	
from civil process.....ii	3	existing, not affected by change in	
qualifications of .....ii		government .....xxvii	
reapportionment after each census		initiation of laws (amend. 7)	1
.....ii		[p. 133] .....ii	1

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Road District.			School Fund (Cont'd).		
vacancy in office, how filled.....xi	6		enlargement authorized .....ix	3	
Roads.			interest of, applied to current ex-		
(see Highways; State Roads;			penses .....ix	3	
Streets and Roads)			investment, what securities.....xvi	5	
Rolling Stock.			loans to private persons or corpora-		
personal property, subject to taxa-			tions forbidden .....xvi	5	
tion and execution sale.....xii	17		losses from, how made good.....ix	5	
Rules of Court.			sources from which derived.....ix	3	
assignment of business of superior			(see Common School Fund; Per-		
court under .....iv	5		manent School Fund)		
judges of superior courts to estab-			School Lands.		
lish .....iv	24		sale, manner of.....xvi	2-4	
Rules of Proceedings.			Seal.		
each house to determine.....ii	9		state, design of.....xviii	1	
Sailors.			custodian, secretary of stato to		
excluded from enumeration or in-			be .....iii	18	
habitants .....ii	6		superior courts, design of.....xxvii	9	
Salaries.			territorial court, county and mu-		
change in, during term, prohibited			nicipal officers, to be seals under		
.....ii	25		state .....xxvii	8, 9	
clerk of supreme court.....iv	22		Seat of Government.		
constables in certain cities.....xi	8		location, how determined.....xiv	1	
county, township, precinct and dis-			election, under territorial law		
trict officers .....xi	5, 8		.....xxvii	15	
judges of supreme and superior			form of ballot.....xxvii	18	
courts .....iv	13		majority vote necessary.....xiv	1	
how and when payable.....iv	14		provision for determination if no		
increase or diminution during			choice at first election.....xiv	1	
term forbidden .....iv	13		permanent location, how changed		
justice of peace in certain cities..iv	10		.....xiv	2	
reporter of supreme court.....iv	18		temporary, to be located where..xiv	1	
state officers, increase or diminu-			Secrecy.		
tion during term prohibited..iii	25		in legislative proceedings, how ob-		
attorney general .....iii	21		tained .....ii	11	
auditor .....iii	20		of ballot, to be secured at elec-		
commissioner of public lands..iii	23		tions .....vi	6	
governor .....iii	14		Secretary of State.		
lieutenant-governor .....iii	16		acts as governor, when.....iii	10	
secretary of state .....iii	17		succession (amend. 6) [p. 132]		
superintendent of public instruc-			.....iii	10	
tion .....iii	22		attests commissions issued by state		
treasurer .....iii	19		.....iii	15	
Sanitary Regulations.			bureau of statistics, etc., to be es-		
county, city and town may enforce			tablished in office of.....ii	34	
.....xi	11		duties .....iii	17	
Schools.			on initiation of laws (amend. 7)		
maintained partly by public funds			[p. 133] .....ii	1	
to be free from sectarian con-			election .....iii	1	
trol .....ix	4		records to be kept at capital...iii	24	
public school system, what included			residence to be maintained at seat		
in .....ix	2		of government .....iii	24	
(see Common Schools; Educa-			salary .....iii	17	
tion; High Schools; Normal			seal of state to be kept by.....iii	18	
Schools; Public Schools)			term of office .....iii	3	
School District.			Sectarian Control.		
authority to contract debts.....viii	6		public schools to be free from..xxvi	4	
School Elections.			Security.		
women may be permitted to vote			of individual rights, what is essen-		
.....vi	2		tial .....i	32	
School Fund.			of person in private affairs and		
applied exclusively to common			home .....i	7	
schools .....ix	2		Senate.		
apportionment by special act for-			advice and consent to appoint-		
bidden .....ii	28(7)		ments by governor.....xiii	1	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Senate (Cont'd).

impeachments tried by.....v	1
conviction requires two-thirds vote	1
legislative powers vested in.....ii	1
number of senators.....ii	2
presiding officer in absence of lieutenant-governor	10
quorum, majority to constitute...ii	8
reapportionment after each census	3
(see Legislature; Senators)	

Senatorial Districts.

allotment of counties	1
convenient and contiguous territory required	6
numbering to be consecutive....ii	6
representative districts not to be divided	6

Senators.

allotment of	6
apportionment	1
compensation and mileage.....ii	23
elections	6
impeachments tried by.....v	1
oath or affirmation required in..v	1
two-thirds necessary to convict	1
number	2
privilege from arrest.....ii	16
from civil process.....ii	16
qualifications	7
reapportionment after each census	3
recall, percentages required (amend. 8) [p. 135].....i	34
term of office.....ii	6
(see Senate)	

Separate Articles.

submission for adoption or rejection	17
form of ballot	18
prohibition (rejected).....xxvii	17
woman suffrage (rejected)	17

Sessions.

legislative, length of.....ii	12
biennial	12
time of meeting may be changed	12
each house to be open.....ii	11
except when secrecy required	11
special, may be convened by governor	7

Sewers.

power of cities to contract debts for	6
---	---

Sex.

educational privileges, no distinction on account of.....ix	1
denial of franchise on account of, legislature may provide against in school elections.....vi	2

Sheriffs.

accountability for fees and moneys	5
--	---

Sheriffs (Cont'd).

duties, term and salary to be prescribed	5
election to be provided for by legislature	5

Shores and Beds of Navigable Waters.

assertion of state ownership...xvii	1
disclaimer by state where patented	2
except in cases of fraud....xvii	2

Soldiers.

excluded from enumeration of inhabitants	3
quartering in private house forbidden	31
except in case of war.....i	31

Soldiers' Home.

admission granted to state militiamen, Union soldiers, sailors and marines	3
maintenance by state to be provided for	3

Special Legislation.

prohibited in enumerated cases...ii	28
-------------------------------------	----

Special Privileges.

grant of, prohibited.....i	12
invalid, when	2

Special Taxation.

local improvements in cities may be constructed by means of.....vii	9
---	---

Speech.

liberty of, guaranteed.....i	5
------------------------------	---

Standing Army.

not to be kept in time of peace...i	31
-------------------------------------	----

State.

boundaries	1
cession to United States of exclusive legislation over certain lands	1
reservation of right to serve process	1
compact with United States..xxvi	
congressional districts, division into	13
convict labor not to be let out by contract	29
corporations, ownership of stock in or loaning credit to, prohibited	9
credit not to be loaned.....viii	5
criminal prosecutions continued in name of state on change of government	5
debts, fines, penalties and forfeitures, accrued to territory inure to state	3
power to contract.....viii	1-3
limitation on power.....viii	1-3
money raised, how applied...viii	1
disclaimer of title to government or Indian lands.....xxvi	2
division into senatorial and representative districts	1, 2
education, duty to provide for all children	1

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

State (Cont'd).

harbors, restriction on sale of lands or rights in.....xv	1
Indian lands, when taxable....xxvi	2
lands granted to, held in trust for people .....xvi	1
ownership of beds and shores of navigable waters asserted ...xvii	1
public schools, assumption of duty of establishing .....xxvi	4
state institutions to be supported .....xiii	1
suits against, legislature to authorize .....ii	26
taxation, power to tax corporations not to be surrendered.....vii	4
territorial debts and liabilities, assumption by .....xxvi	3
property passes to state....xxvii	4
timber and stone on state lands, sale of .....xvi	3
title in lands patented by United States disclaimed by.....xvii	2
validation of void official acts may be by special law as against state .....ii	28(12)

State Auditor.

(see Auditor)

State Board of Health.

legislature to establish.....xx	1
---------------------------------	---

State Capital.

location, how made.....xiv	1
change of, method .....xiv	2
(see Seat of Government)	

State Courts.

jurisdiction of actions in territorial courts to be assumed by....xxvii	5
---	---

State Indebtedness.

annual expenses and state debt to be met by taxation.....vii	1
limit of aggregate debt.....viii	1
increase allowed to repel invasion .....viii	2
also for single work or object, after submission to vote..viii	3
losses in permanent school fund assumed as state debt.....ix	5
state may contract debts to meet .....viii	1

State Institutions.

officers appointed by governor, with advice of senate.....xiii	1
support by state required.....xiii	1

State Land Commissioner.

(see Commissioner of Public Lands)

State Lands.

(see Lands; Public Lands)

State Militia.

(see Militia)

Statement of Receipts and Expenditures.

annual publication required.....vii	7
-------------------------------------	---

State Officers.

abolition of certain offices, power granted legislature .....iii	25
--	----

State Officers (Cont'd).

compensation not to be changed during term, nor extra granted .....ii	25
elections to be quadrennial.....vi	8
contested, legislature to decide .....iii	4
first under constitution, how and when .....xxvii	7
ties to be settled by legislature .....iii	4
time of .....vi	8
impeachment, who liable to.....v	2
information to be furnished to governor in writing by.....iii	5
passes, acceptance and use prohibited.....xii, § 20; ii	39
qualifications .....iii	25
records, to be kept at seat of government .....iii	24
residence of certain, at state capital .....iii	24
salaries (see Salaries)	
terms .....iii	3

State Offices.

abolition of certain, permitted...iii	25
eligibility to .....iii	25

State Reformatories.

employment of chaplain for (amend. 4) [p. 131].....i	11
--	----

State Roads.

opening by special law permitted .....ii	28(2)
--	-------

State Seal.

description and custody.....ii	18
--------------------------------	----

State School Tax.

applied exclusively to common schools .....ix	2
---	---

State Taxes.

(see Taxation)

State Treasurer.

(see Treasurer)

Statistics.

bureau of, to be established.....ii	34
-------------------------------------	----

Statutes.

enacting clause, style of.....ii	18
when take effect.....ii	31
(see Acts; Bill; Laws)	

Stockholders.

consent necessary to increase of corporate stock .....xii	6
joinder as parties defendant in actions against corporation...xii	4
liability for corporate debts....xii	4
double in banking, insurance and joint stock companies.....xii	11
(see Corporations; Stock of Corporations)	

Stock of Corporations.

counties, cities, etc., not to own .....viii	7
fictitious increase void.....xii	6
increase allowed only under general law .....xii	6
with consent of majority of stockholders .....xii	6

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Stock of Corporations (Cont'd).

issued only to bona fide holders
.....xii 6
(see Corporations; Stockholders)

Stone.

sale from state lands authorized
.....xvi 8

Streets and Roads.

extension over tide lands per-
mittedxv 8
opening under special laws pro-
hibited except state roads..ii 28(2)
(see Highway; State Roads)

Students.

residence or absence does not affect
right to votevi 4

Suffrage.

crimes against, legislature to pro-
vide for (amend. 2) [p. 131]..vi 1
denial on account of sex, legisla-
ture may provide against in
school electionsvi 2
exercise of right to be free, equal
and undisturbedi 19
persons entitled to.....vi 1
excluded fromvi 3
woman suffrage, separate article
for (rejected)xxvii 17

Suits Against State.

legislature to make provision for
.....ii 26

Superintendent of Public Instruc- tion.

dutiesiii 22
electioniii 1
records to be kept at seat of gov-
ernmentiii 24
salaryiii 22
succession (amend. 6) [p. 132]..iii 10
term of officeiii 3

Superior Court.

assignment (first) of judges to
countiesiv 5
clerk of, county clerk is ex officio
.....iv 26
court commissioners, appointment
.....iv 23
of recordiv 11
decisions of causes to be made
within ninety days.....iv 20
election and districts.....iv 5
first, contests to be determined
howxxvii 12
eligibility toiv 17
grand jury summoned only on
order of judge.....i 26
judge, one for each county.....iv 5
each, where more than one, in-
vested with powers of all....iv 5
pro tempore, when authorized
.....iv 7
sits in any county, when.....iv 7
term of officeiv 5
judicial power, vested in.....iv 1
jurisdiction, original and appellate
.....iv 6
naturalization, power of.....iv 6

Superior Court (Cont'd).

open, except on nonjudicial days
.....iv 6
probate courts, appellate jurisdic-
tion overxxvii 10
jurisdiction, when to be assumed
.....xxvii 10
process extends to all parts of state
.....iv 6
report to supreme court defects in
lawsiv 25
rules of practice, may establish
.....iv 24
salaries of judges.....iv 13, 14
sealxxvii 9
sessions and distribution of business
.....iv 5
territorial causes and records pass
toxxvii 8
vacancies, governor to fill.....iv 5
writs, power to issue.....iv 6

Supreme Court.

chief justice, how determined...iv 3
classification of judges by lot...iv 3
one class vacates seats every two
yearsiv 3
clerk to be appointed.....iv 22
court of recordiv 11
decisions to be in writing and
state groundsiv 2
departments of court may be pro-
vidediv 2
election of judges.....iv 3
eligibility to office.....iv 17
judges, court to consist of five..iv 2
number may be increased.....iv 2
salariesiv 13, 14
term of officeiv 3
judicial power vested in.....iv 1
jurisdiction, original and appel-
lateiv 4
open except on nonjudicial days..iv 2
opinions to be published.....iv 21
quorum, majority of judges to form
and pronounce decisionsiv 2
report of defects in laws to be
made to governor.....iv 25
reporter to be appointed.....iv 18
sealxxvii 9
sessions to be held where.....iv 3
territorial supreme court, when ju-
risdiction over causes passes to
state courtxxvii 8
vacancies, governor to fill.....iv 3

Supreme Court Clerk.

(see Clerk of Supreme Court)

Supreme Court Reporter.

(see Reporter of Supreme Court)

Supreme Law.

constitution of United States is..i 2

Surgery.

practice of, to be regulated by law
.....xx 2

Surveyor.

may or may not be salaried officer
.....xi 8

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Swamp and Overflowed Lands.		Telegraph and Telephone Companies (Cont'd).			
disclaimer by state of title to patented	xvii	2	delay and discrimination in handling messages prohibited....xii	19	
Taxation.		Tenure of Office.			
annual tax for state debt and expenses may be levied.....vii	1	county officers ineligible for more than two terms in succession..xi		7	
assessment or collection by special laws prohibited	ii	28(5)	in office at adoption of constitution, how long to hold.....xxvii	14	
cities, power, to assess and collect local taxes	xi	12	extension of term not to be granted to county and local officers....xi	8	
corporate property subject to, same as individual	vii	3	state treasurer ineligible for succeeding term	iii	25
counties, power to assess and collect local	xi	12	(see Recall of Officers; Term of Office)		
deduction of debts from credits allowed	vii	2	Term of Office.		
deficiencies, state tax may be levied for	vii	8	attorney general	iii	3
exemption from, allowed certain property	vii	2	auditor of state.....	iii	3
of certain amount of personalty (amend. 3) [p. 132].....vii	2	2	commencement of term.....	iii	4
Indian lands, when.....	xxvi	2	of first officers elected under constitution	xxvii	16
United States lands, when..	xxvi	2	commissioner of public lands....	iii	3
expenses of state and state debt, annual tax for.....vii	1	1	county, district, precinct and township officers	xi	5
Indian lands, patented, how taxed	xxvi	2	governor	iii	2
jurisdiction, appellate, of supreme court	iv	4	judges of supreme court.....	iv	3
original, of superior court.....	iv	6	of superior court.....	iv	5
law imposing tax must state object	vii	5	lieutenant-governor	iii	3
levy only in pursuance of law....vii	5	5	officers not provided for in constitution, legislature to fix..xxvii	11	
proceeds applied only to object stated	vii	5	representatives	ii	4, 5
property subject to.....	vii	1, 2	secretary of state	iii	3
local, legislature no power to impose	xi	12	senators	ii	6
municipal corporations vested with power for general purposes and local improvements	vii	9	superintendent of public instruction	iii	3
nonresidents, lands of, how taxed	xxvi	2	treasurer of state.....	iii	3
property subject to.....	vii	1, 2	(see Recall of Officers; Tenure of Office)		
rolling stock of railroads subject to	xii	17	Territory.		
state purposes, payable into treasury in money only.....vii	6	6	accrued debts, fines, etc., inure to state	xxvii	3
taxes, no commutation of county's proportionate share	xi	9	bonds and recognizances given to, pass to state.....	xxvii	4
surrender of state's power to tax corporate property, prohibited	vii	4	courts of, continue until when	xxvii	8
towns, power to assess and collect taxes	xi	12	causes transferred to state courts	xxvii	5, 8
uniformity required in respect to persons and property.....vii	2, 9	2, 9	debts of, assumed by state....xxvi	3	
Technical Schools.		existing rights, change in form of government not to affect....xxvii		1	
included in public school system	ix	2	laws to remain in force.....xxvii	2	
Telegraph and Telephone Companies.		except those affecting tide lands		xxvii	2
common carriers	xii	19	liabilities, assumption of, by state	xxvi	3
construction of lines authorized	xii	19	officers to hold until superseded by state officers	xxvii	6
			process to be valid.....xxvii	1	
			property of, to vest in state..xxvii	4	

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Testimony.			
accused not required to testify			
against himself .....i	9		
except in case of bribery.....ii	30		
compulsory in cases of corrupt			
solicitation .....ii	30		
treason, what necessary for conviction			
.....i	27		
weight of, not affected by religious			
belief .....i	11		
(see Evidence)			
Tide Lands.			
ownership by state asserted...xvii	1		
streets may be extended over, by			
municipal corporations .....xv	3		
title to lands patented disclaimed			
by state .....xvii	2		
vested rights may be asserted in			
courts .....xvii	1		
Tide Waters.			
control and regulation within harbor			
areas .....xv	1-3		
Timber.			
sale of state lands, how.....xvi	3		
Timber Lands.			
sale of, when valid.....xvi	3		
Title.			
assertion by state in tide lands			
.....xvii	1		
disclaimer by state to patented			
lands .....xvii	2		
Tolerance.			
secured in matters of religious			
sentiment .....xxvi	1		
Toll.			
appellate jurisdiction of supreme			
court .....iv	4		
original jurisdiction of superior			
court .....iv	6		
Towns and Villages.			
amendment of charter by special			
act, prohibited .....ii	28(8)		
corporate stock or bonds not to be			
owned by .....viii	7		
credit not to be loaned, except..viii	7		
indebtedness, limitation on.....viii	6		
increase, power and restrictions			
on .....viii	6		
limit may be exceeded for water,			
light and sewers.....viii	6		
moneys to be deposited with treasurer			
.....xi	15		
use of, by official, a felony....xi	14		
officers, salaries of, not to be			
changed during term.....xi	8		
term not to be extended.....xi	8		
organization under general laws required			
.....xi	10		
police and sanitary regulations may			
be enforced .....xi	11		
taxation, power of.....xi	12		
local, legislature not to impose			
.....xi	12		
(see Municipal Corporations; Municipal			
Courts; Municipal Fine)			
Townships.			
county may adopt township form of			
organization by majority vote			
.....xi	4		
local affairs to be managed under			
general laws .....xi	4		
officers, election, duties, terms,			
compensation to be prescribed by			
legislature .....xi	5		
police and sanitary regulations,			
power to enforce.....xi	11		
salaries of officers not to be changed			
during term .....xi	8		
term of office not to be extended			
.....xi	8		
vacancies in office, how filled....xi	6		
Transportation Companies.			
commission to regulate may be established			
.....xii	18		
common carriers, subject to legislative			
control .....xii	13		
discrimination in charges prohibited			
.....xii	15		
excursion and commutation tickets			
may be issued.....xii	15		
passes not to be granted public			
officers .....xii	20		
pooling earnings prohibited.....xii	14		
(see Railroad Companies)			
Treason.			
acts constituting .....i	27		
evidence necessary for conviction			
.....i	27		
Treasurer.			
duties .....iii	19		
election .....iii	1		
ineligibility for succeeding term			
.....iii	25		
records to be kept at seat of government			
.....iii	24		
residence must be at seat of government			
.....iii	24		
salary .....iii	19		
succession (amend. 6).....iii	10		
term of office .....iii	3		
Treasury.			
moneys collected by municipal officers			
to be paid into.....xi	5		
paid out of state, when and how			
.....viii	4		
Trial by Jury.			
number of jurors in courts not of			
record .....i	21		
right of, remains inviolate.....i	21		
waiver in civil cases.....i	21		
verdict by less than twelve may be			
authorized in civil cases.....i	21		
Trustees.			
appointment for state institutions			
.....xiii	1		
Trusts.			
forfeiture of property and franchise			
may be enforced.....xii	22		
prohibited under penalty.....xi	22		
Twice in Jeopardy.			
not to be subjected to for same			
offense .....i	9		

INDEX TO STATE CONSTITUTION.

(References are to Articles and Sections.)

Uniformity.

in system of county government to
be provided for.....xi 4
in taxation, required.....vii 2, 9

United States.

compact of state with.....xxvi 1
consent of, necessary in disposing
of certain lands.....xvi 2
constitution is supreme law of land
.....i 14
office under, acceptance vacates seat
in legislatureii 6
officers for territory hold until
superseded by statexxvii 2
taxation of lands of, not to be im-
posedxxvi 2
title to unappropriated lands re-
mains inxxvi 2
(see Congress; Federal Officers;
Forts; Dockyards, etc.; Indian
Lands)

Vacancies in Office.

county, township, precinct and road
district filled by county commis-
sionersxi 6
judges of supreme and superior
courts, governor to fill.....iv 3, 5
legislature, writs of election to be
issued by governor.....ii 15
state, filled by governor until next
electioniii 13

Validating Acts.

relating to deeds, etc., by special
laws, prohibitedii 28(9)

Validity of Statute.

appellate jurisdiction of supreme
courtiv 4

Verdict.

number of jurors may be less than
twelve in civil cases.....i 21

Vested Rights.

in tide lands, protected.....xvii 1

Veto.

governor has power to.....iii 12
denied when (amend. 7) [p. 133]
.....ii 1
two-thirds vote necessary to pass
bill overiii 12

Village.

(see Towns and Villages)

Vital Statistics.

bureau of, to be created.....xx 1

Vote.

by ballot on all elections.....vi 6
congressional election, how deter-
minedxxvii 13
first election to be under territorial
lawxxvii 15
initiative and referendum (amend.
7)ii 1
legislative elections to be viva voce
.....ii 27
persons entitled to (amend. 5)
[p. 132]vi 1

Vote (Cont'd).

not entitled to.....vi 3
registration a prerequisite, when.vi 7
residence of certain persons not to
affect rightvi 4
school elections, women may be
given rightvi 2
(see Elections; Electors)

Voter.

absence of certain persons not to
affect rights as.....vi 4
exempt from military duty on elec-
tion dayvi 5
privilege from arrest, when.....vi 5
qualifications of (amend. 5).....vi 1
(see Elective Franchise; Electors)

Water and Water Rights.

appropriation for irrigation, etc.,
declared a public use.....xxi 1
municipal corporations, power to
contract debt for.....viii 6
restrictions on sale by state.....xv 1

Wharves.

harbor areas to be leased for, under
general lawsxv 2
limit of term of lease.....xv 2
(see Area Reserved; Harbors;
Navigable Waters)

Wills.

validation by special law pro-
hibitedii 28(9)

Witness.

crimination of self in bribery
cases compulsoryii 30
not compelled to testify against
himselfi 9
number necessary for conviction in
treasoni 27
religious belief not ground of com-
petencyi 11
(see Testimony)

Woman Suffrage.

adopted (amend. 5) [p. 132]....vi 1
denial in school elections may be
provided againstvi 2
separate article submitted (re-
jected)xxvii 17

Worship, Religious.

freedom guaranteedi 11

Writs.

issuance and service on nonjudicial
daysiv 6
jurisdiction of supreme court....iv 4
of superior court.....iv 6
of election, power of governor to
issueii 15

Yeas and Nays.

allowing introduction of bills within
ten days of adjournment.....ii 36
entered on journal, when.....ii 21
taken on final passage of bills....ii 22
on passage of emergency clauses
.....ii 31
(see Ayes and Noes)

VOLUME I

CODES OF PROCEDURE

OF THE

STATE OF WASHINGTON

TITLE I.

COURTS.

CHAPTER I.—THE SUPREME COURT.

- | | |
|---|--|
| <p>1. Jurisdiction—Powers incident to appellate jurisdiction—Writ of habeas corpus.</p> <p>2. A court of record—General powers.</p> <p>3. Courthouse and rooms—Furnishing.</p> <p>4. Always open—Sessions.</p> <p>5. Effect of adjournments.</p> <p>6. Style of process.</p> <p>7. The seal.</p> <p>8. Two departments—Assignment of Judges—Quorum.</p> | <p>9. Apportionment of business—Order for hearings en banc.</p> <p>10. Decisions of department—Finality—Rehearings.</p> <p>11. Hearings en banc—Quorum—Finality of decision.</p> <p>12. Acting chief justice.</p> <p>13. Rules of practice and form of process.</p> <p>14. Effect of judgment.</p> |
|---|--|

CHAPTER II.—SUPERIOR COURTS.

- | | |
|--|--|
| <p>15. Original jurisdiction of superior courts.</p> <p>16. Naturalization of aliens.</p> <p>17. Appellate jurisdiction.</p> <p>18. Courts of record—Always open—Sessions.</p> <p>26. Effect of adjournments.</p> <p>27. Judge of another county to sit—Designation by governor.</p> <p>28. Sessions held at request of another judge.</p> <p>29. Number of sessions at same time—Effect of acts of visiting judge.</p> <p>30. Expenses of judge called to another county.</p> <p>32. Jurisdiction—Process—Venue.</p> <p>35. Process, to whom directed.</p> <p>36. Judges to establish uniform rules.</p> <p>38. Seal.</p> <p>39. Limit of time for decision.</p> <p>40. Judges pro tempore—Appointment—Oath—Compensation.</p> | <p>41. Powers of judge in other counties of his district.</p> <p>42. Decisions and rulings out of his own district.</p> <p>42-1. Official court reporter—Appointment—Term—Removal—Bond.</p> <p>42-2. Duties of reporter.</p> <p>42-3. Compensation of reporter.</p> <p>42-4. Additional fees to be paid reporter.</p> <p>42-5. Transcript of notes—Fees—Criminal cases.</p> <p>42-6. Transcript accorded verity.</p> <p>42-7. Subsequent transcript.</p> <p>42-8. Reporter pro tem.</p> <p>42-9. Court amanuensis—Compensation.</p> <p>42-10. Court files accessible to reporters.</p> <p>42-11. Office expenses.</p> <p>42-12. Substituted reporters.</p> <p>42-13. Application of act.</p> |
|--|--|

CHAPTER III.—JUSTICES' COURTS.

- | | |
|---|--|
| <p>43. General powers of justices of the peace.</p> <p>44. Jurisdiction in civil actions and proceedings.</p> <p>45. Restrictions on civil jurisdiction.</p> <p>46. Jurisdiction in criminal cases—Cities of first and other classes.</p> | <p>47. Territorial jurisdiction of justices—Residence.</p> <p>48. Office, where held—Process.</p> <p>49. Not to office with an attorney, except.</p> |
|---|--|

COURTS.

CHAPTER IV.—MAGISTRATES.

- | | | | |
|-----|---------------------------|-----|----------------------|
| 50. | Definition of magistrate. | 51. | Who are magistrates. |
|-----|---------------------------|-----|----------------------|

CHAPTER V.—POWERS AND GENERAL PROVISIONS.

- | | | | |
|-------|--|-------|---|
| 52. | Powers of courts respecting conduct of judicial proceedings. | 62. | Labor Day. |
| 53. | Court may punish for contempt. | 63. | Lincoln's Birthday. |
| 54. | Judicial officer defined—When disqualified. | 63-1. | Columbus Day. |
| 55. | When may act as attorney. | 64. | No courts on legal holidays, except, etc. |
| 56. | Judge as distinguished from a court. | 65. | Sitting deemed adjourned over legal holiday. |
| 57. | Powers of judicial officers. | 66. | Proceedings may be adjourned from time to time. |
| 58. | Judicial officer may punish for contempt. | 67. | Proceedings not to fail for want of judge of court. |
| 59. | Judges to exercise certain powers. | 68. | Court may provide rooms, etc. |
| 60. | Inferior judicial officers—Powers. | 69. | Proceeding when mode not prescribed. |
| 61. | Legal holidays. | | |
| 61-1. | Holiday follows Sunday. | | |

CHAPTER VI.—COUNTY CLERKS—CLERK OF SUPERIOR COURT.

- | | | | |
|-----|---|-----|---|
| 70. | Bond of clerk—Conditions—When filed, etc. | 75. | Books to be kept by county clerk. |
| 71. | Amount of bond. | 76. | Custody and delivery of books, etc. |
| 72. | New bond, when may be required—Penalty for failure to file. | 77. | Powers and duties of clerks of supreme and superior courts. |
| 73. | Office—Where kept—When to be open. | 78. | Deputies, appointment and powers of. |
| | | 81. | Clerks not to practice law. |

CHAPTER VII.—REFEREES AND COURT COMMISSIONERS.

- | | | | |
|-----|--|-----|------------------------------|
| 82. | Referees—Definition and powers of. | 85. | Powers of commissioner—Fees. |
| 83. | Court commissioners—Appointment—Qualifications—Term of office. | 86. | Revision by superior court. |
| | | 87. | Salary. |
| | | 88. | Oath. |

CHAPTER VIII.—JURORS.

- | | | | |
|-----|--|------|---|
| 89. | Jury, definition of. | 100. | Excused from service. |
| 90. | Different kinds of juries. | 101. | Separation of jury. |
| 91. | Grand jury, defined. | 102. | Felon not competent. |
| 92. | Petit jury, defined. | 103. | Who are exempt—Effect of disqualification on verdict. |
| 93. | Jury of inquest, defined. | 104. | Public interest as excuse. |
| 94. | Qualification of jurors. | 105. | Drawing in certain counties in absence of judge. |
| 95. | Persons exempt—Preparation of lists—Claim of exemption by women. | 106. | Irregularities do not invalidate. |
| 96. | Jury list—Yearly revision. | 107. | Proceedings when venire set aside. |
| 97. | Jury terms—Jury how drawn. | 108. | Sheriff to summon jurors. |
| 98. | Grand jurors—How drawn. | 110. | Venire to fill incomplete panel. |
| 99. | Additional names—Open venire. | 111. | Juror not to be summoned twice in one year. |

CHAPTER IX.—ATTORNEY GENERAL AND PROSECUTING ATTORNEYS.

- | | | | |
|------|--|------|---|
| 112. | Powers and duties of attorney general. | 115. | Deputy prosecuting attorneys—Appointment. |
| 113. | Prosecuting attorneys defined. | 116. | General powers and duties of prosecuting attorneys. |
| 114. | Appointment by the court. | | |

CHAPTER X.—ATTORNEYS AND COUNSELORS AT LAW.

- | | | | |
|------|--|------|--|
| 118. | Attorney and counsel defined. | 131. | Proceedings when attorney appears without authority. |
| 129. | Duties of attorneys and counselors. | 132. | Attorney may be required to show authority. |
| 130. | Authority of attorneys and counselors. | | |

- | | |
|---|---|
| <p>133. Change of attorneys.
 134. Notice of change and substitution.
 135. Proceedings on death or removal of attorney.
 136. Lien of attorneys.
 137. Proceedings to compel delivery of papers.
 138. Proceedings where lien exists.
 139-1. State Board of Law Examiners—Appointment—Term—Compensation.
 139-2. Secretary, Records and Meetings.
 139-3. Applications to Practice—Certification—Admission.
 139-4. Qualifications of Admission to Practice.
 139-5. Practice of Law—Restrictions—Associates of Prosecutor.
 139-6. Affidavit upon Application.
 139-7. Residents of Another State.
 139-8. Board to Investigate and Recommend.</p> | <p>139-9. Admission on Accredited Certificate—Definition.
 139-10. Approved Schools—Credits.
 139-11. Registration and Course of Study Outside Approved School.
 139-12. Oath Before Admission.
 139-13. Fee on Admission.
 139-14. Disbarment or Suspension—Grounds.
 139-15. Code of Ethics.
 139-16. Complaints and Hearings Thereon.
 139-17. Proceedings upon Hearings—Duties of Prosecuting Attorney—Witness Fees and Costs.
 139-18. Supreme Court—Hearings and Judgment.
 139-19. Forms, Rules and Regulations.
 139-20. Annual Registration—Fees—Failure to Register—Effect.
 139-21. Record of Attorneys.
 139-22. Violations.
 139-23. Repealing Clause.</p> |
|---|---|

CHAPTER I.

THE SUPREME COURT.

Judges of: See "State Officers," § 11035 et seq., infra.

Clerk, reporter, etc.: See "State Officers," § 11055 et seq., infra.

§ 1. Jurisdiction—Powers Incident to Appellate Jurisdiction—Writs of Habeas Corpus.

The supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, excepting that its appellate jurisdiction shall not extend to civil actions at law for the recovery of money or personal property, when the original amount in controversy or the value of the property does not exceed the sum of two hundred dollars, unless the action involves the legality of a tax, impost, assessment, toll, municipal fine, or the validity of a statute. The supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. Each of the judges shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or before the supreme court, or before any superior court of the state, or any judge thereof. [L. '90, p. 322, § 6; 2 H. C., § 1; Const., Art. IV, § 4.]

Cited in 22 Wash. 362; 32 Wash. 53; 37 Wash. 511; 41 Wash. 152; 51 Wash. 310.

Jurisdiction of the supreme court dependent on validity of statute or ordinances: See Remington's Digest, App. & E., § 26; Doty v. Krutz, 13 Wash. 169, 43 Pac. 17; Jacobs v. Puyallup, 10 Wash. 384, 38 Pac. 994; Huber v. Brown, 17 Wash. 4, 48 Pac. 412; Cox v. Holmes,

14 Wash. 255, 44 Pac. 262; Shook v. Sexton, 37 Wash. 509, 79 Pac. 1093; Sherman v. Eastern & Western Lumber Co., 56 Wash. 69, 105 Pac. 166.

Dependent on legality of tax, assessment or fine: See Remington's Digest, App. & E., § 27; Hansen v. Nilson, 17 Wash. 606, 50 Pac. 511; Thomas v. Lincoln County, 41 Wash. 150, 83 Pac. 18;

Sylvester v. Franklin County, 90 Wash. 648, 156 Pac. 843.

Dependent on amount or value in controversy: See *Remington's Digest*, App. & E., §§ 33—42.

Requisite amount or value, \$200: *State ex rel. Egbert v. Superior Court*, 9 Wash. 369, 37 Pac. 489; *National Grocery Co. v. Cann*, 39 Wash. 596, 81 Pac. 1034; *State ex rel. Ide v. Coon*, 40 Wash. 682, 82 Pac. 993; *State ex rel. Bassett v. Frcasure*, 39 Wash. 198, 81 Pac. 688; *State ex rel. Plaisie v. Cole*, 40 Wash. 474, 82 Pac. 749; *Johnson v. Joslyn*, 47 Wash. 531, 92 Pac. 413; *State ex rel. Lack v. Meads*, 49 Wash. 468, 95 Pac. 1022; *State ex rel. Simpson v. Smith*, 102 Wash. 574, 173 Pac. 428.

Prohibition does not lie to prevent the superior court from proceeding without jurisdiction to hear a civil action at law for the recovery of money involving less than \$200, the constitutional limitation upon the jurisdiction of the supreme court, the lower court's decision as to its jurisdiction being final: *State ex rel. Home Tel. & Tel. Co. v. Hurn*, 106 Wash. 362, 180 Pac. 400.

Amount claimed not amount recovered: *Blecker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073; *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Trumbull v. School District No. 7*, 22 Wash. 631, 61 Pac. 714; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378; *Johnson v. Goodenough*, 103 Wash. 625, 175 Pac. 306; *Ingham v. Wm. P. Harper & Son*, 71 Wash. 286, 128 Pac. 675, Ann. Cas. 1914C, 528; *Johnson v. Pacific Power & Light Co.*, 90 Wash. 492, 156 Pac. 530. But see *Doty v. Krutz*, 13 Wash. 169, 43 Pac. 17.

Amount claimed or value of property: *Herrin v. Pugh*, 9 Wash. 637, 38 Pac. 213; *Edison v. Woolery*, 10 Wash. 225, 38 Pac. 1025; *Graves v. Thompson*, 35 Wash. 282, 77 Pac. 384 (overruling *Freeburger v. Caldwell*); *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835; *Donahue v. Hardman Estate*, 91 Wash. 125, 157 Pac. 478; *Schreiner v. Emel*, 26 Wash. 555, 67 Pac. 228.

Amount, how determined: *Schreiner v. Emel*, 26 Wash. 555, 67 Pac. 228; *Graves v. Thompson*, 35 Wash. 282, 77 Pac. 384; *Gilbert Co. v. Husted*, 50 Wash. 61, 96 Pac. 835; *Fidelity and Deposit Co. v. Faben*, 51 Wash. 308, 98 Pac. 764; *Sherman v. Babcock*, 92 Wash. 546, 159 Pac. 781; *Sherman v. Babcock*, 92 Wash. 546, 159 Pac. 781.

What constitutes the claim, attorneys' fees and costs: *Durand v. Simpson Logging Co.*, 21 Wash. 21, 56 Pac. 846; *Leavitt v. Carr*, 22 Wash. 361, 60 Pac.

1044; *Fidelity & Deposit Co. v. Faben*, 51 Wash. 308, 98 Pac. 764; *Williams v. Lindenberger Packing Co.*, 86 Wash. 292, 150 Pac. 432.

Interest accrued: *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Ingham v. Wm. P. Harper & Son*, 71 Wash. 286, 128 Pac. 675, Ann. Cas. 1914C, 528; *Pickford v. Borland*, 76 Wash. 339, 136 Pac. 128; *Sherman v. Babcock*, 92 Wash. 546, 159 Pac. 781.

Effect of setoff or counterclaim: *Sorrell v. McGougan*, 44 Wash. 558, 87 Pac. 825; *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440; *Northern Pac. R. Co. v. Shoemaker*, 69 Wash. 140, 124 Pac. 385, Ann. Cas. 1914A, 1040; *Gorham-Revere Rubber Co. v. Broadway Automobile Co.*, 71 Wash. 578, 129 Pac. 89; *Jaklewicz v. Lenhart*, 86 Wash. 138, 149 Pac. 642.

Aggregated claims, interests or judgments: *Lotz v. Mason County*, 6 Wash. 166, 32 Pac. 1049; *Goodyear Rubber Co. v. Schreiber*, 29 Wash. 94, 69 Pac. 648; *Garneau v. Port Blakely Mill Co.*, 20 Wash. 97, 54 Pac. 771; *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337.

See, also, *Cascade Construction Co. v. Snohomish County*, 105 Wash. 484, 178 Pac. 470; *State ex rel. Home Tel. & Tel. Co. v. Hurn*, 106 Wash. 362, 180 Pac. 400.

Reduction by amendment or remission: *Huber v. Brown*, 17 Wash. 4, 48 Pac. 412; *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869; *Dodge v. Corliss*, 28 Wash. 474, 68 Pac. 869; *Gabriel v. Seattle & M. R. Co.*, 7 Wash. 515, 35 Pac. 410; *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Taylor v. Spokane Falls etc. R. Co.*, 32 Wash. 450, 73 Pac. 499; *Flick v. Showalter*, 51 Wash. 345, 99 Pac. 9.

Reduction by payment or other satisfaction: *Fenton v. Morgan*, 16 Wash. 30, 47 Pac. 214; *Puyallup Light etc. Co. v. Stevenson*, 21 Wash. 604, 59 Pac. 504; *Stewart v. Hanna*, 35 Wash. 148, 76 Pac. 688.

Original jurisdiction in general: See *Remington's Digest*, Courts, § 56; *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *State ex rel. Stearns v. Smith*, 6 Wash. 496, 33 Pac. 974; *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091; *Sullivan v. Sullivan*, 49 Wash. 508, 95 Pac. 1095; *State ex rel. Hoppe v. Superior Court*, 68 Wash. 500, 123 Pac. 786; *State ex rel. Prentice v. Superior Court*, 86 Wash. 90, 149 Pac. 321; *State ex rel. McGhee v. Superior Court*, 99 Wash. 619, 170 Pac. 130.

Issuance of prerogative writs and who are state officers: See *Remington's Digest*,

Courts, § 57; *Rafferty, In re*, 1 Wash. 382, 25 Pac. 465; *State ex rel. German-Am. etc. Bank v. Superior Court*, 12 Wash. 677, 42 Pac. 123; *State ex rel. Amsterdamsch etc. v. Superior Court*, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111; *Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780; *State ex rel. North Coast Fire Ins. Co. v. Schively*, 68 Wash. 148, 122 Pac. 1120; *Hill v. Howell*, 70 Wash. 603, 127 Pac. 211; *State ex rel. Pacific American Fisheries v. Darwin*, 81 Wash. 1, 142 Pac. 441; *State ex rel. Murphy v. Taylor*, 101 Wash. 148, 172 Pac. 217.

Mandamus—State officers: State ex rel. Home Tel. & Tel. Co. v. Hurn, 106 Wash. 362, 180 Pac. 400.

Prohibition—Amount in controversy: Id.

For text treatment of "Courts," see 7 R. C. L. 969.

Original jurisdiction of state court of last resort to issue mandamus. 20 Ann. Cas. 184; 58 L. R. A. 833; 38 L. R. A. (N. S.) 1000.

Original jurisdiction of appellate court to issue writ of habeas corpus. Ann. Cas. 1913A, 156.

Constitutional and statutory grants of superintending control over inferior tribunals. 51 L. R. A. 37; 20 L. R. A. (N. S.) 943.

Inherent power of supervisory control of appellate court over inferior courts. 51 L. R. A. 34.

§ 2. A Court of Record—General Powers.

The supreme court shall be a court of record, and shall be vested with all power and authority necessary to carry into complete execution all its judgments, decrees, and determinations in all matters within its jurisdiction, according to the rules and principles of the common law, and the constitution and laws of this state. [L. '90, p. 323, § 10; 2 H. C., § 2; Const., Art. IV, § 11.]

Cited in 6 Wash. 159.

§ 3. Courthouse and Rooms—Furnishing.

If proper rooms in which to hold the court, and for the accommodation of the officers thereof, are not provided by the state, together with attendants, furniture, fuel, lights, record books and stationery, suitable and sufficient for the transaction of business, the court, or any three justices thereof, may direct the clerk of the supreme court to provide the same; and the expense thereof, certified by any three justices to be correct, shall be paid out of the state treasury, out of any funds therein not otherwise appropriated. Such moneys shall be subject to the order of the clerk of the supreme court, and be by him disbursed on proper vouchers, and accounted for by him in annual settlements with the state auditor. [L. '90, p. 322, § 4; 2 H. C., § 3; Const., Art. IV, § 2.]

The first part of this section is omitted, as it is covered by the next section.

§ 4. Always Open—Sessions.

The supreme court shall always be open for the transaction of business except on nonjudicial days. It shall hold regular sessions for the hearing of causes en banc, and in each of its departments, at the capital of the state [on the second Mondays of January, May, and October of each year]. Special sessions at the same place may be held at such other times as may be prescribed by the judges of such court. [L. '09, p. 36, § 7.]

See *infra*, § 64, business authorized to be transacted on nonjudicial days.

Cited in 1 Wash. 268; 2 Wash. 369; 44 Wash. 148; 102 Wash. 414.

There are no terms of the supreme court in the sense in which they were formerly held, but only a division of its sittings into sessions: *Skagit R. & L. Co. v. Cole*, 1 Wash. 330, 26 Pac. 535.

The close and termination of a session, provided for by this section, does not preclude the court from entertaining an application to recall a remittitur and vacate a judgment entered at such term: *Gordon v. Hillman*, 102 Wash. 411, 173 Pac. 22.

§ 5. Effect of Adjournments.

Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. [L. '90, p. 323, § 7; 2 H. C., § 4.]

§ 6. Style of Process.

Its process shall run in the name of the "state of Washington," bear test in the name of the chief justice, be signed by the clerk of the court, dated when issued, sealed with the seal of the court, and made returnable according to law, or such rule or orders as may be prescribed by the court. [L. '90, p. 323, § 11; 2 H. C., § 7.]

§ 7. The Seal.

The seal of the supreme court shall be the vignette of General George Washington, with the words "Seal of the Supreme Court, State of Washington," surrounding the vignette. [L. '90, p. 324, § 17; 2 H. C., § 8; Const., Art. XXVII, § 9.]

§ 8. Two Departments—Assignment of Judges—Quorum.

There shall be two departments of the supreme court, denominated respectively department one and department two. The chief justice shall assign four of the associate judges to each department and such assignment may be changed by him from time to time: Provided, that the associate judges shall be competent to sit in either department and may interchange with one another by agreement among themselves, or if no such agreement be made, as ordered by the chief justice. The chief justice may sit in either department and shall preside when so sitting, but the judges assigned to each department shall select one of their number as presiding judge. Each of the departments shall have the power to hear and determine causes, and all questions arising therein, subject to the provisions in relation to the court en banc. The presence of three judges shall be necessary to transact any business in either of the departments, except such as may be done at chambers, but one or more of the judges may from time to time adjourn to the same effect as if all were present, and a concurrence of three judges shall be necessary to pronounce a decision in each department: Provided, that if three do not concur, the cause shall be reheard in the same department or transmitted to the other department, or to the court en banc. [L. '09, p. 34, § 3. For former laws relating to quorum, see L. '90, p. 322, § 5; 2 H. C., § 5; Bal. Code, § 4654; L. '05, p. 14, § 2. See, also, Const., Art. IV, § 2.]

Cited in 53 Wash. 554, 555.

It was competent for the legislature to increase the number of judges pro-

vided by Const., Art. IV, § 2: *State ex rel. Vanderveer v. Gormley*, 53 Wash. 453, 102 Pac. 435.

§ 9. Apportionment of Business—Order for Hearings en Banc.

The chief justice shall from time to time apportion the business to the departments, and may, in his discretion, before a decision is pronounced, order any cause pending before the court to be heard and determined by the court en banc. When a cause has been allotted to one of the departments and a decision pronounced therein, the chief justice, together with any two associate judges, may order such cause to be heard and decided by the court en banc. Any four judges may, either before or after decision by a department, order a cause to be heard en banc. [L. '09, p. 34, § 4.]

§ 10. Decisions of Department—Finality—Rehearings.

The decision of a department, except in cases otherwise ordered as hereinafter provided, shall not become final until thirty days after the filing thereof, during which period a petition for rehearing, or for a hearing en banc, may be filed, the filing of either of which, except as hereinafter otherwise provided, shall have the effect of suspending such decision until the same shall have been disposed of. If no such petition be filed the decision of a department shall become final thirty days from the date of its filing, unless during such thirty-day period an order for a hearing en banc shall have been made: Provided, that if for any cause the chief justice or a majority of the department rendering any decision shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect, and a judgment issue thereon, any time after its filing and prior to such thirty-day period, upon being in writing approved by the chief justice and any two associate judges who took no part in rendering such decision. The effect of granting a petition for a rehearing, or of ordering a cause once decided by department to be heard en banc, shall be to vacate and set aside the decision. Whenever a decision shall become final, as herein provided, a judgment shall issue thereon. [L. '09, p. 35, § 4.]

Cited in 53 Wash. 554. 555.

§ 11. Hearings en Banc—Quorum—Finality of Decision.

The chief justice, or any four judges, may convene the court en banc at any time, and the chief justice shall be the presiding judge of the court when so convened. The presence of five judges shall be necessary to transact any business, and a concurrence of five judges present at the argument shall be necessary to pronounce a decision in the court en banc: Provided, that if five of the judges so present do not concur in a decision, then reargument shall be ordered and all the judges qualified to sit in the cause shall hear the argument, but to render a decision a concurrence of five judges shall be necessary; and every decision of the court en banc shall be final except in cases in which no previous decision has been rendered in one of the departments, and in such cases the decision of the court en banc shall become final thirty days after its filing, unless during such period a petition for rehearing be filed. The filing of such petition within such period shall have the effect of suspending the decision until disposed of by the concurrence of five judges:

Provided, that if for any cause five judges shall be of the opinion that such decision should go into effect prior to thirty days after its filing, it shall go into effect any time after its filing and prior to such thirty-day period upon being in writing approved by six judges of such court. Whenever a decision shall become final as herein provided, a judgment shall issue thereon. [L. '09, p. 35, § 5.]

Cited in 53 Wash. 554, 555.

§ 12. Acting Chief Justice.

In cases of the absence of the chief justice, or his inability to act, the judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall perform the duties and exercise the powers of the chief justice during such absence or inability to act. In case there shall be two or more judges having in like manner the same short term, the other judges of the supreme court shall determine which of them shall perform the duties and exercise the powers of the chief justice during such absence or inability to act. [L. '09, p. 36, § 6.]

§ 13. Rules of Practice and Form of Process.

The supreme court may from time to time institute such rules of practice and prescribe such forms of process to be used in such court and in the court en banc and each of its departments, and for the keeping of the dockets, records and proceedings, and for the regulation of such court, including the court en banc and in departments, as may be deemed most conducive to the due administration of justice. [L. '09, p. 36, § 8. Cf. L. '90, p. 323, § 12; 2 H. C., § 6; Bal. Code, § 4655.]

§ 14. Effect of Judgment.

The judgments and decrees of the supreme court shall be final and conclusive upon all the parties properly before the court. [L. '90, p. 323, § 8; 2 H. C., § 9.]

Nature of decision as affecting its conclusiveness: See Remington's Digest, App. & E., § 472, and cases cited.

Former decision as law of case: See Remington's Digest, App. & E., § 473, and cases cited.

Persons concluded: See Remington's Digest, App. & E., § 474, and cases cited.

Questions concluded: See Remington's Digest, App. & E., § 475, and cases cited.

Questions not concluded: See Remington's Digest, App. & E., § 476, and cases cited.

CHAPTER II.

SUPERIOR COURTS.

Judges of: See "State Officers," § 11045 et seq., infra.

§ 15. Original Jurisdiction of Superior Courts.

The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to one hundred dollars, and in

all criminal cases amounting to felony, and in all cases of misdemeanor not otherwise provided for by law; of actions of forcible entry and detainer; of proceedings in insolvency; of actions to prevent or abate a nuisance; of all matters of probate, of divorce, and for annulment of marriage, and for such special cases and proceedings as are not otherwise provided for; and shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court, and shall have the power of naturalization, and to issue papers therefor. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunctions and writs of prohibition and of habeas corpus may be issued on legal holidays and nonjudicial days. [L. '90, p. 342, § 5; 2 H. C., § 10; Const., Art. IV, § 6.]

Cited in 32 Wash. 53; 43 Wash. 228; 68 Wash. 490; 103 Wash. 40.

Jurisdiction of property or other subject matter involved—In general: See Remington's Digest, Courts, § 3; State ex rel. Dodge v. Langhorne, 12 Wash. 588, 41 Pac. 917.

— Situation of real property: See Remington's Digest, Courts, § 4; Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Carkeek v. Boston Nat. Bank, 16 Wash. 399, 47 Pac. 884; Lindsley v. Union Silver Star Min. Co., 26 Wash. 301, 66 Pac. 382; Puget Sound Nat. Bank v. Fisher, 52 Wash. 246, 100 Pac. 724, 17 Ann. Cas. 526; Olympia Mining & Milling Co. v. Kerns, 64 Wash. 545, 117 Pac. 260; Smith v. Fletcher, 102 Wash. 218, 173 Pac. 19, 636.

— Situation of personal property: See Remington's Digest, Courts, § 5; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73.

Mode of acquiring jurisdiction in general: See Remington's Digest, Courts, § 6; State ex rel. Peterson v. Superior Court, 6 Wash. 417, 34 Pac. 151; Munch v. McLaren, 9 Wash. 676, 38 Pac. 205.

Judicial departments, circuits and districts: See Remington's Digest, Courts, § 18; Leschi v. Territory, 1 W. T. 13; Wood v. Mastick, 2 W. T. 64, 3 Pac. 612; McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76; State ex rel. Dustin v. Rusk, 15 Wash. 403, 46 Pac. 387; State ex rel. Lytle v. Superior Court, 54 Wash. 378, 103 Pac. 464; State ex rel. Lytle v. Superior Court, 54 Wash. 378, 103 Pac. 464.

Organization and incidents of existence—In general: See Remington's Digest, Courts, §§ 19, 20; Gunderson v. Cochrane, 3 Wash. 476, 28 Pac. 1105; Shephard v. Gove, 26 Wash. 452, 67 Pac. 256.

Courts of record: Barbee, In re, 19 Wash. 306, 53 Pac. 155; Reformed Presby-

terian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

Presumption as to jurisdiction—In general: See Remington's Digest, Courts, § 41; Baldwin v. Baer, 10 Wash. 414, 39 Pac. 117; Kizer v. Caulfield, 17 Wash. 417, 49 Pac. 1064; State ex rel. State Ins. Co. v. Superior Court, 14 Wash. 203, 44 Pac. 131; State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; Bird v. Winyer, 24 Wash. 269, 64 Pac. 178; Magee v. Big Bend Land Co., 51 Wash. 406, 99 Pac. 16.

Courts invested with probate jurisdiction: See Remington's Digest, Courts, § 47; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107; Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502; Sloan v. West, 63 Wash. 623, 116 Pac. 272; Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

Administration of decedents' estates: See Remington's Digest, Courts, § 48; Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863 (reversed on writ of error in Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896); Webster v. Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1086; State ex rel. Cox v. Superior Court, 21 Wash. 575, 59 Pac. 483; Macdonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502; Ritchie v. Trumbull, 89 Wash. 389, 154 Pac. 816.

Guardianship and estates of infants: See Remington's Digest, Courts, § 49; Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

Ancillary and incidental jurisdiction: See Remington's Digest, Courts, § 50; Webster v. Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1086; Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593;

Winston v. Crowe, 28 Wash. 65, 68 Pac. 174.

Determination of title to property: See Remington's Digest, Courts, §§ 51, 52; Stewart v. Lohr, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150.

Prohibition as a process for review

of question of jurisdiction. **Ann. Cas.** 1913D, 595.

Jurisdiction of action to recover personality located in another state. **Ann. Cas.** 1913B, 838.

Courts-martial as subject to review by civil courts. 17 **Ann. Cas.** 445.

§ 16. Naturalization of Aliens.

The superior courts of the several counties shall have jurisdiction, and it shall be their duty to hear applications and proofs by aliens to become citizens of the United States, and to grant certificates of citizenship to such applicants, in accordance with section 2165 of the Revised Statutes of the United States. [L. '86, p. 113, § 1; Const., Art. IV, § 6.]

Jurisdiction and proceedings: See Remington's Digest, Aliens, §§ 6—8; Yamashita, In re, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L. R. A. 671;

State ex rel. Newman v. Libby, 47 Wash. 481, 92 Pac. 350; State ex rel. Gorelick v. Superior Court, 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

§ 17. Appellate Jurisdiction.

The superior courts shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. [L. '90, p. 343, § 6; 2 H. C., § 12; Const., Art. IV, § 6.]

Cited in 60 Wash. 548.

§ 18. Courts of Record—Always Open—Sessions.

The superior courts are courts of record, and shall be always open, except on nonjudicial days. They shall hold their sessions at the county seats of the several counties, respectively. They shall hold regular and special sessions in the several counties of this state at such times as may be prescribed by the judge or judges thereof. [L. '90, p. 343, § 7; 2 H. C., § 13. Cf. L. '91, p. 89, § 1; 2 H. C., § 41; Bal. Code, § 4708; Const., Art. IV, §§ 6, 11.]

Cited in 54 Wash. 392.

Powers and proceedings at chambers or out of court: See Remington's Digest, Judges, § 15; Ainsworth v. Territory, 3 W. T. 270, 14 Pac. 590; Murne v.

Schwabacher, 2 W. T. 130, 3 Pac. 899; Kalb v. German Savings & Loan Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757.

§ 26. Effect of Adjournments.

Adjournments from day to day, or from time to time, are to be construed as recesses in the sessions, and shall not prevent the court from sitting at any time. [L. '90, p. 343, § 8; 2 H. C., § 14.]

§ 27. Judge of Another County to Sit—Designation by Governor.

Whenever a judge of the superior court of any county in this state, or a majority of such judges in any county in which there is more than one judge of said court, shall request the governor of the state to direct a judge of the superior court of any other county to hold a session of the superior court of any such county as is first herein above mentioned, the governor shall thereupon request and direct a judge of the

superior court of some other county, making such selection as the governor shall deem to be most consistent with the state of judicial business in other counties, to hold a session of the superior court in the county the judge shall have requested the governor as aforesaid. Such request and direction by the governor shall be made in writing, and shall specify the county in which he directs the superior judge to whom the same is addressed to hold such session of the superior court, and the period during which he is to hold such session. Thereupon it shall be the duty of the superior judge so requested, and he is hereby empowered, to hold a session of the superior court of the county specified by the governor, at the seat of judicial business thereof, during the period specified by the governor, and in such quarters as the county commissioners of said county may provide for the holding of such session. [L. '90, p. 343, § 10; 2 H. C., § 15; L. 93, p. 67, § 1; Const., Art. IV, § 7.]

Cited in 12 Wash. 172.

Under constitution, article IV, section 7, a visiting judge of the superior court may hold a session of the court at the request of a resident judge, without any

request by the governor, and although all of the resident judges are also holding sessions in the same county at the same time: *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609.

§ 28. Sessions Held at Request of Another Judge.

Whenever a like request shall be addressed by the judge, or by a majority of the judges (if there be more than one) of the superior court of any county to the superior judge of any other county, he is hereby empowered, if he deem it consistent with the state of judicial business in the county or counties whereof he is a superior judge (and in such case it shall be his duty to comply with such request), to hold a session of the superior court of the county the judge or judges whereof shall have made such request, at the seat of judicial business of such county, in such quarters as shall be provided for such session by the board of county commissioners, and during such period as shall have been specified in the request, or such shorter period as he may deem necessary by the state of judicial business in the county or counties whereof he is a superior judge. [L. '90, p. 343, § 10; 2 H. C., § 15; L. '93, p. 68, § 2; Const., Art. IV, § 7.]

Cited in 12 Wash. 172; 55 Wash. 70.

Authority and powers of substitute judges in general: See *Remington's Digest, Judges*, § 14; *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *Demaris v. Barker*, 33 Wash. 200, 74

Pac. 362; *Fisher v. Puget Sound Brick etc. Co.*, 34 Wash. 578, 76 Pac. 107; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *State ex rel. Calhoun v. Superior Court*, 86 Wash. 492, 150 Pac. 1168.

§ 29. Number of Sessions at Same Time—Effect of Acts of Visiting Judge.

In any county where there shall be more than one superior judge, or in which a superior judge of another county may be holding a session of the superior court, as in this chapter provided, there may be as many sessions of the superior court at the same time as there are judges thereof, or assigned to duty therein by the governor, or responding to a request made as provided in the last preceding section. In such cases the business of the court shall be so distributed and assigned by law,

or in the absence of legislation therefor, by such rules and orders of the court as shall best promote and secure the convenient and expeditious transaction thereof. Judgments, decrees, orders and proceedings of any session of the superior court held by one or more of the judges of said court, or by any judge of the superior court of another county pursuant to the provisions of this charter, shall be equally effectual as if all the judges of such court presided at such session. [L. '90, p. 341, § 2; 2 H. C., § 16; L. '93, p. 68, § 3.]

"Chapter" in this section, refers to §§ 27—30.

Cited in 25 Wash. 146.

Under the rules of allotment of causes in the superior court of King county an order transferring an equity cause from the equity department to the civil jury department for the sole purpose of having the question of title in partition tried by a jury is unauthorized: *State ex rel. Hill v. Lichtenberg*, 4 Wash. 553, 30 Pac. 659.

Where there are several departments of a court and one presides temporarily over a department not his own and

grants an order appointing a guardian, a petition thereafter filed asking that the order be vacated may be heard by the judge usually presiding over that department: *Wetmore's Guardianship, In re*, 6 Wash. 271, 33 Pac. 615.

There being but one superior court in a county, it is not error to refuse to transfer a cause for trial from one department to another in which preliminary orders had been made, as the court has jurisdiction: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355.

§ 30. Expenses of Judge Called to Another County.

Any judge of the superior court of any county in this state who shall hold a session of the superior court of any other county, in pursuance of the provisions of this chapter, shall be entitled to receive from the county in which he shall hold such sessions the amount of his actual traveling expenses from his residence to the place where he shall hold such sessions, and on his return to his residence, and of the actual traveling expenses of his sojourn at the place where he shall hold such sessions during the continuance thereof. The county clerk of such county shall, upon the presentation to him by such judge of a statement of such expenses, verified by his affidavit, issue to such judge a certificate that he is entitled to the amount thereof; and upon presentation of such certificate to the auditor of such county he shall draw a warrant on the general fund of such county for the amount in favor of such judge. [L. '93, p. 69, § 4; Const., Art. IV, § 14.]

§ 32. Jurisdiction—Process—Venue.

The process of the superior courts shall extend to all parts of the state: Provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions is situated. [L. '90, p. 343, § 9; 2 H. C., § 17; Const., Art. IV, § 6.]

See Const., Art. IV, § 27, style of process.

Cited in 110 Wash. 51.

An action upon a promissory note in which real estate was attached is not an action for the recovery of, quieting title to, or for the enforcement of liens upon

real estate, within this section; since the attachment is but an ancillary proceeding not affecting the same: *State ex rel. Owen v. Superior Court*, 110 Wash. 49, 187 Pac. 708.

§ 35. Process, to Whom Directed.

Unless otherwise provided by statute, all process issuing out of the [superior] court shall be directed to the sheriff of the county in which it is to be served, and be by him executed according to law. [L. '91, p. 84, § 5; 2 H. C., § 795.]

§ 36. Judges to Establish Uniform Rules.

The judges of the superior courts shall, from time to time, establish uniform rules for the government of the superior courts. [L. '90, p. 344, § 13; 2 H. C., § 18; Const., Art. IV, § 24.]

Cited in 76 Wash. 461.

Power to make rules, and effect thereof: See Remington's Digest, Courts, §§ 29—32; Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140; Tacoma Nat. Bank v.

Peet, 9 Wash. 222, 37 Pac. 426; Washington Bank of Walla Walla v. Horn, 24 Wash. 299, 64 Pac. 534; Sylvester v. Olson, 63 Wash. 285, 115 Pac. 175; Nickels v. Griffin, 1 W. T. 374.

§ 38. Seal.

The seals of the superior courts of the several counties of the state shall be, until otherwise provided by law, the vignette of General George Washington, with the words, "Seal of the Superior Court of — County, State of Washington," surrounding the vignette. [L. '90, p. 345, § 17; 2 H. C., § 19; Const., Art. XXVII, § 9.]

Cited in 20 Wash. 96.

§ 39. Limit of Time for Decision.

Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof: Provided, that if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such rehearing, and upon willful failure of any such judge so to do, he shall be deemed to have forfeited his office. [L. '90, p. 344, § 12; 2 H. C., § 20; Const., Art. IV, § 20.]

Cited in 21 Wash. 630.

The failure of a judge to decide a case within ninety days from its submission does not render the judgment void for want of jurisdiction: Demaris v. Barker, 33 Wash. 200, 74 Pac. 362. See, also, Moylan v. Moylan, 49 Wash. 341, 95 Pac. 271.

The action of the superior court in dismissing an appeal from the board of

state land commissioners, although made more than ninety days after the submission of the question to the court for decision, contrary to the provisions of this section, is reviewable on appeal, and therefore mandamus will not lie to compel the court to redocket the cause with a view to a retrial in said court: State ex rel. Washington Dredging etc. Co. v. Moore, 21 Wash. 629, 59 Pac. 505.

§ 40. Judges Pro Tempore—Appointment—Oath—Compensation.

A case in the superior court of any county may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; and his action in the trial of such cause shall have the same effect as if he were a judge of such court. A judge pro tempore shall, before entering upon his duties in any cause, take and subscribe the following oath or affirmation:—

I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States and the constitution of the state of Washington, and that I will faithfully discharge the duties of the office of judge pro tempore in the cause wherein — is plaintiff and — defendant, according to the best of my ability.

He shall receive a compensation of ten dollars for each day engaged in said trial, to be paid in the same manner as the salary of the superior judge. [L. '90, p. 343, § 11; 2 H. C., § 21; Const., Art. IV, § 7.]

Cited in 3 Wash. 693; 25 Wash. 603.

Appointment and authority: See Remington's Digest, Judges, §§ 6—8; State ex rel. Coughill v. Sachs, 3 Wash. 691, 29 Pac. 446; State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; State v. Krug, 12 Wash. 288, 41 Pac. 126; Nelson v. Seattle Traction Co., 25 Wash. 602, 66

Pac. 61; First National Bank of Snohomish v. Parker, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; American Bonding Co. v. Dufur, 49 Wash. 632, 96 Pac. 160.

§ 41. Powers of Judge in Other Counties of His District.

Any judge of the superior court of the state of Washington shall have power, in any county within his district: (1) To sign all necessary orders and papers in probate matters pending in any other county in his district; (2) to issue restraining orders, and to sign the necessary orders of continuance in actions or proceedings pending in any other county in his district; (3) to decide and rule upon all motions, demurrers, issues of fact or other matters that may have been submitted to him in any other county. All such rulings and decisions shall be in writing and shall be filed immediately with the clerk of the proper county: Provided, that nothing herein contained shall authorize the judge to hear any matter outside of the county wherein the cause or proceeding is pending, except by consent of the parties. [L. '01, p. 76, § 1.]

See next section and notes.

Cited in 57 Wash. 589.

There is no law requiring the judge who tried the case to sign the findings and judgment in the county where it is pending: Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955.

The court has no power to adjourn the settlement of a statement of facts to a county other than the one of trial, when the respondent had not consented thereto: Prospectors' Development Co. v. Brooks, 31 Wash. 187, 71 Pac. 774.

An order extending time for filing a statement of facts, made by the judge outside of the county, without consent of the parties, is invalid: Driscoll v. Dufur, 45 Wash. 494, 88 Pac. 929.

A judge cannot properly hear a motion for a new trial outside of the county wherein the cause is pending, except by consent of the parties: Shaw v. Spencer, 57 Wash. 587, 107 Pac. 383.

§ 42. Decisions and Rulings Out of His Own District.

Any judge of the superior court of the state of Washington who shall have heard any cause, either upon motion, demurrer, issue of fact, or other matter in any county out of his district, may decide, rule upon, and determine the same in any county in this state, which decision, ruling and determination shall be in writing and shall be filed immediately with the clerk of the county where such cause is pending. [L. '01, p. 77, § 2.]

Cited in 55 Wash. 40; 70 Wash. 9; 86 Wash. 496; 96 Wash. 692.

Exercise of jurisdiction beyond territorial limits—Consent: See Remington's Digest, Judges, § 16.

Under sections 28, 41, and this section, the parties to an action in D. county may stipulate that a motion to vacate the judgment may be heard at the county seat of S. county, before the superior judge of W. county: Meisenheimer v.

Meisenheimer, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005.

Under this section a judge having heard a cause out of his district may decide and rule thereon in any other county in the state: Rice v. Ahlman, 70 Wash. 6, 126 Pac. 64; State ex rel. Calhoun v. Superior Court, 86 Wash. 492, 150 Pac. 1168; Allen v. Allen, 96 Wash. 689, 165 Pac. 889.

§ 42-1. Official Court Reporter—Appointment—Term—Removal—Bond.

It shall be the duty of each superior court judge in counties or judicial districts in the state of Washington having a population of over twenty-seven thousand inhabitants to appoint a stenographer to be attached to the court holden by him (except, for the sake of economy, wherein counties or judicial districts having more than one judge there is not sufficient trial work to require the services of two or more official reporters, the judges of such courts may, provided their trial dockets can be satisfactorily arranged so as not to delay the trials of cases, appoint one official reporter jointly to act as official reporter for their respective courts), who shall have had at least three years' experience as a skilled, practical court reporter, or who upon examination shall be able to report and transcribe accurately one hundred fifty words per minute of the judge's charge or one hundred seventy-five words of testimony for five consecutive minutes; said test of efficiency, in the event of inability to meet the qualifications as to length of time of experience, to be given by a committee of three of the attorneys of the county or district in which the said stenographer is seeking to act as official reporter, and such stenographer shall thereupon become an officer of the court and shall be designated and known as the official reporter for the court or district for which he is appointed. Each official reporter so appointed shall hold office during the term of office of the judge appointing him, but may be removed for incompetency, misconduct or neglect of duty, and before entering upon the discharge of his duties shall take an oath to perform faithfully the duties of his office, and file a bond in the sum of two thousand dollars (\$2,000) for the faithful discharge of his duties. No person shall be appointed to the office of official reporter who is not a citizen of and a duly qualified elector in the state of Washington. [L. '21, p. 147, § 1. Cf. L. '13, p. 386, § 1.]

This act not applicable to counties having a population of 280,000. See *infra*, § 42-13. Cited in 79 Wash. 228—231; 84 Wash. 467; 102 Wash. 329.

§ 42-2. Duties of Reporter.

It shall be the duty of each official reporter appointed under this act to attend every term of the superior court in the county or judicial district for which he is appointed, at such times as the judge presiding may direct; and upon the trial of any cause in any court, if either party to the suit or action, or his attorney, request the services of the official reporter, the presiding judge shall grant such request, or upon his own motion such presiding judge may order a full report of the

testimony, exceptions taken, and all other oral proceedings; in which case the official reporter shall cause accurate shorthand notes of the oral testimony, exceptions taken, and other oral proceedings had, to be taken, except when the judge and attorneys dispense with his services with respect to any portion of the proceedings therein, which notes shall be filed in the office of the clerk of the superior court where such trial is had. [L. '13, p. 387, § 2.]

Cited in 102 Wash. 329.

§ 42-3. Compensation of Reporter.

Each official reporter so appointed shall be paid a compensation at the rate of ten dollars (\$10) per diem for every day that he is actually in attendance upon said court pursuant to the direction of the court, which compensation shall be paid out of the county treasury where such court is held, as other expenses of the court are paid; and the sworn statement of the official reporter as to the number of days' attendance upon the court, when certified as correct by the judge presiding, shall be a sufficient voucher to the county auditor, upon which he shall draw his warrant upon the treasurer of the county in favor of the official reporter. [L. '13, p. 387, § 3.]

Cited in 102 Wash. 329.

Under this section the reporter is entitled to the per diem for each day regardless of the period of time that

such attendance covers: State ex rel. Greb v. Hurn, 102 Wash. 328, 172 Pac. 1147.

§ 42-4. Additional Fees to be Paid Reporter.

In each civil action hereafter commenced the sum of one dollar (\$1) shall be paid by the plaintiff at the time of the filing of the complaint to the clerk of the court, and at the time of the appearance of the defendant, or any defendant appearing separately, there shall be paid in to the clerk of the court one dollar (\$1), and these sums so paid shall be taxed as costs in the case, and collected from the unsuccessful party in said action, and shall be known as stenographers' costs, and shall be paid by the clerk of said court into the county treasury of the county in which said action is commenced. [L. '13, p. 387, § 4.]

This section does not violate constitution, article VII, sections 1, 2 and 9, guaranteeing a uniform and equal rate of taxation; the fee not being a tax

or the act a revenue act: State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540.

§ 42-5. Transcript of Notes—Fees—Criminal Cases.

When shorthand notes have been taken in any cause as in this act provided, if the court, or either party to the suit or action, or his attorney, requests a transcript of the notes into longhand, the official reporter shall make, or cause to be made, with reasonable diligence, full and accurate typewritten transcript of the testimony and other proceedings, which shall, when certified to, as hereinafter provided, be filed with the clerk of the court where such trial is had for the use of the court or parties to the action. The fees of the reporter for making such transcript shall be fifteen cents per folio of one hundred words for

the original copy, and five cents per folio for each carbon copy ordered before the original is made, or made at the same time as the original, and when such transcript is ordered by any party to any such suit or action said fees shall be paid forthwith by the party ordering the same, and in all cases where a transcript is made as provided for under the provisions of this act the cost thereof shall be taxable as costs in the case, and shall be so taxed as other costs in the case are taxed: Provided, that when the defendant in any criminal cause shall present to the judge presiding satisfactory proof, by affidavit or otherwise, that he is unable to pay for such transcript the presiding judge, if in his opinion justice will thereby be promoted, may order said transcript to be made by the official reporter, in which case the official reporter shall be paid for preparing said transcript ten cents per folio for the original copy and five cents per folio for each carbon copy ordered at the same time as the original or made at the same time as the original, which transcript fee shall be paid in like manner as the per diem fees are paid as specified in section 42-3. [L. '13, p. 388, § 5.]

§ 42-6. Transcript Accorded Verity.

The report of the official reporter, when transcribed and certified as being a correct transcript of the stenographic notes of the testimony, or other oral proceedings had in the matter, shall be prima facie a correct statement of such testimony or other oral proceedings had, and the same may thereafter, in any civil cause, be read in evidence as competent testimony, when satisfactory proof is offered to the judge presiding that the witness originally giving such testimony is then dead or without the jurisdiction of the court, subject, however, to all objections the same as though such witness were present and giving such testimony in person. [L. '13, p. 389, § 6.]

The refusal of a clerk of court to file a complaint until the stenographer's fee of \$1 is paid, as required by this act, does not raise any question as to the validity of that portion of the act re-

lating to the use of the stenographer's transcript as evidence: *State ex rel. Lindsey v. Derbyshire*, 79 Wash. 227, 140 Pac. 540.

§ 42-7. Subsequent Transcript.

When the official reporter who has taken notes in any cause, shall thereafter cease to be such official reporter, any transcript thereafter made by him therefrom, or made by any competent person under the direction of the court, and duly certified to by the person making the same, under oath, as a full, true and correct transcript of said notes, the same shall have full force and effect the same as though certified by an official reporter of said court. [L. '13, p. 389, § 7.]

§ 42-8. Reporter Pro Tem.

In the event of the absence or inability of the official reporter to act, the presiding judge may appoint a competent stenographer to act pro tem, who shall perform the same duties as the official reporter, and whose report when certified to, shall have the same legal effect as the certified report of the official reporter. The reporter pro tem shall

possess the qualifications and take the oath prescribed for the official reporter, and shall file a like bond, and shall receive the same compensation. [L. '13, p. 389, § 8.]

§ 42-9. Court Amanuensis—Compensation.

In all counties or judicial districts, except counties of the first class and class "A" counties, having a regularly appointed official reporter, such official reporter shall act as amanuensis to the court where he is appointed, and the court shall allow per diem therefor as provided in this act: Provided, that in no event shall the per diem for such work exceed ten days in any one calendar month: And provided further, that said official reporter shall be allowed at least ten days' per diem for his services as reporter and amanuensis in each calendar month that the court where he is appointed is in session. [L. '19, p. 133, § 2. Cf. L. '13, p. 389, § 9.]

§ 42-10. Court Files Accessible to Reporters.

Official reporters or reporters pro tem may, without order of court, upon giving a proper receipt therefor, procure at all reasonable hours from the office of the clerk of the court, any files or exhibits necessary for use in the preparation of statements of fact or transcribing portions of testimony or proceedings in any cause reported by them. [L. '13, p. 389, § 10.]

§ 42-11. Office Expenses.

Necessary supplies for reporting and for the preparation of transcripts in criminal cases shall be furnished by the county. Typewriters and all other supplies in all other cases shall be furnished by the stenographers. In counties where arrangements can be made therefor, suitable office room shall be furnished the official reporter. [L. '13, p. 390, § 11.]

§ 42-12. Substituted Reporters.

At the request of either party to an action an official reporter from the same or any other district in the state may be substituted for the official reporter of the court in which the action is being tried for the purpose of reporting the trial of said action: Provided, that the party or parties to the action requesting such substitution pay or secure to be paid to the clerk of the court the necessary traveling and hotel expenses of the official reporters so substituted as aforesaid. [L. '13, p. 390, § 12.]

§ 42-13. Application of Act.

This act shall not apply to any county having a population of two hundred and eighty thousand, or over. [L. '19, p. 133, § 1. Cf. L. '13, p. 390, § 13.]

Cited in 79 Wash. 228—231.

Whether this section violates any constitutional provision will not be determined in an action in which such a district is not concerned, since its invalidity would not affect the validity of the balance of the act: State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540.

This section is not so inseparably connected with the balance of the act that the act would not have been passed without it; hence the invalidity of such section would not affect the validity of the balance of the act: State ex rel. Lindsey v. Derbyshire, 79 Wash. 227, 140 Pac. 540.

CHAPTER III.

JUSTICES' COURTS.

See "Justices of the Peace and Constables," § 7544 et seq., *infra*.

Justice Code: See *infra*, §§ 1755-1924.

§ 43. General Powers of Justices of the Peace.

Every justice of the peace elected in any precinct in this state is hereby authorized to hold a court for the trial of all actions in the next section enumerated, to hear, try, and determine the same according to law; and for that purpose, where no special provision is otherwise made by law, such court shall be vested with all the necessary powers which are possessed by courts of record in this state; and all laws of a general nature shall apply to such justice's court, as far as the same may be applicable, and not inconsistent with the provisions of this chapter. [L. '54, p. 226, § 22; Cd. '81, § 1709; 2 H. C., § 22; Const., Art. IV, § 10.]

Cited in 11 Wash. 14; 20 Wash. 96, 164;
88 Wash. 551.

For text treatment of "Justices of
the Peace," see 16 R. C. L. 327.

§ 44. Jurisdiction in Civil Actions and Proceedings.

Every justice of the peace shall have jurisdiction and cognizance of the following civil actions and proceedings:—

1. Of an action arising on contract for the recovery of money only in which the sum claimed is less than one hundred dollars;

2. Of an action for damages for injuries to the person, or for taking or detaining personal property, or for injuring personal property, or for an injury to real property when no issue raised by the answer involves the plaintiff's title to or possession of the same, when the amount of damages claimed is less than one hundred dollars; also of actions to recover the possession of personal property, when the value of such property, as alleged in the complaint, is less than one hundred dollars;

3. Of an action for a penalty less than one hundred dollars;

4. Of an action upon a bond conditioned for the payment of money, when the amount claimed is less than one hundred dollars, though the penalty of the bond exceed that sum, the judgment to be given for the sum actually due, not exceeding the amount claimed in the complaint;

5. Of an action on an undertaking or surety bond taken by him or his predecessor in office, when the amount claimed is less than one hundred dollars;

6. Of an action for damages for fraud in the sale, purchase, or exchange of personal property, when the damages claimed are less than one hundred dollars;

7. To take and enter judgment on confession of a defendant, when the amount of the judgment confessed is less than one hundred dollars.

8. To issue writs of attachment upon goods, chattels, moneys, and effects, when the amount is less than one hundred dollars;

9. Of all other actions and proceedings of which jurisdiction is specially conferred [conferred] by statute, when the amount involved is less than one hundred dollars, and the title to or right of possession of or

to a lien upon real property is not involved. [L. '54, p. 226, § 23; L. '55, p. 11; L. '73, p. 333, § 17; L. '77, p. 199, § 1; Cd. '81, § 1710; L. '83, p. 44, § 1, subd. 4; L. '91, p. 137, § 1; 2 H. C., § 23; Const., Art. IV, § 10.]

Cited in 20 Wash. 96; 94 Wash. 682.

Civil jurisdiction and authority: See Remington's Digest, J. P., §§ 8—11.

Nature of subject matter—Abatement of nuisances: State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

Amount or value in controversy: Bagley v. Carpenter, 2 W. T. 19, 3 Pac. 193; Moore v. Perrott, 2 Wash. 1, 25 Pac. 906; State ex rel. Egbert v. Superior Court, 9 Wash. 369, 37 Pac. 489.

Loss or divestiture of jurisdiction—Continuances or adjournments: Taylor v. Ringer, 3 W. T. 539, 19 Pac. 147; Nelson v. Campbell, 1 Wash. 261, 24 Pac. 539.

Powers of successor as to proceedings before former justice: Nelson v. Campbell, 1 Wash. 261, 24 Pac. 539.

Pleading jurisdictional facts: Wood-

bury v. Henningsen, 11 Wash. 12, 39 Pac. 243.

The jurisdiction of the justice was limited by this section to \$100, and damages in excess thereof were waived by the parties by bringing action in the justice court for \$99.99, and amendment increasing the amount did not change the "original amount in controversy"; Bertles v. Hawkins Motor Car Co., 94 Wash. 680, 163 Pac. 3.

Amount claimed or amount due as determining jurisdiction of justice of the peace. Ann. Cas. 1912A, 1284.

Right of holder to reduce amount due on promissory note to sum within jurisdiction of justice's court. 5 Ann. Cas. 308.

§ 45. Restrictions on Civil Jurisdiction.

The jurisdiction conferred by the last section shall not, however, extend to the following civil actions:—

1. In which the title to real property shall come in question;
2. Nor to an action for the foreclosure of a mortgage, or enforcement of a lien on real estate;
3. Nor to an action for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction;
4. Nor to any action against an executor or administrator as such. [L. '54, p. 227, § 24; Cd. '81, § 1711; 2 H. C., § 24; Const., Art. IV, §§ 6, 10.]

§ 46. Jurisdiction in Criminal Cases—Cities of First and Other Classes.

Justices of the peace shall have jurisdiction concurrent with the superior courts of all misdemeanors and gross misdemeanors committed in or which may be tried in their respective counties: Provided, that justices of the peace in cities of the first class shall in no event impose greater punishment than a fine of five hundred dollars, or imprisonment in the county jail for six months; and justices of the peace other than those elected in cities of the first class shall in no event impose greater punishment than a fine of one hundred dollars, or imprisonment in the county jail for thirty days. [L. '09, p. 377, § 1. Cf. L. '60, p. 279, § 171; L. '73, p. 181, § 184; L. '75, p. 51, § 1; Cd. '81, § 1886; 2 H. C., § 25; L. '01, p. 34, § 1; Const. Art. IV, §§ 6, 10.]

See *infra*, § 1925, practice and trial in criminal actions in justices' courts.

Cited in 13 Wash. 513; 23 Wash. 579; 25 Wash. 624; 36 Wash. 454; 40 Wash. 405; 43 Wash. 123; 57 Wash. 626, 627; 60 Wash. 239, 240; 98 Wash. 506, 508; 101 Wash. 154; 104 Wash. 651.

Jurisdiction of justices and other officers: See Remington's Digest, Crim. Law,

§ 25; State v. Gleason, 15 Wash. 509, 46 Pac. 1043; State v. Davis, 43 Wash. 116, 86 Pac. 201; State v. Hagimori, 57 Wash. 623, 107 Pac. 855.

This section does not deprive justices in towns of the fourth class of jurisdiction in causes arising under a town ordi-

nance, in view of the intent of the amending act to merely enlarge the jurisdiction, and of section 9180, *infra*, providing that the violation of any ordinance of a town of the fourth class shall be a misdemeanor: *State ex rel. Hall v. Wicker*, 60 Wash. 238, 110 Pac. 992.

A change of venue will not lie from the police court of a city of the third class to a justice court, when the action is to recover a penalty or fine declared by city ordinance which exceeds \$100 in amount; in view of this section, ex-

pressly limiting the jurisdiction of justices of the peace, while police judges in cities of the third class have jurisdiction by section 9143, *infra*, in criminal cases to impose a fine of \$300: *State ex rel. Kiggins v. Woolson*, 98 Wash. 505, 167 Pac. 1088.

Under this section a justice of the peace is not limited to a fine of \$100 in cases coming under city ordinances: *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855.

§ 47. Territorial Jurisdiction of Justices—Residence.

The jurisdiction of justices of the peace elected in pursuance of the provisions of this act shall be coextensive with the limits of the county in which they are elected or appointed, and no other or greater, but every justice of the peace shall continue to reside in the precinct for which he was elected or appointed, during his continuance in office. [L. '54, p. 224, § 9; Cd. '81, § 1702; 1 H. C., § 314; see 2 H. C., § 27.]

Cited in 11 Wash. 14; 23 Wash. 579.

Territorial extent limited to county: *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243.

Under this section one charged with

an offense cognizable by a justice of the peace may be prosecuted before any justice of the county: *State ex rel. Calderwood v. Schomber*, 23 Wash. 573, 63 Pac. 221.

§ 48. Office, Where Held—Process.

Every justice of the peace shall keep his office in the precinct for which he may be elected, and not elsewhere, but he may issue process in any place in his county. [L. '54, p. 226, § 20; Cd. '81, § 1707; 2 H. C., § 28.]

Cited in 1 Wash. 387, 388; 2 Wash. 288; 14 Wash. 308; 21 Wash. 396.

§ 49. Not to Office With an Attorney, Except.

No justice of the peace shall hold his office in the same room with a practicing attorney, unless such attorney shall be his law partner; and in that case, such partner shall not be permitted to appear or practice as an attorney in any case tried before such justice of the peace. [L. '54, p. 226, § 21; Cd. '81, §§ 1708, 3294; 2 H. C., § 29.]

CHAPTER IV.

MAGISTRATES.

§ 50. Definition of Magistrate.

A magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime. [L. '91, p. 91, § 1; 2 H. C., § 30.]

§ 51. Who are Magistrates.

The following persons are magistrates:—

1. The justices of the supreme court;
2. The superior judges, and justices of the peace;
3. All municipal officers authorized to exercise the powers and perform the duties of a justice of the peace. [L. '91, p. 91, § 2; 2 H. C., § 31.]

CHAPTER V.

POWERS AND GENERAL PROVISIONS.

§ 52. Powers of Courts Respecting Conduct of Judicial Proceedings.

Every court of justice has power,—

1. To preserve and enforce order in its immediate presence;
2. To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority;
3. To provide for the orderly conduct of proceedings before it or its officers;
4. To compel obedience to its judgments, decrees, orders, and process, and to the orders of a judge out of court, in an action, suit, or proceeding pending therein;
5. To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto;
6. To compel the attendance of persons to testify in an action, suit, or proceeding therein, in the cases and manner provided by this code;
7. To administer oaths in an action, suit, or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties. [L. '91 p. 91, § 1; 2 H. C., § 32.]

Cited in 15 Wash. 578; 71 Wash. 496; 92 Wash. 221.

Inherent powers of the court: See Remington's Digest, Courts, § 45; Lane v. Spokane Falls & N. R. Co., 21 Wash.

119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; State ex rel. Burrows v. Superior Court, 43 Wash. 225, 86 Pac. 632.

§ 53. Court may Punish for Contempt.

For the effectual exercise of the powers specified in the last section, the court may punish for contempt in the cases and the manner provided by law. [L. '91, p. 92, § 2; 2 H. C., § 33.]

See *infra*, § 1049 et seq., and notes, relating to contempts in general.

See *infra*, § 58, punishment of contempts by "judicial officer."

Cited in 71 Wash. 497.

Power of judge at chambers or in vacation to punish for contempt. *Ann. Cas.* 1913B, 35.

Power of judge to punish contempt committed out of state. *L. R. A.* 1917E, 553.

§ 54. Judicial Officer Defined—When Disqualified.

A judicial officer is a person authorized to act as a judge in a court of justice. Such officer shall not act as such in a court of which he is a member in any of the following cases:—

1. In an action, suit or proceeding to which he is a party, or in which he is directly interested;
2. When he was not present and sitting as a member of the court at the hearing of a matter submitted for its decision;
3. When he is related to either party by consanguinity or affinity within the third degree. The degree shall be ascertained and computed by ascending from the judge to the common ancestor and descending to

the party counting a degree for each person in both lines, including the judge and party and excluding the common ancestor;

4. When he has been attorney in the action, suit or proceeding in question for either party; but this section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the cases specified in subdivisions three and four, the disqualification may be waived by the parties, and except in the supreme court shall be deemed to be waived unless an application for a change of the place of trial be made as provided by law. [Cf. L. '91, p. 92, § 3; 2 H. C., § 34; L. '95, p. 63, § 1.]

Cited in 18 Wash. 393.

When a judge is disqualified by pecuniary interest, relationship, or bias: See Remington's Dig., Judges, §§ 22, 23, 23-1, 25; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; State ex rel. Barnard v. Board

of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317; State v. Strodemier, 40 Wash. 608, 82 Pac. 915; Fortson-Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304; State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

§ 55. When may Act as Attorney.

Any judicial officer may act as an attorney in any action, suit, or proceeding to which he is a party or in which he is directly interested. A justice of the peace, otherwise authorized by law, may act as an attorney in any court other than the one of which he is judge, except in an action, suit, or proceeding removed therefrom to another court for review; but no judicial officer shall act as attorney in any court, except as in this section allowed. [L. '91, p. 92, § 4; 2 H. C., § 35; see Cd. '81, § 3293.]

See *infra*, this title, chapter X, attorneys, in general.

§ 56. Judge as Distinguished from a Court.

A judge may exercise, out of court, all the powers expressly conferred upon a judge as contradistinguished from a court, and not otherwise. [L. '91, p. 92, § 5; 2 H. C., § 36.]

Cited in 43 Wash. 22; 44 Wash. 617.

The word "court" sometimes signifies more than the judge who tries the cause: Gunderson v. Cochrane, 3 Wash. 476, 28 Pac. 1105; Shepard v. Gove, 26 Wash. 452, 67 Pac. 256; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071.

Proceedings in vacation or out of court: See Remington's Digest, Courts, § 26; Murne v. Schwabacher, 2 W. T. 130, 3 Pac. 899; Kalb v. German Sav. & Loan Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397.

§ 57. Powers of Judicial Officers.

Every judicial officer has power,—

1. To preserve and enforce order in his immediate presence, and in the proceedings before him, when he is engaged in the performance of a duty imposed upon him by this code or other statute;

2. To compel obedience to his lawful orders, as provided in this code;

3. To compel the attendance of persons to justify[testify] in a proceeding pending before him in the cases and manner provided in this code;

4. To administer oaths to persons, in a proceeding pending before him, and in all other cases where it may be necessary, in the exercise

of his powers and the performance of his duties. [L. '91, p. 92, § 6; 2 H. C., § 37.]

(Cited in 71 Wash. 497.

§ 58. Judicial Officer may Punish for Contempt.

For the effectual exercise of the powers specified in the last preceding section, a judicial officer may punish for contempt in the cases and manner provided by law. [L. '91, p. 93, § 7; 2 H. C., § 38.]

See *supra*, § 53, punishment of contempt by "court."

See *infra*, § 1049 et seq., and notes, relating to contempts in general.

Cited in 71 Wash. 497.

§ 59. Judges to Exercise Certain Powers.

The judges of the supreme and superior courts have power in any part of the state to take and certify,—

1. The proof and acknowledgment of a conveyance of real property, or any other written instrument authorized or required to be proved or acknowledged;
2. The acknowledgment of satisfaction of a judgment in any court;
3. An affidavit or deposition to be used in any court of justice or other tribunal of this state;
4. To exercise any other power and perform any other duty conferred or imposed upon them by statute. [L. '91, p. 93, § 8; 2 H. C., § 30.]

Cited in 21 Wash. 203; 54 Wash. 155.

§ 60. Inferior Judicial Officers—Powers.

Every other judicial officer may, within the county, city, district, or precinct in which he is chosen,—

1. Exercise the powers mentioned in subdivisions one, two, and three of the last preceding section;
2. Exercise any other power and perform any other duty conferred or imposed upon him by other statute. [L. '91, p. 93, § 9; 2 H. C., § 40.]

§ 61. Legal Holidays.

The following days are legal holidays, namely: Sunday; the first day of January, commonly called New Year's Day; the fourth day of July; the twenty-second day of February; the twenty-fifth day of December, commonly called Christmas Day; and any day designated by public proclamation of the chief executive of the state as a legal holiday, or as a day of thanksgiving; the day known and observed as Memorial or Decoration Day; and the day on which a general election is held throughout the state. [Cf. L. '88, p. 107, § 1; L. '91, p. 80, § 1; 2 H. C., § 42.]

Cited in 14 Wash. 311; 49 Wash. 2, 3, 6.

Judgment rendered on Sunday is void: *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 140.

The verdict of a jury may be received on Sunday: *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

The court may discharge a jury in a criminal case on a holiday because of its inability to agree: *State v. Lewis*, 31 Wash. 515, 72 Pac. 121.

A contract to perform certain services each day during the term of contract does not include Sundays, and services

performed on Sundays cannot be offset against shortages on other days: *Go Fun v. Fidalgo Island Canning Co.*, 37 Wash. 238, 79 Pac. 797.

The defendant having admitted the due and legal service of a summons and complaint on a legal holiday cannot thereafter question the legality of such service: *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062.

Proceedings under a judgment will not be restrained on the ground that the judgment was entered on a holiday, where it merely appears from the complaint that on a holiday the judge heard the arguments, announced his decision,

and directed a judgment to be entered; since it will be presumed that the judgment was properly entered at a subsequent date; *Stewart v. State Board of Medical Examiners*, 48 Wash. 655, 94 Pac. 472.

A final judgment entered on a judicial day is not void by reason of the fact that prior proceedings were had in the case upon a legal holiday proclaimed by the governor, where no objection was made at the time to such prior proceedings: *State ex rel. Walter v. Superior Court*, 49 Wash. 1, 94 Pac. 665, 17 L. R. A. (N. S.) 257.

§ 61-1. Holiday Follows Sunday.

Whenever any legal holiday, other than Sunday, shall fall upon any Sunday, the day next following such date shall become and be held as a legal holiday. [L. '11, p. 9, § 1.]

§ 62. Labor Day.

The first Monday of September of each year is hereby declared to be a legal holiday in the state of Washington, to be known as Labor Day. [L. '91, p. 39, § 1; 2 H. C., § 43.]

§ 63. Lincoln's Birthday.

The twelfth day of February of each year, the same being the anniversary of the birth of Abraham Lincoln, be and it is hereby declared to be a legal holiday in the state of Washington. [L. '95, p. 6, § 1.]

§ 63-1. Columbus Day.

The 12th day of October of each year is hereby declared to be a legal holiday to be known as "Columbus Day." [L. '11, p. 390, § 1.]

§ 64. No Courts on Legal Holidays, Except, etc.

No court shall be open, nor shall any judicial business be transacted, on a legal holiday, except,—

1. To give, upon their request, instructions to a jury when deliberating of their verdict;
2. To receive the verdict of a jury;
3. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature;
4. For hearing an application for writs of habeas corpus, injunction, prohibition, and attachment. [L. '91, p. 80, § 2; 2 H. C., § 44; see Cd. '81, § 1267; Const., Art. IV, § 6.]

Cited in 49 Wash. 3, 6.

§ 65. Sitting Deemed Adjourned Over Legal Holiday.

If any legal holiday happen to be a day appointed for the sitting of a court, or to which it is adjourned, such sitting shall be deemed ap-

pointed for or adjourned to the next day which is not a legal holiday. [L. '91, p. 81, § 3; 2 H. C., § 45.]

Cited in 35 Wash. 129.

§ 66. Proceedings may be Adjourned from Time to Time.

A court or judicial officer has power to adjourn any proceeding before it or him from time to time, as may be necessary, unless otherwise expressly provided by law. [L. '91, p. 93, § 10; 2 H. C., § 46.]

§ 67. Proceedings not to Fail for Want of Judge or Court.

No proceeding in a court of justice, in any action, suit, or proceeding pending therein, is affected by a vacancy in the office of any or all of the judges, or by the failure of a session of the court. [L. '91, p. 89, § 2; 2 H. C., § 47.]

Cited in 1 Wash. 338, 340; 9 Wash. 220; 102 Wash. 13.

In view of this section, upon the death of a judge who tried the case, his suc-

cessor in office has power to grant a new trial: *Carkonen v. Columbia & Puget Sound R. Co.*, 102 Wash. 11, 172 Pac. 816.

§ 68. Court may Provide Rooms, etc.

If the proper authority neglects to provide any supreme or superior court with rooms, furniture, fuel, lights, and stationery, suitable and sufficient for the transaction of its business, and for the jury attending upon it, if there be one, the court may order the sheriff to do so, at the place within the county designated by law for holding such court; and the expense incurred by the sheriff in carrying such order into effect, when ascertained and ordered to be paid by the court, is a charge upon the county. [L. '91, p. 93, § 11; 2 H. C., § 48.]

Cited in 3 Wash. 400; 4 Wash. 713; 5 Wash. 165; 14 Wash. 311.

The board of county commissioners is the proper authority, and the court can order the sheriff to make such provisions only in case the county commissioners

neglect to do so: *Barnett v. Ashmore*, 5 Wash. 163, 31 Pac. 466.

The proper remedy on the part of the county commissioners to prevent improper expenditure is injunction and not prohibition: *State ex rel. Stopper v. Hunter*, 4 Wash. 712, 30 Pac. 1055.

§ 69. Proceeding When Mode not Prescribed.

When jurisdiction is, by the constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code. [L. '91, p. 94, § 12; 2 H. C., § 49.]

Cited in 4 Wash. 33; 10 Wash. 575; 16 Wash. 129; 56 Wash. 494; 60 Wash. 422; 71 Wash. 597; 88 Wash. 616, 617.

Hill's Code, section 2170, conferring the right of appeal from decisions of the state board of control, is not nugatory for failure to provide a method of appeal, as this section provides for any suitable process in such a case: *Hays v. Merchants' Bank*, 10 Wash. 573, 39 Pac. 98.

The right to personal service outside of the state must be specially conferred by statute, and hence is not given by

this section: *State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 153 Pac. 315.

Under this section the court has power to appoint a commissioner to act for an irrigation district: *State ex rel. Dyer v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203.

A venire to summon a jury in a police court "from a body of your city" is not authorized by this section: *State ex rel. Fugita v. Milroy*, 71 Wash. 592, 129 Pac. 384.

CHAPTER VI.

COUNTY CLERKS—CLERK OF SUPERIOR COURT.

§ 70. Bond of Clerk—Conditions—When Filed, etc.

Every county clerk, before he enters on the duties of his office, shall enter into bond, payable to the state of Washington, with good and sufficient sureties, as provided by law for other county officers, the amount to be fixed and the bond to be approved by the judge or a majority of the judges presiding over the court of which he is clerk. The bond shall be conditioned that he will faithfully perform the duties of his office, and account for and pay over all moneys which may come into his hands by virtue of his office, and that he, his executors or administrators will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office, and cause said bond to be filed in the office of the county treasurer of his said county, after it has been recorded in a book kept for that purpose by the county auditor. [L. '95, p. 95, § 1.]

For text treatment of "Clerks of Court," see 5 B. C. L. 619.

§ 71. Amount of Bond.

The bond of said county clerk shall in no case be in a penal sum less than double the amount of money which said judge or judges, or a majority of them, may, by order of said court entered on the records of said court, fix upon as liable to come into his hands as clerk; and it shall be the duty of the judge or judges of the court of which he is clerk to require that said bond be sufficient, and in a penal sum double the amount of moneys liable to come into the hands of said clerk. [L. '95, p. 96, § 2.]

§ 72. New Bond, When may be Required—Penalty for Failure to File.

When the judge or judges of any court, or a majority of them, shall believe that the clerk of said court has not a good and sufficient bond on file, or that said bond is not large enough in amount, as herein required, the said judge or judges shall enter an order requiring him, within such time as may be specified in said order, to execute and present to said judge or judges a good and sufficient bond, as hereinbefore described, in such sum as may be fixed by said order; and in case of his failure to make and file said bond within ten days from the expiration of the date fixed by said order for the making of the same, it shall be the duty of the judge or judges of said court to declare the office of said county clerk vacant. [L. '95, p. 96, § 3.]

§ 73. Office—Where Kept—When to be Open.

The office of the clerk of the superior court shall be kept at the county seat of the county of which he is clerk. Each clerk of a superior court shall keep his office open for the transaction of business on every judicial day from eight to twelve in the forenoon, and from one to five in the afternoon. [Cf. Cd. '81, § 2125; L. '91, p. 98, §§ 1, 2; 2 H. C., §§ 71, 72.]

§ 75. Books to be Kept by County Clerk.

1. He shall, at the expense of the county, provide and keep a book, in which he shall enter all appearances and the time of filing all pleadings in any cause pending in said court;

2. He shall also keep a docket, in which he shall enter, before every session, the titles of all causes pending before said court at such session, in the order in which they were commenced, beginning with criminal cases, noting in separate columns the names of the attorneys, the character of the action, the pleadings upon which it stands at the commencement of the session, leaving a margin opposite each case for the court to enter a short minute of the orders of the session. One copy of this docket he shall furnish for the use of the court, and another for the use of the members of the bar;

3. He shall also provide and keep at each session a minute-book, in which he shall enter the names of witnesses and jurors, with time of attendance, distance of travel, and whatever else is necessary to enable him to make out a complete cost bill;

4. He shall also provide and keep a well-bound book to be called the order book or journal in which he shall record the daily proceedings of the court, and enter all verdicts, orders, judgments, and decisions thereof, from which every morning shall be read in open court the proceedings of the previous day, which shall be signed by the judge; but the court shall have full control of all entries in said journal at any time during the same term [session] in which they were made;

5. He shall also provide and keep well-bound books, one for an execution docket, one for a book of levies, and one for a final record, in which he shall make a full and perfect record of all criminal cases in which a final judgment is rendered, and all civil cases in which by any order or final judgment the title to real estate, or any interest therein, is any way affected, and such other final judgments, orders, or decisions as either party may require, and may pay him for recording;

6. He shall also provide and keep such other books as are prescribed by law and required in the discharge of the duties of his office. [Cf. L. '54, p. 366, § 6; L. '63, p. 317, § 6; Cd. '81, § 2179; 1 H. C., § 173.]

"Session," substituted for "term."

See *infra*, § 444, execution docket.

Cited in 26 Wash. 227; 29 Wash. 442; 42 Wash. 79; 86 Wash. 383; 112 Wash. 249.

§ 76. Custody and Delivery of Books, etc.

He shall be responsible for the safe custody and delivery to his successor of all books and papers belonging to his office. [L. '54, p. 367, § 8; Cd. '81, § 2181; 1 H. C., § 175.]

§ 77. Powers and Duties of Clerks of Supreme and Superior Courts.

The clerk of the supreme court, and each clerk of a superior court, has power to take and certify the proof and acknowledgment of a conveyance of real property or any other written instrument, authorized or required to be proved or acknowledged, and to administer oaths in every case when authorized by law: and it is the duty of the clerk of

the supreme court, and of each county clerk for each of the courts for which he is clerk,—

1. To keep the seal of the court, and affix it in all cases where he is required by law;
2. To record the proceedings of the court;
3. To keep the records, files and other books and papers appertaining to the court;
4. To file all papers delivered to him for that purpose, in any action or proceeding in the court;
5. To attend the court of which he is clerk, to administer oaths, and receive the verdict of a jury in any action or proceeding therein, in the presence and under the direction of the court;
6. To keep the journal of the proceedings of the court, and, under the direction of the court, to enter its orders, judgments, and decrees;
7. To authenticate, by certificate or transcript, as may be required, the records, files, or proceedings of the court, or any other paper appertaining thereto, and filed with him;
8. To exercise the powers and perform the duties conferred and imposed upon him elsewhere by statute;
9. In the performance of his duties, to conform to the direction of the court. [Cf. L. '58, p. 29, § 1; Cd. '81, § 2184; L. '91, p. 98, § 3; 2 H. C., § 73.]

Cited in 65 Wash. 540; 90 Wash. 4, 5.

§ 78. Deputies, Appointment and Powers of.

The clerk of the supreme court, and each clerk of a superior court, may have one or more deputies, to be appointed by such clerk in writing, and to continue during his pleasure. Such deputies have the power to perform any act or duty relating to the clerk's office that their respective principals have, and their respective principals are responsible for their conduct. [L. '91, p. 98, § 4; 2 H. C., § 74.]

Deputies and assistants—Powers: See 154; State v. Rosener, 8 Wash. 42, 35 Remington's Digest, Clerks of C., § 2; Pac. 357.
State v. Devine, 6 Wash. 687, 34 Pac.

§ 81. Clerks not to Practice Law.

Each clerk of a court is prohibited during his continuance in office from acting, or having a partner who acts, as an attorney of the court of which he is clerk. [Cf. L. '54, p. 367, § 10; Cd. '81, § 2183; 1 H. C., § 177; L. '91, p. 99, § 5; 2 H. C., § 75.]

CHAPTER VII.

REFEREES AND COURT COMMISSIONERS.

§ 82. Referees—Definition and Powers.

A referee is a person appointed by the court or a judicial officer with power,—

1. To try an issue of law or of fact in a civil action or proceeding, and report thereon;

2. To ascertain any other fact in a civil action or proceeding, when necessary for the information of the court, and report the fact, or to take and report the evidence in an action;

3. To execute an order, judgment, or decree, or to exercise any other power or perform any other duty expressly authorized by law. [L. '91, p. 41, § 1; 2 H. C., § 67.]

See *infra*, § 369 et seq., trial by referees.

§ 83. Court Commissioners — Appointment — Qualifications — Term of Office.

There may be appointed in each county, by the judge of the superior court having jurisdiction therein, a court commissioner for said county. Such commissioner shall be a citizen of the United States and an elector of the county in which he may be appointed, and shall reside at the county seat of such county, and shall hold his office during the pleasure of the judge appointing him. [L. '95, p. 164, § 1; L. '09, p. 418, § 1; Const., Art. IV, § 23.]

Cited in 44 Wash. 616, 617; 90 Wash. 251.

§ 85. Powers of Commissioner—Fees.

Such court commissioner shall have power, authority and jurisdiction, concurrent with the superior court and the judge thereof, in the following particulars:

a. To hear and determine all matters in probate, to make and issue all proper orders therein, and to issue citations in all cases where same are authorized by the probate statutes of this state.

b. To grant and enter defaults and after ten days from the entry thereof, to enter judgment thereon.

c. To issue temporary restraining orders and temporary injunctions, and to fix and approve bonds thereon.

d. To act as referee in all matters and actions referred to him by the superior court as such, with all the powers now conferred upon referees by law.

e. To hear and determine all proceedings supplemental to execution, with all the powers conferred upon the judge of the superior court in such matters.

f. To hear and determine all petitions for the adoption of children, for the dissolution of incorporations, and to change the name of any person.

g. To hear and determine all applications for the commitment of any person to the hospital for the insane, with all the powers of the superior court in such matters: Provided, that in cases where a jury is demanded, same shall be referred to the superior court for trial.

h. To hear and determine all complaints for the commitment of minors to the state reform or industrial school, with all powers conferred upon the superior court in such matters.

i. To grant adjournments, administer oaths, preserve order, compel attendance of witnesses, and to punish for contempts in the refusal to obey or the neglect of his lawful orders made in any matter before him as fully as the judge of the superior court.

j. To take acknowledgments and proofs of deeds, mortgages and all other instruments requiring acknowledgment under the laws of this state, and to take affidavits and depositions in all cases.

k. To provide an official seal, upon which shall be engraved the words "Court Commissioner," and the name of the county for which he may be appointed, and to authenticate his official acts therewith in all cases where same is necessary.

l. To charge and collect, for his own use, the same fees for the official performance of official acts mentioned in subsections "d" and "j" herein as are provided by law for referees and notaries public. [L. '09, p. 419, § 2. Cf. L. '95, pp. 164, 165, §§ 2, 3; Const., Art. IV, § 23.]

See *infra*, § 9907, fees of notary.

Cited in 27 Wash. 83; 49 Wash. 319; 90 Wash. 251.

§ 83. Revision by Superior Court.

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, his orders and judgments shall be and become the orders and judgments of the superior court, and from same an appeal may be taken to the supreme court in all cases where an appeal will lie from like orders and judgments entered by the judge. [L. '09, p. 420, § 3.]

The judgment entered by a court commissioner is reviewable by the judge of the superior court: *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397.

commissioner is not a part of the record, unless brought up by statement of facts: *State ex rel. Richardson v. Superior Court*, 41 Wash. 439, 83 Pac. 1027.

When testimony taken before court

§ 87. Salary.

Each court commissioner appointed hereunder shall be allowed a salary, in addition to the fees herein provided for, in such sum as the board of county commissioners may designate, said salary to be paid at the time and in the manner as the salary of other county officials. [L. '09, p. 420, § 4.]

Cited in 90 Wash. 251.

§ 88. Oath.

Court commissioners appointed hereunder shall, before entering upon the duties of such office, take and subscribe an oath to support the constitution of the United States, the constitution of the state of Washington, and to perform the duties of such office fairly and impartially and to the best of his ability. [L. '09, p. 420, § 5.]

CHAPTER VIII.

JURORS.

Fees of: See "Counties," § 4229 et seq., *infra*.

Jury trials, challenges, etc.: See *infra*, § 322 et seq.

§ 89. Jury, Definition of.

A jury is a body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power,—

1. To present or indict a person for a public offense;
2. To try a question of fact. [L. '91, p. 86, § 1; 2 H. C., § 50.]

Cited in 12 Wash. 55; 30 Wash. 142.

For text treatment, see "Jury," 16

B. C. L. 176, and "Grand Jury," 12

B. C. L. 1013.

§ 90. Different Kinds of Juries.

There shall be three kinds of juries:—

1. A grand jury;
2. A petit jury;
3. A jury of inquest. [L. '91, p. 86, § 2; 2 H. C., § 51.]

§ 91. Grand Jury, Defined.

A grand jury is a body of men, not less than twelve nor more than seventeen in number, impaneled and sworn to inquire of public offenses committed or triable within the county. [L. '91, p. 86, § 3; 2 H. C., § 52.]

Cited in 5 Wash. 500.

§ 92. Petit Jury, Defined.

A petit jury is a body of men, twelve in number in the superior court, and six in number in courts of justices of the peace, drawn in the superior court by lot from the jurors in attendance upon the court at a particular session, and sworn to try and determine a question of fact; but in justice's court the jury is drawn according to the mode specially provided for such court. [L. '91, p. 87, § 4; 2 H. C., § 53.]

Cited in 12 Wash. 55.

§ 93. Jury of Inquest, Defined.

A jury of inquest is a body of men, six in number, summoned from the qualified inhabitants of a particular district, before the coroner, or other ministerial officer, to inquire of particular facts. [L. '91, p. 87, § 5; 2 H. C., § 54.]

§ 94. Qualification of Jurors.

No person shall be competent to serve as a juror in the superior courts of the state of Washington unless he be (1) an elector and taxpayer of the state, (2) a resident of the county in which he is called for service for more than one year preceding such time, (3) over twenty-one years of age, (4) in full possession of his faculties and of sound mind, (5) able to read and write the English language. [L. '11, p. 314, § 1. Cf. L. '09, p. 131, § 1.]

Cited in 82 Wash. 619.

Qualifications of jurors under former laws: See Remington's Digest, Grand Jury, § 3; Jury, §§ 27—30, and cases cited.

This act impliedly repeals laws of 1905, page 270, section 4, requiring the drawing of a grand jury to serve during the ensuing three months: *State ex rel. Gibson v. Gilliam*, 56 Wash. 29, 104 Pac. 1131.

Payment of Taxes.—Constitution, article I, section 21, providing that the

right to trial by jury, "shall remain inviolate," is not violated by requiring jurors to be taxpayers: *State v. McDowell*, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414.

A juror need not be a taxpayer within the county in which he is called: *State v. Jahns*, 61 Wash. 636, 112 Pac. 747; *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752.

§ 95. Persons Exempt—Preparation of Lists—Claim of Exemption by Women.

Officers of the United States and of the state, attorneys at law, school teachers, practicing physicians, licensed embalmers, active members of the fire and police departments of any municipality, women, and all persons over sixty years of age, shall not be compelled to serve as jurors; and in preparing jury lists, the names of such persons, other than women and persons over sixty years of age, shall, if it be known that they are entitled to be excused from jury service, be omitted from the jury list: Provided, however, that the right of any such person to be excused from jury service shall not be cause for challenge as to his competency if he desires to serve: Provided further, that any woman desiring to be excused from jury service may claim exemption by signing a written or printed notice thereof and returning same to the sheriff before the date for appearance and if exemption is claimed by reason of sex no fee shall be allowed for her appearance. And it shall be the duty of the person serving any summons for jury service to inform the person served of this provision. [L. '11, p. 314, § 2.]

See *infra*, § 103, an earlier enactment.

§ 96. Jury List—Yearly Revision—Exempting Women—Jury-boxes.

Upon the taking effect of this act, the judge or judges of the superior court of each county in this state shall divide the county into not less than three nor more than six jury districts, following the lines of voting precincts and arranging the districts in such manner that the population in each district shall be as nearly equal as may be, and the fixing of the boundaries of the district shall be evidenced by an order made by the court and entered upon its records. The county assessor in each county in the state shall prepare annually a list of all persons qualified and subject to serve as a juror, giving the name, age, sex, whether naturalized or native born citizens, occupation, judicial district and postoffice address of such persons and file a copy thereof with the county clerk on or before the first day of June of each year. Any female who upon being listed by the county assessor shall claim her exemption to serve as a juror, shall not be listed by the said county clerk in the preparation of the list of jurors. During the month of July of each year the county clerk of each county in the state shall make up and revise in a book kept for that purpose a jury list containing the names of all the qualified jurors in the county. The county clerk shall provide boxes sufficient in number to correspond with the number

of jury districts fixed by the court, and numbered to correspond therewith, and having written the names of the jurors in each district upon slips of paper, which shall be similar in size, quality of paper, and writing, and shall deposit such slips in the jury-box of the proper district. The jury list shall be revised from year to year, new lists being made up each year, adding thereto the names of new residents, and omitting therefrom the names of persons who have removed from the county, or who may have served as jurors within five years theretofore (unless they shall be necessary to make up a sufficient list) and the names of the new lists shall be deposited in the box for service for that year, as hereinbefore provided. [L. '21, p. 92, § 1; L. '11, p. 314, § 3.]

Cited in 82 Wash. 618..

Jury list—Making and requisites of list and record: See Remington's Digest, Jury, § 32; State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Vance, 29 Wash. 435, 70 Pac. 34.

This section is directory merely; and a list made up from additional sources of information, such as memoranda by deputy assessors and the personal knowledge of the clerk, does not render the panel subject to challenge, where there

was no attempt to show any prejudice or consequent injury: State v. Rholeder, 82 Wash. 618, 144 Pac. 914.

Constitution, article I, section 22, guaranteeing to accused the right to a trial before "a jury of the county," is not violated by this section, providing that the county shall be divided into jury districts, and that an equal number of the jurors shall be drawn from each district for service in any month: State v. Newcomb, 58 Wash. 414, 109 Pac. 355.

§ 97. Jury Terms—Jury, How Drawn.

Jury terms shall commence on the first Monday of each month, and shall end on the Saturday preceding the first Monday of each month, unless the day of commencing or ending said term be changed by order of the judge or judges of the superior court; but it shall not be necessary to call a jury for any term in any county unless the judge or judges of the superior court of that county shall consider that there is sufficient business to be submitted to a jury to require that one be called. When the judge or judges of the superior court of any county shall deem that the public business requires a jury term to be held, he or they shall require the county clerk to draw a jury to serve for the ensuing term, and the county clerk, on the second Saturday of the calendar month preceding the month on which the jury is to be called to serve, shall be blindfolded, and in the presence of the judge or judges or of a court commissioner of the superior court, shall draw from the jury-boxes such number of names as the judge or judges may have ordered to be summoned as jurors for the ensuing term. The names shall be drawn in equal numbers from each jury-box, and before the drawing is made the boxes shall be shaken up so that the slips bearing the names thereon may be thoroughly mixed, and the drawing of the slips shall depend purely upon chance. [L. '11, p. 315, § 4.]

Drawings in absence of judge: See *infra*, § 105.

Cited in 76 Wash. 17; 82 Wash. 285; 85 Wash. 385.

Selection and drawing of panel: See Remington's Digest, Jury, § 33; State v. Payne, 6 Wash. 563, 34 Pac. 317; Mercereau v. Maughlin Mill Co., 53 Wash. 475, 102 Pac. 232; State v. Barnes, 54

Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932.

Term of Service.—Under Laws 1911, p. 315, § 4, an order extending a jury term should be made before the term expired, and an order made thereafter is not a substantial compliance

with the statute: *Jennings v. Puget Sound Traction, Light & Power Co.*, 76 Wash. 15, 135 Pac. 468.

If a jury is properly drawn and impaneled, and enters upon a trial within

the regular jury term, it is a properly constituted jury to complete the trial, though it may carry them over their statutory term as jurors: *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39.

§ 98. Grand Jurors—How Drawn.

Whenever the judge or judges of the superior court of any county in the state shall desire to summon a grand jury, the names of persons to serve as grand jurors shall be drawn from the jury list, as hereinbefore provided: Provided, however, that the names of the persons who shall serve as grand jurors shall not be stricken from the jury list, and such service shall not excuse them from service upon petit juries, as though they had not been summoned upon the grand jury. [L. '11, p. 316, § 5.]

Cited in 82 Wash. 286.

A grand jury is illegally drawn where the necessary seventeen grand jurors were arbitrarily selected by the court from forty of the attending qualified jurors drawn by the clerk by chance, as required by this and the preceding section: *State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32.

There is no such distinction between the words "drawn" and "impaneled" as here used, as to permit the judge to select without chance, a grand jury: *State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32.

A grand jury may be selected by the

clerk's drawing a certain number from the jury list, and qualifying them singly until sufficient jurors are obtained; or all drawn might be first qualified, and a sufficient number drawn by chance to make up the grand jury: *State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32.

A similar section (Rem. & Bal., § 104), providing that grand jurors shall be "drawn from the jury list as hereinbefore provided" held to have no application to the portions of the preceding section requiring monthly jury terms and fixing the time for the commencement of the term: *State ex rel. Gibson v. Gilliam*, 56 Wash. 29, 104 Pac. 1131.

§ 99. Additional Names—Open Venire.

If for any reason the jurors drawn for service upon a petit jury for any term shall not be sufficient to dispose of the pending jury business, or where no jury is in regular attendance and the business of the court may require the attendance of a jury before a regular term, the judge or judges of the superior court may draw from the jury list such additional names as they may consider necessary, and the persons whose names are so drawn shall thereupon be summoned to serve as jurors forthwith. The judge or judges drawing such additional names, may, in his or their discretion, order and direct that, of such additional jurors, only those living nearest to the county seat or most conveniently reached and found shall be at first summoned by the sheriff, and at any time when a sufficiency of such persons has been summoned and produced in court, such judge or judges may, in his or their discretion, order and direct the sheriff not to summon the remainder of the additional jurors so drawn. By stipulation or agreement made in open court as a part of the record, the parties to any action may agree that an open venire may be issued to make up a jury in that action and upon order of the court approving such stipulation and directing the number of jurors to be drawn, the clerk shall issue an open venire, and the sheriff shall fill the same by summoning from the bystanders, or elsewhere, a sufficient number of persons to fill the open venire. [L. '11, p. 316, § 6.]

Construction of former statutory provisions: See Remington's Digest, Jury, § 31; Thompson v. Territory, 1 W. T. 547; State v. Croncy, 31 Wash. 122, 71 Pac. 783; Cathey v. Seattle Elec. Co., 58 Wash. 176, 108 Pac. 443.

Special venire or panel: See Remington's Digest, Jury, § 36; Blanton v. State, 1 Wash. 265, 24 Pac. 439; State v. Payne, 6 Wash. 563, 34 Pac. 317; State ex rel. King v. Trimbell, 12 Wash. 440,

41 Pac. 183; State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. Lattin, 19 Wash. 57, 52 Pac. 314; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881.

Talesmen or additional jurors: See Remington's Digest, Jury, § 38; Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837; State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

§ 100. Excused from Service.

A person summoned as a juror may be excused from acting as such on account of any of the reasons stated in section 95 hereof; when his own health requires, on account of death in his family, or of illness in his family of such character that he is required to be in attendance thereupon, or when his business interests would be seriously prejudiced by such service. No person, however, shall be excused from service as a juror on account of business reasons unless his service is such as would lead to the waste or destruction of his property; and unless it shall appear that after having been summoned as a juror he had made every reasonable effort to permit of his serving as a juror without causing waste or destruction of his property. When excused for any of the foregoing reasons, or for any reason deemed sufficient by the court, the name of the juror so excused shall remain upon the jury list from which jurors are drawn, and his name returned to the jury box from which it was drawn. Any person applying to be excused from jury service for any of the causes herein specified, may be placed upon oath or affirmation to testify truly in all respects as to the cause of such excuse, and that he will answer truly any question put to him by the judge with respect thereto. [L. '11, p. 317, § 7.]

§ 101. Separation of Jury.

In no action or proceeding whatever, except felony cases shall the jury sworn to try the issues therein be kept together and in the custody of the officers of the court, save during the actual progress of the trial, until the case shall have been finally submitted to them for their decision. Whenever the jury are kept together in the custody of the officers when the trial is not in progress, they shall be supplied with meals at regular hours, and with comfortable sleeping and toilet accommodations. [L. '11, p. 317, § 8. Cf. 1 Rem. & Bal. Code, § 346, repealed by this act.]

§ 102. Felon not Competent.

A person who has been convicted of a felony is not competent to act as juror. [L. '99, p. 35, § 1; L. '91, p. 87, § 6; 2 H. C., § 55; see L. '88, p. 117, § 1.]

This section is superseded by § 94, supra, except as to subdivision 6, which is retained.

§ 103. Who are Exempt—Effect of Disqualification on Verdict.

Civil officers of the United States, civil and judicial officers of the state, attorneys at law, ministers of the gospel or priests, school teach-

ers, practicing physicians, locomotive engineers, active members of the fire department of any city or village, all persons who have served twice as a juror within two years, and all persons over sixty years of age, shall not be compelled to serve as jurors, and in preparing jury lists the county commissioners shall omit the names of such persons; but no act of a grand or petit jury shall be invalid by reason of such person or persons aforesaid, qualified in other respects, serving thereon; nor shall any disqualification of any member of a grand or petit jury affect the indictment or verdict, unless the juror for that specific cause was challenged or excepted to before the finding of the indictment or rendition of the verdict, and the challenge or exception overruled, and error specifically assigned upon the overruling of such challenge or exception. [L. '88, p. 117, § 2; L. '91, p. 87, § 7; 2 H. C., § 56.]

See supra, § 95, a later enactment.

See infra, § 111, as to previous service within one year.

See infra, § 8597, militia and employers exempt from jury duty, when.

See infra, § 11358, telegraph employees exempt.

See infra, § 332, exemption a personal privilege.

Cited in 31 Wash. 78; 110 Wash. 667.

§ 104. Public Interest as an Excuse.

A person may be excused from acting as a juror when, for any reason, . . . interests . . . of the public will be materially injured by his attendance; but no person shall be excused on account of the causes in this section mentioned, unless it appear that after he was summoned he could not, by reasonable precaution, have provided against them. [L. '91, p. 87, § 7; 2 H. C., § 57.]

The above portions of § 7 of the act of 1891 are retained.

§ 105. Drawing in Certain Counties in Absence of Judge.

When, pursuant to any statute of this state, there is elected but one judge of the superior court in and for two or more counties, the superior court of any such county may by an order made and entered of record direct that until such order be altered or revoked, the drawing from such box of the names of persons to serve as jurors in that court shall take place in the courtroom in such county and not in open court and without the presence of the judge; and while such order remains in force the drawing shall be made accordingly; but the names of the persons drawn shall nevertheless be entered upon the journal of such court, together with the clerk's certificate prescribed in section 4 of this act, and the judge of the superior court for any such county may, while he is within or without such county, make in writing and sign the order prescribed in said section 4 for drawing persons to serve as jurors; but he shall then forward such order to the clerk of such court in time to reach such clerk on or before 10 o'clock A. M. of the last Saturday in the current month; and such drawing shall then take place at said hour on said Saturday. If at the time when the said judge would otherwise make said order, it appears to the judge of said court that no jury will be needed in the ensuing month, the judge may omit said order and no jury need be drawn for such ensuing month. [L. '05, p. 275, § 14.]

It is doubtful if this section is in force. "Section 4" is repealed.

§ 106. Irregularities Do not Invalidate.

The failure on the part of any officer to perform the duties required within the time, or other irregularity in said drawing, shall in no way invalidate the selecting, summoning or drawing of said jurors. [Cf. L. '88, p. 116, § 4; L. '90, p. 332, § 2; 2 H. C., § 62.]

Cited in 12 Wash. 291.

This section shows the intention of the legislature to be that the regulations

for the drawing of jurors is not mandatory: State v. Krug, 12 Wash. 288, 41 Pac. 126.

§ 107. Proceedings When Venire Set Aside.

If for any cause the court shall see fit to set aside the venire for grand or petit jurors, returned as above provided, an open venire may thereupon issue to the sheriff, who shall thereupon complete the panel by such open venire as speedily as possible. [Cf. L. '90, p. 332, § 3; L. '91, p. 88, § 8; 2 H. C., § 63.]

Cited in 12 Wash. 295; 17 Wash. 550; 20 Wash. 558.

§ 108. Sheriff to Summon Jurors.

When a venire is delivered to the sheriff he shall without delay proceed to summon the jurors as therein directed, and shall immediately thereafter make and file in the court a return of his doings thereon. [L. '91, p. 88, § 10; 2 H. C., § 65.]

The fact that the sheriff does not make a return of his acts in summoning a special venire of jurors until after the

commencement of a trial is not ground for a challenge: State v. Payne, 6 Wash. 563, 34 Pac. 317.

§ 110. Venire to Fill Incomplete Panel.

If for any cause a sufficient number of grand or petit jurors are not returned by the sheriff in the manner first herein contemplated, or if a sufficient number of grand or petit jurors are not in attendance, the court may order the panel filled by summoning a sufficient number by an open venire issued and directed to the sheriff. [Cf. L. '90, p. 332, § 4; L. '91, p. 88, § 9; 2 H. C., § 64.]

§ 111. Juror not to be Summoned Twice in One Year.

No person shall be summoned as a petit juror in any superior court upon an open venire more than once in one year. [L. '91, p. 88, § 11; 2 H. C., § 66.]

For balance of this section, see *infra*, § 328.

Cited in 24 Wash. 257.

An act making service upon a jury within the previous year a ground for challenge, does not render one incom-

petent to serve as a juror, in the absence of a challenge: State v. Hall, 24 Wash. 255, 64 Pac. 153.

CHAPTER IX.**ATTORNEY GENERAL AND PROSECUTING ATTORNEYS.**

Duties of attorney general: See "State Officers," § 11020 et seq., *infra*.

Duties of prosecutors: See "Counties," § 4127 et seq., *infra*.

§ 112. Powers and Duties of Attorney General.

The powers and duties of the attorney general in relation to actions and proceedings in the courts shall be,—

1. To appear for and represent the state before the supreme court in all cases in which the state is interested;

2. To institute and prosecute all actions and proceedings for or for the use of the state, which may be necessary in the execution of the duties of any state officer;

3. To defend all actions and proceedings against any state officer in his official capacity, in any of the courts of this state or the United States;

4. To consult and advise the several prosecuting attorneys in matters relating to the duties of their office, and when, in his judgment, the interests of the state require, he shall attend the trial of any person accused of a crime, and assist in the prosecution. [L. '91, p 95, § 2; 2 H. C., § 84.]

Cited in 3 Wash. 66; 21 Wash. 454; 28 Wash. 497.

70 Pac. 114; Ritchie v. State, 42 Wash. 653, 85 Pac. 417.

Powers and duties in general: See Remington's Digest, Atty.-Gen., § 3; Jones v. Reed, 3 Wash. 57, 27 Pac. 1067; State ex rel. Attorney General v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946,

Nature and functions of office: See Remington's Digest, Dist. & Pros. Attys., § 1; Spokane County v. Allen, 9 Wash. 229, 37 Pac. 428, 43 Am. St. Rep. 830.

§ 113. Prosecuting Attorneys Defined.

Prosecuting attorneys are attorneys authorized by law to appear for and represent the state and the counties thereof in actions and proceedings before the courts and judicial officers. [L. '91, p. 95, § 3; 2 H. C., § 85.]

Cited in 18 Wash. 224; 21 Wash. 61; 28 Wash. 500.

§ 114. Appointment by the Court.

When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until such disability is removed. [L. '91, p. 95, § 5; 2 H. C., § 87.]

Cited in 21 Wash. 62.

Appointment and tenure: See Remington's Digest, Dist. & Pros. Attys., § 2; Smalley v. Snell, 6 Wash. 161, 32 Pac. 1062; State ex rel. McMartin v. Whitney, 9 Wash. 377, 37 Pac. 473.

being a county officer, under the constitution and laws of this state, a vacancy in the office should be filled by appointment of the county commissioners and not by the governor: State ex rel. McMartin v. Whitney, 9 Wash. 377, 37 Pac. 473. See Swanson v. Hoyle, 32 Wash. 169, 72 Pac. 1011.

The prosecuting attorney of a county

§ 115. Deputy Prosecuting Attorneys—Appointment.

The prosecuting attorney of each county may appoint, by and with the consent of the county commissioners, one or more deputies who shall have the same power in all respects as their principal. Such appointment shall be in writing, signed by the prosecuting attorney and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, but his appointment may be revoked by the prosecuting attorney or county commissioners at will. The prosecuting attorney shall be responsible for the acts of his deputies. [L. '03, p. 7, § 1. Cf. L. '91, p. 96, § 6; 2 H. C., § 88; see L. '86, p. 63, § 17.]

Cited in 33 Wash. 327.

Assistants and substitutes: See Remington's Digest, Dist. & Pros. Attys., § 3; State v. Elswood, 15 Wash. 453, 46 Pac. 727; State v. Heaton, 21 Wash. 59, 56 Pac. 843; Swanson v. Hoyle, 32 Wash. 139, 72 Pac. 1011.

A deputy prosecuting attorney has the power to subscribe his principal's name to an information: Hammond v. State, 2 Wash. 171, 28 Pac. 334.

It is proper for the deputy in executing papers pertaining to his duties to

sign his own name thereto as such, and it is unnecessary that he sign in the name of his principal, by himself as deputy: State v. Devine, 6 Wash. 587, 34 Pac. 154.

An information subscribed by a deputy prosecuting attorney is sufficient, since § 2050, *infra*, requiring information to be subscribed by the prosecuting attorney, must be read in connection with this section, a later act: State v. Riddell, 33 Wash. 324, 74 Pac. 477.

§ 116. General Powers and Duties of Prosecuting Attorneys.

The prosecuting attorney of each county shall have authority and it shall be his duty, subject to the supervisory control and direction of the attorney general, to appear for and represent the state and the county and all school districts in the county in which he is a prosecuting attorney, in all criminal and civil actions and proceedings in such county in which the state or such county or such school district is a party. [L. '11, p. 375, § 1. Cf. L. '91, p. 96, § 7; 2 H. C., § 89.]

Cited in 21 Wash. 61; 28 Wash. 500; 107 Wash. 283.

Powers and duties: See Remington's Digest, Dist. & Pros. Attys., § 5; State ex rel. Rockford v. Superior Court, 4 Wash. 30, 29 Pac. 764; State v. Hansen, 10 Wash. 235, 38 Pac. 1023; State v.

Heaton, 21 Wash. 59, 56 Pac. 843; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; State ex rel. Crawford v. Evenson, 18 Wash. 609, 52 Pac. 230; Spokane County v. Bracht, 23 Wash. 102, 62 Pac. 446; Bates v. School District No. 10, 45 Wash. 498, 88 Pac. 944.

CHAPTER X.

ATTORNEYS AND COUNSELORS AT LAW.

Compensation of: See *infra*, § 474 et seq.

§ 118. Attorney and Counsel Defined.

An attorney is a person duly admitted to practice law and authorized to appear for and represent a party in the written proceedings in any action or proceeding in any stage thereof. An attorney other than the one who represents the party in the written proceedings may also appear for and represent a party in court or before a judicial officer, and then he is known in the particular action or proceeding as counsel only, and his authority is limited to the acts that are done in the court or before such officer at that time. [L. '91, p. 95, § 1; 2 H. C.; § 90; L. '95, p. 178, § 1.]

Cited in 30 Wash. 234.

For text treatment of "Attorneys at Law," see 2 R. C. L. 929.

§ 129. Duties of Attorneys and Counselors.

It shall be the duty of an attorney and counselor,—

1. To support the constitution of the United States and the laws of the state;
2. To maintain the respect due to the courts of justice and judicial officers;
3. To counsel or maintain such actions, proceedings, or defenses only as appear to him legal and just, except the defense of a person charged with a public offense;

4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the judge by any artifice or false statement of fact or law;

5. To maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client;

6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged;

7. Never to reject, from any consideration personal to himself, the cause of the defenseless or oppressed. [L. '63, p. 404, § 5; Cd. '81, § 3279; 2 H. C., § 94.]

Cited in 5 Wash. 332; 18 Wash. 480; 48 Wash. 158; 95 Wash. 254.

Duties and liabilities of attorney to client in general: See Remington's Digest, Atty. & C., §§ 30—32; Isham v. Parker, 3 Wash. 755, 29 Pac. 835; Shine v. Culver, 42 Wash. 484, 85 Pac. 271; Snohomish Land Co. v. Blood, 40 Wash. 626, 82 Pac. 933; Sawdey v. Barnes, 73 Wash. 526, 132 Pac. 225.

Dealings between attorney and client: See Remington's Digest, Atty. & C., § 33; Scully v. Book, 3 Wash. 182, 28 Pac. 556;

Gaffney v. Jones, 18 Wash. 311, 51 Pac. 461; Landis v. Wintermute, 40 Wash. 673, 82 Pac. 100; Winsor v. Commonwealth Coal Co., 63 Wash. 62, 114 Pac. 908, 33 L. R. A. (N. S.) 63.

Acquiring property adversely to interest of client: See Remington's Digest, Atty. & C., § 34; Payette v. Willis, 23 Wash. 299, 63 Pac. 254; Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 Pac. 1020; Carson v. Fogg, 34 Wash. 448, 76 Pac. 112; Hetrick v. Smith, 67 Wash. 664, 122 Pac. 363.

§ 130. Authority of Attorneys and Counselors.

An attorney and counselor has authority,—

1. To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; but the court shall disregard all agreements and stipulations in relation to the conduct of or any of the proceedings in an action or special proceeding, unless such agreement or stipulation be made in open court, or in presence of the clerk, and entered in the minutes by him, or signed by the party against whom the same is alleged, or his attorney;

2. To receive money claimed by his client in an action or special proceeding during the pendency thereof, or after judgment upon the payment thereof, and not otherwise, to discharge the same or acknowledge satisfaction of the judgment;

3. This section shall not prevent a party employing a new attorney, or from issuing an execution upon a judgment, or from taking other proceedings prescribed by statute for its enforcement. [L. '63, p. 404, § 6; Cd. '81, § 3280; 2 H. C., § 95.]

Cited in 7 Wash. 213; 23 Wash. 251, 492; 34 Wash. 234; 41 Wash. 30; 46 Wash. 44; 55 Wash. 40; 57 Wash. 562; 90 Wash. 371.

Employment of attorney: See Remington's Digest, Atty. & C., § 35; Ramage v. Littlejohn, 17 Wash. 386, 49 Pac. 486; Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707; Sullivan's Estate, In re, 36 Wash. 217, 78 Pac. 945; Abel v. Hansen, 62 Wash. 492, 114 Pac. 182; Delbridge v. Beach, 66 Wash. 416, 119 Pac. 856; Jones v. Jones, 72 Wash. 517, 130 Pac.

1125. See, also, Roche v. Madar, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

Premature termination of relation: See Remington's Digest, Atty. & C., § 36; Payette v. Willis, 23 Wash. 299, 63 Pac. 254; Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707; Schmidt v. Curtiss, 72 Wash. 211, 130 Pac. 89; Johnson v. Mann, 72 Wash. 651, 131 Pac. 213.

Discharge from employment—Value of services: Ramey v. Graves, 112 Wash. 88, 191 Pac. 801.

Scope of authority in general: See Remington's Digest, Atty. & C., §§ 17, 18; Ashcraft v. Powers, 22 Wash. 440, 61 Pac. 161; Lacaff v. Dutch Miller Min. & Smelt. Co., 31 Wash. 566, 72 Pac. 112; Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490.

Stipulations and admissions: See Remington's Digest, Atty. & C., § 19; Simpson v. Brown Bros. & Co., 1 W. T. 247; Haas v. Gaddis, 1 Wash. 89, 23 Pac. 1010; Haynes v. Tacoma Olympia etc. R. Co., 7 Wash. 211, 34 Pac. 922; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849.

Commencement and conduct of litigation: See Remington's Digest, Atty. & C., §§ 20, 21; Eldridge v. Stenger, 19 Wash. 697, 54 Pac. 541; De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795; Smalley v. Languenour, 30 Wash. 307, 70 Pac. 786; Simpson v. Brown Bros. & Co., 1 W. T. 247; Furman v. Bon Marche, 71 Wash. 238, 128 Pac. 210; Waterman v. Robertson, 103 Wash. 553, 175 Pac. 177.

Control of judgment and execution: See Remington's Digest, Atty. & C., §§ 22, 23; Murray v. Meade, 5 Wash. 693, 32 Pac. 780; Sturgis v. Dart, 23 Wash. 244, 62 Pac. 858; Carson v. Fogg, 34 Wash. 448, 76 Pac. 112; Richardson v. Seattle, 97 Wash. 371, 166 Pac. 639, 168 Pac. 513.

Prosecution of appeal or other proceedings for review: See Remington's

Digest, Atty. & C., § 24; South Bend Land Co. v. Denio, 7 Wash. 303, 35 Pac. 64; Grunewald v. West Coast etc. Co., 11 Wash. 478, 39 Pac. 964; Humptulips Driving Co. v. Cross, 65 Wash. 636, 118 Pac. 827, 37 L. R. A. (N. S.) 226.

Receiving payment or security—Satisfaction of judgment or execution: See Remington's Digest, Atty. & C., § 25; Lyons v. Bain, 1 W. T. 482; Parker v. Esch, 5 Wash. 296, 31 Pac. 754; High v. Emerson, 23 Wash. 103, 62 Pac. 455; State ex rel. Lane v. Ballinger, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72; Hayes v. Koepfli, 46 Wash. 43, 89 Pac. 151.

Settlements, compromises and releases in general: See Remington's Digest, Atty. & C., § 26; Livesley v. Pier, 11 Wash. 268, 39 Pac. 660; High v. Emerson, 23 Wash. 103, 62 Pac. 455; Collins v. Fidelity Trust Co., 33 Wash. 136, 73 Pac. 1121; Sawyer v. Vermont Loan etc. Co., 41 Wash. 524, 84 Pac. 8; Cogswell v. Cogswell, 70 Wash. 178, 126 Pac. 431.

Sufficiency and proof of authority to settle: See Remington's Digest, Atty. & C., § 27; Timm v. Timm, 34 Wash. 228, 75 Pac. 879; Erickson v. McNecley & Co., 41 Wash. 509, 84 Pac. 3; Pearl Oyster Co. v. Seattle & Montana R. Co., 53 Wash. 101, 101 Pac. 503.

Authority of attorney to consent to account stated. 2 A. L. R. 74.

§ 131. Proceedings When Attorney Appears Without Authority.

If it be alleged by a party for whom an attorney appears that he does so without authority, the court may at any stage of the proceedings relieve the party for whom the attorney has assumed to appear from the consequences of his act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his assumption of authority. [L. '69, p. 405, § 7; Cd. '81, § 3281; 2 H. C., § 96.]

Cited in 21 Wash. 436.

Where the question of the authority of an attorney to appear for a party has been raised and passed upon in the original action, it cannot be retried

upon a petition to vacate the judgment therein under authority of this section: Roberts v. Shelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576.

§ 132. Attorney may be Required to Show Authority.

The court or a judge may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he appears, and until he does so, may stay all proceedings by him on behalf of the party for whom he assumes to appear. [L. '63, p. 405, § 8; Cd. '81, § 3282; 2 H. C., § 97.]

Cited in 23 Wash. 305; 27 Wash. 114, 255.

§ 133. Change of Attorneys.

The attorney in an action or special proceeding may be changed at any time before judgment or final determination as follows:—

1. Upon his own consent, filed with the clerk or entered upon the minutes; or

2. Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made. [L. '63, p. 405, § 9; Cd. '81, § 3283; 2 H. C., § 98.]

Cited in 72 Wash. 519; 78 Wash. 473.

Change and substitution: See Remington's Digest, Atty. & C., §§ 14, 15; Tacoma Mill Co. v. Sherwood, 11 Wash. 492, 39 Pac. 977; Gabrielson v. Gorin, 92 Wash. 408, 159 Pac. 387.

This and the next section governing the substitution of attorneys is confined to changes made before judgment or final determination: Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

§ 134. Notice of Change and Substitution.

When an attorney is changed, as provided in the last section, written notice of the change, and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party; until then, he shall be bound to recognize the former attorney. [L. '63, p. 405, § 10; Cd. '81, § 3284; 2 H. C., § 99.]

Cited in 3 Wash. 392; 27 Wash. 114.

Upon an application to the court to change attorneys, notice to the attorney issued by citation is sufficient, provided the attorney is thereby given reasonable notice of the application: Schultheis v. Nash, 27 Wash. 250, 67 Pac. 707.

After judgment, new attorneys may be employed and may serve notice of appeal without notice of the substitution of attorneys to the adverse party, since this section is confined to changes before final judgment: Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580.

§ 135. Proceedings on Death or Removal of Attorney.

When an attorney dies, or is removed or suspended, or ceases to act as such, a party to an action for whom he was acting as attorney must, at least twenty days before any further proceedings against him, be required by the adverse party, by written notice, to appoint another attorney, or to appear in person. [L. '63, p. 405, § 11; Cd. '81, § 3285; 2 H. C., § 100.]

Cited in 35 Wash. 387.

This section does not apply to a voluntary withdrawal by the attorney, since a

twenty days' delay could thereby be secured by collusion: McInnes v. Sutton, 35 Wash. 384, 77 Pac. 736.

§ 136. Lien of Attorneys.

An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided,—

1. Upon the papers of his client, which have come into his possession in the course of his professional employment;

2. Upon money in his hands belonging to his client;

3. Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

4. Upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a

special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed, and date of filing notice. [L. '63, p. 406, § 12; Cd. '81, § 3286; 2 H. C., § 101.]

See §§ 474, 475, *infra*, relating to compensation of attorneys.

Cited in 3 Wash. 375; 11 Wash. 208; 23 Wash. 307; 25 Wash. 511; 41 Wash. 196; 57 Wash. 242; 60 Wash. 217; 65 Wash. 637; 82 Wash. 401; 89 Wash. 345; 93 Wash. 14.

Nature of attorney's lien: See Remington's Digest, Atty. & C., § 45; Chambers v. Territory, 3 W. T. 280, 13 Pac. 336; State v. Lewis, 31 Wash. 75, 71 Pac. 778; Gust v. Judd, 88 Wash. 536, 153 Pac. 309.

Proceedings to perfect: See Remington's Digest, Atty. & C., § 46; Wooding v. Crain, 11 Wash. 207, 39 Pac. 442; State ex rel. Trumbull v. Sachs, 3 Wash. 371, 28 Pac. 540; Plummer v. Great Northern R. Co., 60 Wash. 214, 110 Pac. 989, 31 L. R. A. (N. S.) 1215; State ex rel. Angeles Brewing & Malting Co. v. Superior Court, 89 Wash. 342, 154 Pac. 603.

An attorney's lien on a judgment cannot attach upon the oral announcement of the decision at the conclusion of the trial, but a written judgment must be formally entered, under this section: Cline Piano Co. v. Sherwood, 57 Wash. 239, 106 Pac. 742.

Waiver, loss or discharge: See Remington's Digest, Atty. & C., § 47; Wooding v. Crain, 11 Wash. 207, 39 Pac. 442; Gottstein v. Harrington, 25 Wash. 508, 65 Pac. 753; Plummer v. Great Northern R. Co., 60 Wash. 214, 110 Pac. 989, 31 L. R. A. (N. S.) 1215; Eighth Avenue, In re, 82 Wash. 398, 144 Pac. 533; Jensen v. Kohler, 93 Wash. 8, 159 Pac. 978.

Protection against assignment or settlement by client: See Remington's Digest,

Atty. & C., § 48; Niagara Fire Ins. Co. v. Hart, 13 Wash. 651, 43 Pac. 937; McRea v. Warehime, 49 Wash. 194, 94 Pac. 924; Cline Piano Co. v. Sherwood, 57 Wash. 239, 106 Pac. 742.

The claim for lien must be filed prior to assignment of the judgment in order to take precedence over the assignment: Humptulips Driving Co. v. Cross, 65 Wash. 636, 118 Pac. 827, 37 L. R. A. (N. S.) 226.

Validity of, and proceedings to test or defeat lien: See Remington's Digest, Atty. & C., § 49; Eighth Avenue, In re, 82 Wash. 398, 144 Pac. 533; State ex rel. Angeles Brewing & Malting Co. v. Superior Court, 89 Wash. 342, 154 Pac. 603; State ex rel. Robinson Co. v. Gilliam, 94 Wash. 243, 161 Pac. 1194.

Lien of attorney on public fund or property. 2 A. L. R. 274.

Lien on papers or securities that come into attorney's possession otherwise than in his professional capacity. 2 A. L. R. 1488.

Lien on property purchased by client on sale under a judgment procured by attorney. 2 A. L. R. 483.

Power of court to adjudge and decree to attorney part of the judgment recovered by his client. 11 A. L. R. 713.

Merits of clients cause of action or defense as affecting attorney's lien against adverse party in case of compromise without attorney's consent. 2 A. L. R. 337.

§ 137. Proceedings to Compel Delivery of Papers.

When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt. [L. '63, p. 406, § 13; Cd. '81, § 3287; 2 H. C., § 102.]

Cited in 3 Wash. 16, 376; 72 Wash. 656; 82 Wash. 399, 401; 88 Wash. 537; 93 Wash. 14; 94 Wash. 244.

§ 138. Proceedings Where Lien Exists.

If, however, the attorney claim a lien upon the money or papers, under the provisions of this chapter, the court or judge may,—

1. Impose as a condition of making the order that the client give security, in a form and amount to be directed, to satisfy the lien, when determined in an action;

2. Summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or

3. To refer it, and upon the report determine the same as in other cases. [L. '63, p. 406, § 14; Cd. '81, § 3288; 2 H. C., § 103.]

Cited in 72 Wash. 519; 82 Wash. 299, 401; 88 Wash. 537; 93 Wash. 14; 94 Wash. 244; 103 Wash. 665.

In a proceeding under sections 137, 138, to set aside a lien for the plaintiff's attorney's fees, in which only the attorneys appeared to contest the claim, other parties and creditors interested in the fund are not necessary parties to an appeal from the judgment establishing the lien, and need not be served with

notice of the appeal: *Gust v. Judd*, 88 Wash. 536, 153 Pac. 309.

The summary method provided by this section for the adjustment of excessive attorney's charges is not exclusive, and a trustee of a corporation appointed by stipulation may maintain an action to enforce the agreement against the parties, including an attorney withholding an excessive fee: *Jensen v. Kohler*, 93 Wash. 8, 159 Pac. 978.

§ 139-1. State Board of Law Examiners—Appointment—Term—Compensation.

There is hereby created a state board of law examiners composed of three members of the bar, each of whom shall have been admitted to practice in this state for at least five years next preceding his appointment. The members of the state board of law examiners at the time of the taking effect of this act shall continue to be members of the board of law examiners for the remainder of their respective terms, and upon the expiration of the term of office of a member, the supreme court shall make an appointment to fill the vacancy, which appointment shall be for a term of three years; and thereafter, at the expiration of any term of office of a member, a like appointment shall be made for a term of three years. Each member of the board shall, before entering upon the duties of his office, take and subscribe such oath as the supreme court shall prescribe, which shall be filed with the clerk of the supreme court. Each member of the board shall be allowed his traveling and incidental expenses and one thousand dollars per year for his services, payable in the same manner as state officers are paid. [L. '21, p. 407, § 1.]

§ 139-2. Secretary, Records and Meetings.

The board shall have its office with the clerk of the supreme court, who shall act as secretary, or one of the members of the board may act as secretary. The records of the board shall be kept in the office of the clerk, where all applications for admission to the bar and all complaints or other matters affecting the rights of persons to practice law in this state shall be filed. The board shall hold meetings at the Temple of Justice at the state capital on the fourth Tuesday of June and January of each year for the purpose of conducting examinations and passing upon applications for admission to practice law in this state, and at such other times and places as it may order, and may authorize any

one or more of its members to conduct examinations and report thereon. Other meetings of the board may be held at such places as the board or the chairman may designate, and the board may authorize one or more of its members to act for it in any matter or proceeding or to make any investigation deemed by it advisable. [L. '21, p. 408, § 2. Cf. L. '17, p. 442, § 5.]

§ 139-3. Applications to Practice—Certification—Admission.

The board shall pass upon all applications for permission to practice law before the courts of this state, and when satisfied that an applicant has the requisite qualification to practice as an attorney and counselor, it shall so certify to the supreme court; and upon such certification, unless objection be raised thereto and found sufficient, the court may make an order admitting the applicant, and the clerk shall issue to him a certificate of admission. No person shall be denied admission to the bar on account of sex. [L. '21, p. 409, § 3. Cf. L. '17, p. 423, § 6.]

§ 139-4. Qualifications of Admission to Practice.

No person shall be permitted to practice as an attorney or counselor at law or to do work of a legal nature for compensation, or to represent himself as an attorney or counselor at law or qualified to do work of a legal nature, unless he is a citizen of the United States and a bona fide resident of this state and has been admitted to practice law in this state: Provided, that any person may appear and conduct his own case in any action or proceeding brought by or against him, or may appear in his own behalf in the small claims department of the justice's court; and provided further, that an attorney of another state may appear as counselor in a court of this state without admission, upon satisfying the court that his state grants the same right to attorneys of this state. [L. '21, p. 409, § 4. Cf. L. '19, p. 243, § 1; L. '17, p. 421, § 1.]

/ A native of Japan is not eligible to any of the courts of this state: *Yamashita, In re*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L. R. A. 671. United States citizenship, being of the Mongolian race, and hence under this section cannot be admitted to practice in

§ 139-5. Practice of Law—Restrictions—Associates of Prosecutor.

No person shall practice law who holds a commission as judge in any court of record, or as sheriff, coroner, or deputy sheriff; nor shall the clerk of the supreme court or of the superior court or the deputy of either practice in the court of which he is clerk or deputy clerk: Provided, it shall be unlawful for a deputy prosecuting attorney, or for the employee, partner, or agent of a prosecuting attorney, or for an attorney occupying offices with a prosecuting attorney, to appear for an adverse interest in any proceeding in which a prosecuting attorney is appearing, or to appear in any suit, action or proceeding in which a prosecuting attorney is prohibited by law from appearing, but nothing herein shall preclude a judge of a court of this state from finishing any business by him undertaken in a court of the United States prior to his becoming a judge. [L. '21, p. 409, § 5.]

§ 139-6. Affidavit upon Application.

Every applicant for admission to the bar shall file his affidavit that he is a citizen of the United States. If a citizen by birth he shall state his birthplace and date of birth; if a citizen by naturalization, the time, place and court in which he or his ancestor made his first and final applications for citizenship and swear that he owes his allegiance to the United States. The applicant shall further state his vocation during the five years immediately preceding his application, and the specific place or places of his residence during that period. [L. '21, p. 410, § 6.]

§ 139-7. Residents of Another State.

If the applicant has practiced law or been admitted to the bar elsewhere than in this state, he shall state such facts with respect thereto as the board may prescribe or require. In addition thereto if the applicant comes from a place where there is a local bar association, he shall present a recommendation from its president and secretary. His application shall be supported by recommendation of a judge of a court of general jurisdiction in which he has practiced; and if there is no bar association at the place whence the applicant came, he shall present recommendations from at least three members of the local bar where he last practiced. If for sufficient reason the applicant cannot obtain any of the recommendations required, the board may accept other satisfactory proof of his character and reputation. [L. '21, p. 410, § 7.]

§ 139-8. Board to Investigate and Recommend.

The board shall investigate the statements in the affidavits, and if any of them are found false in a material respect, or if the board finds the applicant is not a proper person to be admitted to practice law, it shall recommend to the supreme court that the application be denied. If the board finds that the statements in the affidavits are substantially true and that the applicant is a proper person to be admitted to the bar, it shall recommend to the supreme court that the application be granted, if the applicant has the educational qualifications hereinafter required. [L. '21, p. 411, § 8.]

§ 139-9. Admission on Accredited Certificate—Definition.

Applicants may be admitted on accredited certificates or upon examination. An accredited certificate shall be:

(1) A certificate from the clerk or other officer of the highest court of record of another state, or from the clerk of the court by which attorneys are admitted, under the seal of the court, showing that the applicant was entitled to practice and was actively engaged in practice in such state for five years or more next preceding the date of the certificate, together with a certificate from the chief justice or other member of such court, under the seal of the court, certifying that the applicant is in good standing at the bar of the court and is an honorable and worthy member of the profession. If the certificate last mentioned cannot be procured on account of lack of acquaintance, the board may accept in lieu thereof a certificate from the judge of the highest court of record in the county wherein the applicant last resided: Provided,

however, that the certificate was issued within one year prior to his application for admission in this state.

(2) A diploma of graduation from the law school of the University of Washington.

(3) A diploma of graduation from an approved law school within the state of equal standing as to entrance requirements and hours of study to that of the law school of the University of Washington. [L. '21, p. 411, § 9. Cf. L. '17, p. 423, § 7; L. '19, p. 244, § 2.]

§ 139-10. Approved Schools—Credits.

The board shall examine the curricula of law schools and determine which ones shall be approved. No law school shall be approved unless the board finds that its entrance requirements and hours of study are at least equal to those of the University of Washington school of law, or of the American Association of Law Schools. All applicants who have satisfactorily completed the course in an approved law school within this state, may, in the discretion of the board, be recommended for admission without further examination. The board shall prescribe the credits to be allowed for study in any other than an approved law school, and for less than a full course in an approved law school, and for office study. [L. '21, p. 412, § 10.]

§ 139-11. Registration and Course of Study Outside Approved School.

Every person desiring to study law, except a student in an approved law school, shall, prior to the commencement of his studies, register with the clerk of the supreme court. He shall not be registered until he make proof satisfactory to the board that he has general education sufficient to entitle him to enter the freshman class of the University of Washington or of the State College of Washington except its elementary science departments. If a student in an improved law school leave the school and pursue his legal studies elsewhere, he must register as herein required. The board shall prescribe a course of legal study for students other than those in approved law schools. Such course shall not be less than three years and examination shall be held at the completion of the course: Provided, that all persons who have served in the army, navy or marines of the United States, in the late war, may be admitted to examination at any regular examination meeting of the board of law examiners for a period of one year from the date of passage of this act: Provided further, that any person over the age of twenty-five years and of good moral character who is a citizen of the United States and a resident of the state of Washington and who has served for not less than five years as law clerk for a licensed and practicing attorney or attorneys in the state of Washington of good moral character and reputable standing, may be admitted at any time to examination as to his educational qualifications, both general and legal; and if the board be satisfied that he is qualified to practice law it shall so certify to the supreme court. [L. '21, p. 412, § 11; L. '17, p. 426, § 11; L. '19, p. 244, § 3.]

§ 139-12. Oath Before Admission.

Every person before being admitted to practice law in this state shall take and subscribe the following oath:

I do solemnly swear:

I am a citizen of the United States and owe my allegiance thereto;

I will support the constitution of the United States and the constitution of the state of Washington;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land, unless it be in defense of a person charged with a public offense; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God. [L. '21, p. 413, § 12. Cf. L. '17, p. 427, § 14.]

§ 139-13. Fee on Admission.

Applicants for admission to the bar upon accredited certificates or upon examination, not having been admitted to the bar in another state or territory, shall pay a fee of twenty-five dollars and all other applicants a fee of fifty dollars to the clerk of the supreme court at the time of filing the application for admission. Such fees shall be accounted for as other fees of the clerk's office. [L. '21, p. 414, § 13; L. '17, p. 428, § 15.]

§ 139-14. Disbarment or Suspension—Grounds.

An attorney or counselor may be disbarred or suspended for any of the following causes arising after his admission to practice: 1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence. 2. Willful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of, his profession, which he ought in good faith to do or forbear. 3. Violation of his oath as an attorney, or of his duties as an attorney and counselor. 4. Corruptly or willfully, and without authority, appearing as attorney for a party to an action or proceeding. 5. Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor. 6. For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise, and

whether the same constitute a felony or misdemeanor or not; and if the act constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice thereof. 7. Misrepresentation or concealment of a material fact made in his application for admission or in support thereof. 8. Disbarment by a foreign court of competent jurisdiction. 9. Practicing law with or in co-operation with a disbarred or suspended attorney, or maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred or suspended attorney, or permitting a disbarred or suspended attorney to use his name for the practice of law, or practicing law for or on behalf of a disbarred or suspended attorney, or practicing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred or suspended attorney or with any person not a licensed attorney. 10. Gross incompetency in the practice of the profession. 11. Violation of the ethics of the profession. [L. '21, p. 414, § 14. Cf. L. '09, p. 536, § 7.]

SUSPENSION AND DISBARMENT:
See Remington's Digest, Atty. & C., §§ 6—9-1.

Jurisdiction to suspend: Lambuth, In re, 18 Wash. 478, 51 Pac. 1071; Waugh, In re, 32 Wash. 50, 72 Pac. 710; State ex rel. Hardin v. Grover, 47 Wash. 39, 91 Pac. 564; Robinson, In re, 48 Wash. 153, 92 Pac. 929, 15 Ann. Cas. 415, 15 L. R. A. (N. S.) 525.

Laws of 1917, page 421, though unconstitutional in so far as it authorizes judgment of disbarment, is sustainable as to the delegated legislative and administrative functions, and authorizes the board to pass upon the evidence received, and report the same to the supreme court; since the valid is separable from the invalid portions of the act: Bruen, In re, 102 Wash. 472, 172 Pac. 1152. See, also, Ward, In re, 106 Wash. 147, 179 Pac. 76.

Grounds for suspension or for striking from roll: Lambuth, In re, 18 Wash. 478, 51 Pac. 1071; Jones v. Waugh, 20 Wash. 711, 55 Pac. 1103; State ex rel. Dill v. Martin, 45 Wash. 76, 87 Pac. 1054; State ex rel. Murphy v. Snook, 78 Wash. 671, 139 Pac. 764. See, also, Gill In re, 104 Wash. 160, 176 Pac. 11; Gowan, In re, 104 Wash. 166, 176 Pac. 7; Ward, In re, 104 Wash. 170, 176 Pac. 2; Turner, In re, 104 Wash. 276, 176 Pac. 332; Martin, In re, 107 Wash. 372, 181 Pac. 880; Martin, In re, 107 Wash. 461, 182 Pac. 579; Willsie, In re, 109 Wash. 261, 186 Pac. 848.

Misappropriations: Gowan, In re, 104 Wash. 166, 176 Pac. 7.

Evidence—Sufficiency: Ward, In re, 106 Wash. 147, 179 Pac. 76.

Disloyal conduct: Aretander, In re, 110 Wash. 296, 188 Pac. 380.

Criminal offenses and conviction thereof: State ex rel. Mackintosh v. Rossman, 53 Wash. 1, 101 Pac. 357, 17 Ann. Cas. 625, 21 L. R. A. (N. S.) 821; Hopkins, In re, 54 Wash. 569, 103 Pac. 805. See, also, Mills, In re, 104 Wash. 278, 176 Pac. 556.

Contempt of court: Robinson, In re, 48 Wash. 153, 92 Pac. 929, 15 Ann. Cas. 415, 15 L. R. A. (N. S.) 525; State ex rel. Lewis County Bar Assn. v. Willis, 95 Wash. 251, 163 Pac. 737.

Nature of proceedings to disbar: See Remington's Digest, Atty. & C., § 8; State ex rel. Rohde v. Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857; Waugh, In re, 32 Wash. 50, 72 Pac. 710; Ault's Disbarment, In re, 15 Wash. 417, 46 Pac. 644; State ex rel. Martin v. Poindexter, 43 Wash. 147, 86 Pac. 176; Mackintosh v. Rossman, 53 Wash. 1, 101 Pac. 357, 17 Ann. Cas. 625, 21 L. R. A. (N. S.) 821; State ex rel. Lewis County Bar Assn. v. Willis, 95 Wash. 251, 163 Pac. 737.

Parties, proceedings and punishment: See Remington's Digest, Atty. & C., §§ 8-1—9-1; State ex rel. Hardin v. Grover, 47 Wash. 39, 91 Pac. 564; State ex rel. Dill v. Martin, 45 Wash. 76, 87 Pac. 1054; State ex rel. Rohde v. Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857; State ex rel. Murphy v. Snook, 78 Wash. 671, 139 Pac. 764.

Moral delinquency or other conduct not affecting court or client as ground for disbarment. 9 **A. L. R.** 189.

Presenting or permitting false evidence as ground for disbarment or suspension. 14 **A. L. R.** 868.

Encouraging divorce legislation as ground for disbarment. 9 A. L. R. 1500.

Attorney's misconduct with regard to proposed legislation as ground for disbarment. 9 A. L. R. 1277.

Disloyal acts or political opinions as ground for disbarment. 8 A. L. R. 1262; 12 A. L. R. 1189.

Presumption of innocence in disbarment proceedings. 7 A. L. R. 93.

§ 139-15. Code of Ethics.

The code of ethics of the American Bar Association shall be the standard of ethics for the members of the bar of this state. [L. '21, p. 415, § 15. Cf. L. '17, p. 431, § 20.]

§ 139-16. Complaints and Hearings Thereon.

The board shall enforce the laws relating to attorneys. Complaints shall be filed with the secretary of the board and may be made by the board or a member thereof or by persons having information of unprofessional acts or conduct. Notice shall be given to the accused attorney of the time and place of hearing. The hearing shall be had in the county where the accused resides unless the board shall otherwise direct. The board may delegate the taking of testimony or the making of investigation to any one or more members of the board. [L. '21, p. 415, § 16. Cf. L. '17, p. 429, § 17.]

§ 139-17. Proceedings upon Hearings—Duties of Prosecuting Attorney—Witness Fees and Costs.

The board or a member thereof shall have power to issue subpoenas to compel the attendance of witnesses or the production of books or documents. The accused attorney shall have opportunity to make his defense and may have issued such subpoenas as he may desire and as the board or member conducting the hearing deems necessary. Subpoenas shall be served in the same manner as in civil cases in the superior court. Witnesses shall testify under oath administered by a member of the board. Testimony shall be taken in writing, and may be taken by deposition, under such rules as the board may prescribe. The prosecuting attorney of the county in which the hearing is held shall assist the board in the conduct of the hearing, and the attorney general shall assist when so requested by the board. Upon approval by the court or presiding judge of the county where the hearing is held, whether such hearing be one for disbarment or for any other purpose authorized by this act, the county shall pay the witnesses' and stenographer's fees and other disbursements incurred in the conduct of the hearing. The board shall make findings upon the evidence produced, and shall file with the clerk of the supreme court its findings and recommendations, together with a transcript of the evidence. [L. '21, p. 416, § 17. Cf. L. '17, p. 429, § 18; L. '19, p. 247, § 7.]

§ 139-18. Supreme Court—Hearings and Judgment.

There shall be a hearing before the supreme court upon the record certified by the board under such rules of procedure as the court may prescribe. The supreme court shall render such judgment as the facts

warrant or may remand the case to the board for further investigation and consideration. The attorney may be disbarred, or suspended, or subjected to such other discipline as the court may decree. If an attorney's license is suspended or annulled the clerk of the supreme court shall notify the clerks of the superior courts of the state. [L. '21, p. 416, § 18. Cf. L. '17, p. 431, § 21.]

§ 139-19. Forms, Rules and Regulations.

The board shall prescribe forms, rules and regulations to carry out the provisions of this act. Such forms, rules and regulations shall have the same force and effect as if made a part of this act. [L. '21, p. 417, § 19. Cf. L. '17, p. 431, § 23.]

§ 139-20. Annual Registration—Fees—Failure to Register—Effect.

Every attorney and counselor at law of this state except judges, shall register annually with the clerk of the county in which he resides or has his place of practice, which registration may be done in person, by agent, or by mail, and shall state the name of the attorney, his address and the firm of attorneys with which he is connected, if any. The clerk shall provide a book for such registration and shall register the names therein alphabetically. In counties having a population of less than 125,000, the fee for each annual registration shall be one dollar to be paid into the state treasury for the general fund; in counties having population of 125,000 or more, the fee for each annual registration shall be two dollars, one-half of which fee shall be paid into the county treasury for the county law library fund; and the other half shall be paid into the state treasury for the general fund. An attorney who shall have failed to register before the first day of February in any year shall be deemed suspended as an attorney and counselor at law until such registration shall have been made and the fee paid, but such suspension shall not be construed to affect the rights of litigants or others for whom the delinquent may act during suspension. If an attorney fail to register for two successive years and pay his registration fees, the county clerk shall notify the clerk of the supreme court, and the attorney; whereupon the attorney's name shall be stricken from the list of attorneys until all delinquent fees are paid. [L. '21, p. 417, § 20.]

§ 139-21. Record of Attorneys.

The clerk of the supreme court shall certify to the clerks of the superior courts of the several counties a list of all attorneys admitted and in good standing in the state on the first day of September of each year, commencing with the year 1921, which list shall be filed and kept by said clerks as a public record. [L. '21, p. 417, § 21.]

§ 139-22. Violations.

Any violation of this act or of a rule prescribed under this act is a gross misdemeanor. [L. '21, p. 418, § 22. Cf. L. '17, p. 432, § 24.]

§ 139-23. Repealing Clause.

Chapter 115, Laws of 1917, Chapter 100, Laws of 1919, and sections 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 139, 140, 141 and 142 of Remington & Ballinger's Annotated Codes and Statutes of Washington, are hereby repealed. This act shall not affect existing rights. All former statutes and laws are excepted from the repealing clause of this act for the purpose of prosecuting any offenses committed thereunder. The provisions of this act, in so far as they are substantially the same as existing statutes, shall be construed as continuations thereof and not as new enactments. [L. '21, p. 418, § 23.]

PROCEDURE IN COURTS OF RECORD.

TITLE II.

PROCEDURE IN COURTS OF RECORD.

CHAPTER I.—RULES OF DECISION AND CONSTRUCTION.

- | | | | |
|------|---|--------|-------------------------------|
| 143. | Common law, how far prevails. | 150. | Computation of time. |
| 144. | Laws to be liberally construed. | 151. | Adoption of Ballinger's Code. |
| 145. | Laws continued. | 152. | Amendments to code. |
| 146. | Word "person" defined. | 152-5. | Official codes of state laws. |
| 147. | Term "officer" defined. | 152-6. | Citations of codes. |
| 148. | Words importing number and gender, how construed. | 152-7. | Adoption of Pierce code. |
| 149. | Word "month" defined. | 152-8. | Reference and abbreviations. |
| | | 152-9. | Certifying session laws. |

CHAPTER II.—FORMS OF ACTIONS.

- | | | | |
|------|--------------------------|------|--------------------------|
| 153. | Only one form of action. | 154. | Parties, how designated. |
|------|--------------------------|------|--------------------------|

CHAPTER III.—LIMITATION OF ACTIONS.

- | | | | |
|------|--|------|---|
| 155. | Limitations prescribed—Objections, how taken. | 167. | Actions in name of state, etc. |
| 156. | Actions to be commenced in ten years. | 168. | Operation of statute suspended, when. |
| 157. | Within six years. | 169. | Suspension for personal disability. |
| 158. | Within five years. | 170. | Suspension by death. |
| 159. | Within three years. | 171. | Suspension by war. |
| 160. | Within two years. | 172. | Suspension by judicial proceedings. |
| 161. | Within one year. | 173. | Suspension by reversal of judgment. |
| 162. | Action to cancel tax or tax deed. | 174. | When disability available. |
| 163. | Special provisions for action on penalty. | 175. | Cumulative disabilities. |
| 164. | Within three months. | 176. | New promise must be in writing. |
| 165. | Actions for relief not otherwise provided for. | 177. | Effect of partial payment. |
| 166. | Actions on mutual open accounts. | 178. | Foreign statutes of limitations, how applied. |

CHAPTER IV.—PARTIES TO ACTIONS.

- | | | | |
|--------|--|------|--|
| 179. | In whose name actions to be prosecuted. | 190. | Where parties are numerous one or more may sue. |
| 180. | Executor, trustee, etc., may sue in their own names. | 191. | Actions on assigned instruments and choses in action. |
| 181. | Husband and wife must join—Exception. | 192. | Actions against persons severally liable. |
| 182. | When husband and wife may join. | 193. | Action not to abate by disability. |
| 183. | Right of action for wrongful death. | 194. | Action for personal injury survives to wife, child or heirs. |
| 183-1. | Beneficiaries of action for wrongful death. | 195. | Parties and judgment in actions for purchase price of land. |
| 183-2. | Application of terms. | 196. | Bringing in new parties. |
| 183-3. | Limitation on repeal. | 197. | New party entitled to service of summons. |
| 184. | Action for injury or death of child or ward. | 198. | Substitution and interpleader. |
| 185. | Action by parent for seduction of daughter. | 199. | Actions to determine conflicting claims to property. |
| 186. | Action by woman for her own seduction. | 200. | Plaintiff may disclaim and deposit property. |
| 187. | Appointment of guardian ad litem for infants. | 201. | Court may protect interest of claimants. |
| 188. | Guardian ad litem of insane persons. | 202. | Intervention. |
| 189. | Who must be made parties. | 203. | Practice in intervention. |

PROCEDURE IN COURTS OF RECORD.

CHAPTER V.—VENUE OF ACTIONS.

- | | | | |
|--------|---|--------|---|
| 204. | Action to be commenced where subject is situated. | 209-2. | Affidavit of prejudice. |
| 205. | Actions to be tried where cause arose. | 210. | To what venue changed—Only one allowed. |
| 206. | Venue of actions against private corporations. | 211. | Change to newly created county. |
| 207. | Venue in cases not before specified. | 215. | Transmission of record on change—Costs. |
| 208. | Proceeding when action commenced in wrong county. | 216. | Change by stipulation. |
| 209. | Grounds authorizing change of venue. | 217. | Effect of neglect of moving party. |
| 209-1. | Prejudice of judge—Change of venue. | 218. | When change deemed complete. |
| | | 219. | Clerk must certify entries with transcript. |

CHAPTER VI.—MANNER OF COMMENCING ACTIONS.

- | | | | |
|--------|---|--------|---|
| 220. | Service of summons. | 240. | Selection of newspaper—Evidence of payment. |
| 221. | Summons, how issued. | 241. | Appearance, what constitutes. |
| 222. | Contents of summons. | 242. | Notice—Service by mail, etc. |
| 223. | Form of summons. | 243. | Actions affecting title to real estate—Lis pendens. |
| 224. | Summons to be accompanied by copy of complaint, when. | 244. | Notice, upon whom served. |
| 225. | Who shall serve summons—Exception. | 245. | Manner of making service of notice. |
| 226. | Manner of service of summons. | 246. | Service by mail, when may be made. |
| 227. | Service of summons on corporation. | 247. | Service by mail, manner of. |
| 228. | Service of summons by publication. | 248. | Service when no attorney appears. |
| 228-1. | Saving clause. | 249. | Not applicable to service of summons, etc. |
| 229. | Process against "unknown heirs." | 250. | Effect of imperfect paper—Amendments. |
| 230. | Affidavit as to unknown heirs—Publication of summons. | 251. | Assessment of damages. |
| 231. | Title of cause—Unknown claimants—Service of summons. | 252. | Computation of time. |
| 232. | Judgment—Rights of unknown heirs and parties. | 253. | Weekly publication, how made. |
| 233. | Manner of publication and form of summons. | 253-1. | "Legal newspaper" defined. |
| 234. | Personal service out of state. | 253-2. | Affidavit of publication—Presumption. |
| 235. | If no personal service, who may appear—Opening default. | 253-3. | Scope of act. |
| 236. | Service on joint defendants. | 253-4. | Publication fees. |
| 237. | Proof of service. | 253-5. | Selection of legal newspaper. |
| 238. | Jurisdiction acquired, when. | 253-6. | Legal holidays and Sundays—Omission. |
| 239. | Publication of notice in exercise of eminent domain. | 253-7. | Payment of fees—Affidavit. |
| | | 254. | Service of writ by telegraph. |

CHAPTER VII.—PLEADINGS.

- | | | | |
|------|--|-------|---|
| 255. | Rules to determine sufficiency. | 269. | Effect of judgment against executor. |
| 256. | What pleadings there shall be. | 270. | Setoff in action against executor. |
| 257. | First pleading—Complaint. | 271. | Setoff must be pleaded. |
| 258. | What complaint shall contain. | 271½. | Judgment for balance only. |
| 259. | Grounds of demurrer of defendant. | 272. | No judgment for balance if contract shall have been assigned. |
| 260. | Grounds of demurrer, how specified. | 273. | Answer—Contents—Separate statement of defenses. |
| 261. | Objections, when to be taken by answer. | 274. | Demur to one or more causes and answer the residue. |
| 262. | Proceedings when complaint is amended. | 275. | Answer may be stricken. |
| 263. | Objections not taken deemed waived. | 276. | Demur to answer—Reply. |
| 264. | What answer shall contain. | 277. | Reply—Contents—New matter. |
| 265. | Counterclaim defined. | 278. | Judgment for failure to plead to new matter. |
| 266. | Setoff, when allowed. | 279. | Demurrer or motion to reply. |
| 267. | Demand against beneficiary set off in action by trustee. | 280. | Court rules fixing times for pleading. |
| 268. | Demand against decedent in action by executor. | | |

CHAPTER VIII.—VERIFICATION OF PLEADINGS.

- | | |
|--|---|
| 281. Subscription and verification of pleadings. | 282. Verification may be omitted.
283. Pleadings are not proof on trial. |
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CHAPTER IX.—GENERAL RULES OF PLEADING.

- | | |
|--|---|
| 284. Pleadings liberally construed. | 292. Libel or slander, how pleaded. |
| 285. Pleading written instruments and account—Bill of particulars. | 293. Answers in justification and mitigation. |
| 286. Irrelevant, redundant and indefinite matter, how objected to. | 294. Falsely charging certain crime, actionable. |
| 287. Judgments of inferior courts, how pleaded. | 295. Answers in actions to recover property distrained. |
| 288. Conditions precedent, how pleaded. | 296. Joinder of causes of action. |
| 289. Private statutes, how pleaded. | 297. Material allegations not controverted admitted, except in reply. |
| 290. Existence of city or town, how pleaded. | 298. Material allegations defined. |
| 291. Ordinances, how pleaded. | |

CHAPTER X.—MISTAKES AND AMENDMENTS.

- | | |
|---|---|
| 299. Variance, when material. | 305. Informal pleadings, stricken out—Amendment of. |
| 300. Immaterial variance, effect of. | 306. Defendant designated by fictitious name. |
| 301. Failure of proof. | 307. Harmless errors disregarded. |
| 302. Variance in action to recover personal property. | 308. Supplemental pleadings, when allowed. |
| 303. Amendments, allowance of. | |
| 304. Amendments, how made. | |

CHAPTER I.

RULES OF DECISION AND CONSTRUCTION.

§ 143. Common Law, How Far Prevails.

The common law, so far as it is not inconsistent with the constitution and laws of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state. [Cf. L. '63, p. 88, § 1; Cd. '81, § 1; L. '91, p. 31, § 1; 2 H. C., § 108.]

Cited in 3 Wash. 226; 14 Wash. 78; 17 Wash. 281; 19 Wash. 252; 23 Wash. 355; 29 Wash. 638; 30 Wash. 279; 33 Wash. 388; 58 Wash. 181; 78 Wash. 696; 80 Wash. 572; 81 Wash. 543, 544, 553; 82 Wash. 534; 104 Wash. 273; 107 Wash. 102.

The common law of England including the English statutes in force at the date of the Declaration of Independence, as adopted by the territorial law of 1863, continues to be the law of this state, except so far as modified by statute: See Remington's Digest, Com. Law, §§ 1—3; Wagner v. Law, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784; Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Richards v. Redelsheimer, 36 Wash. 325, 78 Pac. 934; Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; Lane v. Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; State v. Williams, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821.

Application and operation: See Rem-

ington's Digest, Com. Law, § 4; Bennett v. United States, 2 W. T. 179, 3 Pac. 272; Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539; Corcoran v. Postal Telegraph-Cable Co., 80 Wash. 570, 142 Pac. 29, L. R. A. 1915B, 552. See, also, Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, 290; Thompson v. Seattle, Renton & S. R. Co., 71 Wash. 436, 128 Pac. 1070.

Common-law rules of procedure having been abolished by section 153, *infra*, our common law, preserved only when not inconsistent with the laws of the state by this section, is a rule of decision and not a rule of practice, and common-law rules of practice as to venue cannot be allowed to defeat a right of action: State ex rel. King County v. Superior Court, Pierce County, 104 Wash. 268, 176 Pac. 352.

What the common law includes. Ann. Cas. 1913E, 1222; Ann. Cas. 1918A, 968.

Adoption of the common law in the United States. 22 L. R. A. 501; Ann. Cas. 1913E, 1232; Ann. Cas. 1918A, 981.

Adoption of the common law in relation to crimes. Ann. Cas. 1913E, 1249; Ann. Cas. 1918A, 990.

§ 144. Laws to be Liberally Construed.

The provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction. [Cf. L. '54, p. 221, § 504; Cd. '81, §§ 758, 1686; L. '91, p. 40, § 1; 2 H. C., § 1707.]

Cited in 71 Wash. 439; 94 Wash. 653, 654; 111 Wash. 71.

Principles and maxims of construction: See Remington's Digest, Statut., § 54; Bloomer v. Todd, 3 W. T. 599, 19 Pac. 135, 1 L. R. A. 111; Coleman v. Yesler, 1 W. T. 591; Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 Pac. 1106; Townsend Gas etc. Co. v. Hill, 24 Wash. 469, 64 Pac. 778; State ex rel. Bellingham Bay Improvement Co. v. Bridges, 19 Wash. 431, 53 Pac. 545; Ransom v. South Bend, 76 Wash. 396, 136 Pac. 365; Irwin v. Rogers, 91 Wash. 284, 157 Pac. 690, L. R. A. 1916E, 1130; State v. Eden, 92 Wash. 1, 158 Pac. 967, 159 Pac. 700; State v. Fabbri, 98 Wash. 207, 167 Pac. 133. See, also, State ex rel. King County v. Superior Court, 103 Wash. 268, 176 Pac. 352; State ex rel. Mullen v. Howell, 107 Wash. 167, 181 Pac. 920; State ex rel. Carroll v. Superior Court, 113 Wash. 54, 193 Pac. 236.

Judicial authority and duty: See Remington's Digest, Statut., § 55; Spokane & Eastern Trust Co. v. Lavigne, 14 Wash. 681, 45 Pac. 664; State ex rel. Calderwood v. Schomber, 23 Wash. 573, 63 Pac. 221; Smith v. Seattle, 25 Wash. 300, 65 Pac. 612; State v. Vance, 29 Wash. 435, 70 Pac. 34; State ex rel. Campbell v. Superior Court, 25 Wash. 271, 65 Pac. 183.

Intention of legislature—In general: See Remington's Digest, Statut., § 56; Bloomer v. Todd, 3 W. T. 599, 19 Pac. 135, 1 L. R. A. 111; Northern Pac. R. Co. v. Haas, 2 Wash. 376, 26 Pac. 869; Olympia Water Works v. Thurston County, 14 Wash. 268, 44 Pac. 267; State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243; Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216; Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; Shorts v. Seattle, 95 Wash. 531, 164 Pac. 239.

— **Equitable Construction:** See Remington's Digest, Statut., § 56-1; Walker v. Spokane, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994.

— **Spirit, Policy or Purpose of Act:** See Remington's Digest, Statut., § 57; State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243; Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; Point Roberts Fishing Co. v. George

& Barker Co., 28 Wash. 200, 68 Pac. 438; State v. Stewart, 52 Wash. 61, 100 Pac. 153, 17 Ann. Cas. 411; State ex rel. Oregon R. & Nav. Co. v. Clausen, 63 Wash. 535, 116 Pac. 7; State ex rel. Jones v. Clausen, 78 Wash. 103, 138 Pac. 653; Spear v. Bremerton, 95 Wash. 264, 163 Pac. 741.

Meaning of Language.—In general: See Remington's Digest, Statut., § 58; Bloomer v. Todd, 3 W. T. 599, 19 Pac. 135, 1 L. R. A. 111; State ex rel. McKenzie v. Forrest, 11 Wash. 227, 39 Pac. 684; Knipe v. Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; Townsend Gas & Elec. Co. v. Hill, 24 Wash. 469, 64 Pac. 778.

Statute as a Whole and Intrinsic Aids to Construction.—Giving effect to entire statute: See Remington's Digest, Statut., §§ 60, 61; Davidson v. Carson, 1 W. T. 307; Meade v. French, 4 Wash. 11, 29 Pac. 833; State v. McArthur, 5 Wash. 558, 32 Pac. 367; State ex rel. Chamberlain v. Daniel, 17 Wash. 111, 49 Pac. 243; New Whatcom v. Roeder, 22 Wash. 570, 61 Pac. 767; Bloomer v. Todd, 3 W. T. 599, 19 Pac. 135, 1 L. R. A. 111; Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; Barto v. Stewart, 21 Wash. 605, 59 Pac. 480.

— **Conflicting Provisions:** See Remington's Digest, Statut., § 62; Littell & Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Meade v. French, 4 Wash. 11, 29 Pac. 833; McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060; Mills v. Thurston County, 16 Wash. 378, 47 Pac. 759. See, also, State ex rel. Calouri v. Stratton, 108 Wash. 485, 185 Pac. 610.

— **Title and Headings:** See Remington's Digest, Statut., § 63; State ex rel. Swan v. Taylor, 21 Wash. 672, 59 Pac. 489; State v. Hall, 24 Wash. 255, 64 Pac. 153; State ex rel. Zenner v. Graham, 34 Wash. 81, 74 Pac. 1058; State ex rel. Schade Brewing Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576; Huntworth v. Tanner, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676.

Extrinsic Aids to Construction.—Motives of legislators and history of act: See Remington's Digest, Statut., §§ 64, 65; State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; Howlett v. Cheetham, 17 Wash. 626, 50 Pac. 522; Scouten v. Whatcom, 33 Wash. 273, 74

Pac. 389; *State ex rel. Aetna Life Ins. Co. v. Schively*, 68 Wash. 503, 123 Pac. 784; *State ex rel. Griffin v. Superior Court*, 70 Wash. 545, 127 Pac. 120; *State ex rel. Leach v. Fishback*, 79 Wash. 290, 140 Pac. 387; *State ex rel. Fair v. Hamilton*, 92 Wash. 347, 159 Pac. 379. See, also, *Stovall v. Toppenish School Dist.* No. 49, 110 Wash. 97, 188 Pac. 12, 9 A. L. R. 908.

— **Contemporaneous Construction**, in general: See *Remington's Digest*, Statut., § 66; *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111, 49 Pac. 243; *Huntworth v. Tanner*, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676.

— **Executive Construction**: See *Remington's Digest*, Statut., § 67; *McSorley v. Hill*, 2 Wash. 638, 27 Pac. 552; *Keane v. Brygger*, 3 Wash. 338, 28 Pac. 653; *Spokane & Eastern Trust Co. v. Young*, 19 Wash. 122, 52 Pac. 1010; *Hicks v. King*, 21 Wash. 567, 58 Pac. 1070; *Semon v. Callvert*, 27 Wash. 679, 68 Pac. 350; *Regan v. School District No. 25*, 44 Wash. 523, 87 Pac. 828; *Puget Sound Nat. Bank v. Fisher*, 52 Wash. 246, 100 Pac. 724, 17 Ann. Cas. 526; *State ex rel. Pindall v. Ross*, 55 Wash. 242, 104 Pac. 216; *State ex rel. Cowles v. Schively*, 63 Wash. 103, 114 Pac. 901; *State ex rel. Leach v. Fishback*, 79 Wash. 290, 140 Pac. 387; *Wendt v. Industrial Insurance Commission*, 80 Wash. 111, 141 Pac. 311, 5 N. C. C. A. 790; *State ex rel. Fishback v. Globe Casket & Undertaking Co.*, 82 Wash. 124, 143 Pac. 878, L. R. A. 1915B, 976; *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11; *State v. Warburton*, 97 Wash. 242, 166 Pac. 615.

— **Legislative Construction**: See *Remington's Digest*, Statut., § 68; *Graves v. Seattle*, 8 Wash. 248, 35 Pac. 1079; *State ex rel. Heaton v. Beman*, 15 Wash. 24, 45 Pac. 1052; *Great Northern R. Co. v. Snohomish County*, 48 Wash. 478, 93 Pac. 924; *State ex rel. Warson v. Howell*, 92 Wash. 540, 159 Pac. 777. See, also, *American Sav. Bank & Trust Co. v. National Surety Co.*, 104 Wash. 663, 177 Pac. 646; *Pierce v. Pierce*, 107 Wash. 125, 181 Pac. 24.

— **Construction With Reference to Other Statutes**.—In general: See *Remington's Digest*, Statut., § 69; *New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767; *State v. Gustafson*, 87 Wash. 613, 152 Pac. 335; *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, L. R. A. 1917D, 1084. See, also, *Ledingham v. Blaine*, 105 Wash. 253, 177 Pac. 783.

— **Special Acts Incorporating Provisions of General Act**: See *Remington's Digest*, Statut., § 70; *Newman v. North Yakima*, 7 Wash. 220, 34 Pac. 921; *Ford v. Durie*, 8 Wash. 87, 35 Pac. 595, 1082;

School Dist. v. Fairchild, 10 Wash. 198, 38 Pac. 1029; *State ex rel. Smith v. Parker*, 12 Wash. 685, 42 Pac. 113; *Chelan County v. Navarre*, 38 Wash. 684, 80 Pac. 845; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893.

— **Statutes Relating to Same Subject Matter**: See *Remington's Digest*, Statut., § 71; *Davidson v. Carson*, 1 W. T. 307; *Pierce County ex rel. Maloney v. Spike*, 19 Wash. 652, 54 Pac. 41; *New Whatcom v. Roeder*, 22 Wash. 570, 61 Pac. 767; *State ex rel. Miller v. Griffin*, 46 Wash. 489, 90 Pac. 661; *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645. See, also, *State ex rel. American Piano Co. v. Superior Court*, 105 Wash. 676, 178 Pac. 827.

Construction of Statutes Adopted from Other States or Countries: See *Remington's Digest*, Statut., § 72; *Spokane Lumber etc. Co. v. McChesney*, 1 Wash. 609, 21 Pac. 198; *Brown v. Seattle*, 5 Wash. 35, 38 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *State ex rel. Brislawn v. Meath*, 84 Wash. 302, 147 Pac. 11; *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, L. R. A. 1917D, 1084.

Construction as Mandatory or Directory: See *Remington's Digest*, Statut., § 73; *Tolmie v. Dean*, 1 W. T. 46; *Seattle & Montana Ry. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835; *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 55 Wash. 1, 103 Pac. 426. See, also, *National Surety Co. v. Campbell*, 108 Wash. 596, 185 Pac. 602.

Provisos, Exceptions and Saving Clauses: See *Remington's Digest*, Statut., § 74; *Germond v. Tacoma*, 6 Wash. 365, 33 Pac. 961; *State v. Wilson*, 9 Wash. 218, 37 Pac. 424; *State ex rel. Chamberlain v. Daniel*, 17 Wash. 111, 49 Pac. 243; *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 521, 102 Am. St. Rep. 888, 65 L. R. A. 336; *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766. See, also, *State v. Ripley*, 104 Wash. 299, 176 Pac. 343; *Tatum v. Marsh Mines Consolidated*, 108 Wash. 367, 184 Pac. 628, 187 Pac. 410; *State ex rel. Mullen v. Howell*, 107 Wash. 167, 181 Pac. 920.

Liberal or Strict Construction as affected by nature of act in general: See *Remington's Digest*, Statut., § 76; *Hays v. Miller*, 1 W. T. 143; *Smith v. United States*, 1 W. T. 262; *Scott v. Patterson*, 1 Wash. 487, 20 Wash. 593; *Thurston County v. Sisters of Charity*, 14 Wash. 264, 44 Pac. 252; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133; *State ex rel. Atty. Gen. v. Superior Court*, 36 Wash. 381, 78 Pac. 1011; *State ex rel. Wyman, Partridge & Co. v. Su-*

perior Court, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568; United States, Use of Standard Furn. Co. v. Aetna Indemnity Co., 40 Wash. 87, 82 Pac. 171. See, also, Dernac v. Pacific Coast Coal Co., 110 Wash. 138, 188 Pac. 15.

A statute creating a right where none existed before will be strictly construed as to the persons entitled to the benefit

of it: Dernac v. Pacific Coast Coal Co., 110 Wash. 138, 188 Pac. 25.

— **Penal Statutes:** See Remington's Digest, Statut., § 77; McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; State v. Coolidge, 72 Wash. 42, 129 Pac. 1088; State v. Furth, 82 Wash. 665, 144 Pac. 907. See, also, State v. Eberhart, 106 Wash. 222, 179 Pac. 853; State v. Hoffman, 110 Wash. 82, 188 Pac. 25.

§ 145. Laws Continued.

The provisions of a statute, so far as they are substantially the same as those of a statute existing at the time of their enactment, must be construed as continuations thereof. [Cf. Cd. '81, §§ 761, 1681; L. '91, p. 40, § 1; 2 H. C., § 1708.]

§ 146. Word "Person" Defined.

The term "person" may be construed to include the United States, this state, or any state or territory, or any public or private corporation, as well as an individual. [Cf. L. '54, p. 99, § 134; L. '57, p. 46; Cd. '81, §§ 756, 964; L. '91, p. 40, § 1; 2 H. C., § 1709.]

Cited in 6 Wash. 137.

"Person" defined: Denny Hotel Co. v. Schram, 6 Wash. 134, 137, 32 Pac. 1002, 36 Am. St. Rep. 130; Barnes v. Flummerfelt, 21 Wash. 498, 500, 58 Pac. 575; West Coast Mfg. & Inv. Co. v. West Coast Imp. Co., 25 Wash. 627, 642, 66 Pac. 97, 62 L. R. A. 763; State ex rel.

Atty. Gen. v. Seattle Gas & Elec. Co., 28 Wash. 488, 493, 68 Pac. 946, 70 Pac. 114; State v. Pakenham, 40 Wash. 403, 406, 82 Pac. 597; State v. Nick, 66 Wash. 134, 137, 119 Pac. 15; Spear v. Bremerton, 90 Wash. 507, 510, 156 Pac. 825; Whittlesey v. Seattle, 94 Wash. 645, 656, 163 Pac. 193, L. R. A. 1917D, 1084.

§ 147. Term "Officer" Defined.

Whenever any term indicating an officer is used it shall be construed, when required, to mean any person authorized by law to discharge the duties of such officer. [L. '54, p. 221, § 501; Cd. '81, § 755; 2 H. C., § 1710.]

"Officer" defined: Nelson v. Troy, 11 Wash. 435, 441, 39 Pac. 974; State ex rel. Griffith v. Newland, 37 Wash. 428, 431,

79 Pac. 983; State ex rel. Powell v. Fassett, 69 Wash. 555, 559, 125 Pac. 963.

§ 148. Words Importing Number and Gender, How Construed.

Words importing the singular number may also be applied to the plural of persons and things; words importing the plural may be applied to the singular; and words importing the masculine gender may be extended to females also. [Cf. L. '54, p. 99, § 135; Id., p. 221, § 502; L. '57, p. 45, § 1; Cd. '81, §§ 756, 965; L. '91, p. 40, § 1; 2 H. C., § 1711.]

Cited in 20 Wash. 523; 94 Wash. 653, 654.

Application of the clause in this section providing that words importing the masculine gender may be extended to females also: Thompson v. Seattle, Ren-

ton & S. R. Co., 71 Wash. 436, 128 Pac. 1070.

Under this section incest may be committed without the concurrent consent of both parties, and one alone may be guilty: State v. Nugent, 20 Wash. 52, 56 Pac. 25.

§ 149. Word "Month" Defined.

The word "month" or "months," whenever the same occurs in the statutes of this state now in force, or in statutes hereinafter enacted,

or in any contract made in this state, shall be taken and construed to mean "calendar month." [L. '77, p. 333; Cd. '81, § 759; L. '91, p. 40, § 1; 2 H. C., § 1712.]

It was intimated in *Hale v. Finch*, 1 W. T. 566, that when in the statute the word "month" is used a lunar month is

meant, unless the contrary is indicated. The above section was, however, enacted subsequent to this ruling.

§ 150. Computation of Time.

The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last, unless the last day is a holiday or Sunday, and then it is also excluded. [Cf. L. '54, p. 219, § 486; Cd. '81, § 743; L. '88, p. 32, § 1; 2 H. C., § 794.]

See *infra*, § 252, computation of time for service of notice.

Cited in 7 Wash. 537; 18 Wash. 263; 40 Wash. 40; 87 Wash. 273; 99 Wash. 677.

Days—Excluding First or Last Day: See *Remington's Digest*, Time, § 3; *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 285; *Allen v. Morris*, 87 Wash. 268, 151 Pac. 827.

— **Sunday or Other Nonjudicial Day:** See *Remington's Digest*, Time, § 4; *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536; *Martin v. Sunset Telephone & Telegraph Co.*, 18 Wash. 260, 51 Pac. 376.

A motion for a new trial to be filed within two days, is in time if made on the fourth day, where two consecutive legal holidays intervene: *Kubillus v. Ewert*, 40 Wash. 38, 82 Pac. 147.

When the last day falls upon Sunday, the notice may be filed on the next day, under this section: *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077.

The statute relating to the exclusion of Sunday applies to the computation of time for the maturity of a note: *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590.

A tenant under a lease reserving a monthly rental payable in advance on the first of the month is entitled to the second day of the month to make payment, where the first day falls on Sunday, and suit cannot be commenced by the landlord until such second day: *Byers v. Rothschild*, 11 Wash. 296, 39 Pac. 688.

The law takes no notice of fractions of a day: See *Remington's Digest*, Time, § 5; *Goetzinger v. Rosenfeld*, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Oriental Trading Co. v. Houser*, 87 Wash. 184, 151 Pac. 242.

Fractions of day in computation of time. 2 *Ann. Cas.* 135; *Ann. Cas.* 1914C, 95; 1 *L. R. A. (N. S.)* 835.

"From" as word of inclusion or exclusion in computation of time. 15 *Ann. Cas.* 27; *Ann. Cas.* 1918A, 924.

Meaning of word "to" in computation of time. 2 *Ann. Cas.* 518.

Meaning of "by" as fixing time for performance of an act or happening of an event. 12 *A. L. R.* 1168.

§ 151. Adoption of Ballinger's Code.

The compilation arranged by R. A. Ballinger and known as *Ballinger's Annotated Codes and Statutes of Washington*, two volumes, is hereby adopted as an official compilation of existing statutes of the state, up to and including the year 1897, but of no greater authority than all other existing official compilations or session laws of the state. [L. '99, p. 109, § 1.]

The code of 1881 is a valid and binding body of laws, arranged and consecutively sectionized under authority of the legislature of 1881, from laws revised and re-enacted by the body, and ratified by subsequent legislatures by constant reference thereto as the code of 1881:

Marston v. Humes, 3 Wash. 267, 28 Pac. 520.

The code of 1881 must be construed as continuations of existing statutes, and not new enactments: *Littell & Smythe Mfg. Co. v. Miller*, 3 Wash. 480, 28 Pac. 1035.

§ 152. Amendments to Code.

It shall be proper for the legislature in amending or repealing existing statutes, and for the courts in referring to existing statutes, to refer to or cite Ballinger's Annotated Codes and Statutes of Washington, containing such law. [L. '99, p. 110, § 2.]

§ 152-5. Official Codes of State Laws.

The compilation of the Session Laws of the state of Washington, arranged and compiled by Richard A. Ballinger and Arthur Remington, and known as Remington & Ballinger's Annotated Codes and Statutes of Washington, and supplement thereto, and the compilation of the Session Laws of the state of Washington arranged and compiled by Frank Pierce, and known as Pierce's Washington Code, are hereby respectively adopted as the official compilations of the existing statutes of the state up to and including the year 1913. [L. 1915, p. 18, § 1. Cf. L. '11, p. 8, § 1; L. '13, p. 276, § 1.]

§ 152-6. Citations of Codes.

It shall be proper for the legislature in amending or repealing existing statutes, and for the courts in referring to existing or repealed statutes, to refer to or cite Remington & Ballinger's Annotated Codes and Statutes of Washington, containing such law, and in any such references and citations to abbreviate the same to Rem. & Bal. Code, or refer to and cite Pierce's Washington Code containing such law. [L. 1915, p. 19, § 2.]

§ 152-7. Adoption of Pierce Code.

The compilation by Frank Pierce of the Session Laws of the state of Washington, known as Pierce's Washington Code, is hereby adopted as an official compilation of the existing statutes up to and including the year 1919. [L. '21, p. 75, § 1.]

§ 152-8. Reference and Abbreviation.

It shall be proper for the legislature, in amending or repealing existing statutes, or for the courts in referring to existing statutes, to refer to or cite Pierce's Washington Code containing such law, and in any such references or citations to abbreviate the same as Pierce's Code. [L. '21, p. 75, § 2.]

§ 152-9. Certifying Session Laws.

The secretary of state is hereby authorized and directed to certify the laws of the present, seventeenth, session for publication as a part of said compilation. [L. '21, p. 75, § 3.]

CHAPTER II.**FORMS OF ACTIONS.****§ 153. Only One Form of Action.**

There shall be in this state hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil action. [L. '54, p. 131, § 1; L. '60, p. 5, § 1; L. '71, p. 3, § 1; L. '73, p. 4, § 2; Cd. '81, § 2; 2 H. C., § 109.]

Cited in 1 Wash. 193; 3 Wash. 587; 11 Wash. 664; 18 Wash. 100; 23 Wash. 576; 24 Wash. 329; 27 Wash. 396; 28 Wash. 183, 210; 30 Wash. 76; 40 Wash. 454; 46 Wash. 114, 115; 47 Wash. 479; 67 Wash. 535; 92 Wash. 623; 97 Wash. 634; 102 Wash. 165; 104 Wash. 273.

Abolition of Distinction as to Form: See Remington's Digest, Action, §§ 12, 15, 16; Garrison v. Cheeney, 1 W. T. 489; Meeker v. Gilbert, 3 W. T. 369, 19 Pac. 18; McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76; Watson v. Glover, 21 Wash. 677, 59 Pac. 516; Dormitzer v. German-American Sav. etc. Soc., 23 Wash. 132, 62 Pac. 862; Dunlap v. Rauch, 24 Wash. 620, 64 Pac. 807; Barto v. Seattle etc. R. Co., 28 Wash. 179, 68 Pac. 442; Smith v. Wingard, 3 W. T. 291, 13 Pac. 717; Dickerson v. Spokane, 26 Wash. 292, 66 Pac. 381; Barto v. Seattle etc. Ry. Co., 28 Wash. 179, 68 Pac. 442; Browder v. Phinney, 30 Wash. 74, 70 Pac. 264.

Includes Both Legal and Equitable: See Remington's Digest, Action, § 20; Garrison v. Cheeney, 1 W. T. 489; Thompson v. Caton, 3 W. T. 31, 13 Pac. 185; Washington Iron Works v. Jensen, 3 Wash.

584, 28 Pac. 1019; Browder v. Phinney, 30 Wash. 74, 70 Pac. 264; Durga v. Lincoln Creek Lumber Co., 47 Wash. 477, 92 Pac. 343; Sartori v. Denny-Renton Clay & Coal Co., 77 Wash. 166, 137 Pac. 494; Forrester v. Jastad, 97 Wash. 633, 167 Pac. 55.

An application for a writ of certiorari under this section is an "action" within the meaning of the statute relating to the taxation of costs: State ex rel. Spokane Terminal Co. v. Superior Court, 40 Wash. 453, 82 Pac. 878.

The statutory abolition of the distinction between actions at law and in equity does not relieve the courts of the necessity of recognizing the inherent distinctions as an aid in the determination of the rights of a party: Montesano v. Carr, 80 Wash. 384, 141 Pac. 894.

An action to compel the specific performance of a contract whereby defendant agreed to purchase and pay for a certificate of sale is not an action for damages in the sense of excluding equitable jurisdiction: Lindholm v. Patrick, 107 Wash. 243, 181 Pac. 876.

§ 154. Parties, How Designated.

The party commencing the action shall be known as the plaintiff, and the opposite party the defendant. [L. '54, p. 131, § 2; Cd. '81, § 3; 2 H. C., § 110.]

Cited in 35 Wash. 137; 67 Wash. 3.

CHAPTER III.

LIMITATION OF ACTIONS.

§ 155. Limitations Prescribed—Objections, How Taken.

Actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, except when in special cases a different limitation is prescribed by statute; but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer. [Cf. L. '54, p. 362, § 1; L. '60, p. 289, § 1; L. '63, p. 85, § 16; L. '69, p. 8, § 25; L. '73, p. 8, § 25; Cd. '81, § 25; L. '85, p. 74, § 1; L. '91, p. 90, § 1; 2 H. C., § 111.]

Cited in 7 Wash. 86; 12 Wash. 669; 25 Wash. 388; 26 Wash. 423, 467, 487; 27 Wash. 151, 595; 28 Wash. 538; 34 Wash. 569; 41 Wash. 611; 42 Wash. 453; 93 Wash. 693; 102 Wash. 165; 106 Wash. 6; 108 Wash. 392.

The statute of limitations is not an unconscionable defense: Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054; Deering v. Holcomb, 26 Wash. 588, 67 Pac. 240, 561; Liberman v. Gurensky, 27 Wash. 410, 67 Pac. 398; Arthur & Co. v. Burke, 83 Wash. 690, 145 Pac. 974.

Nor is to be viewed with disfavor

McClaine v. Fairchild, 23 Wash. 758, 63 Pac. 517.

The statute of limitations is a statute of repose: Wickham v. Sprague, 18 Wash. 466, 51 Pac. 1055; Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; Northern Pacific R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555, 87 Am. St. Rep. 766, 54 L. R. A. 526; Northern Pac. R. Co. v. Hasse, 28 Wash. 353, 68 Pac. 882, 92 Am. St. Rep. 840.

"Arose" and "arisen," in the statute of limitations, should be defined not to have been used in the sense of "originated,"

but rather in the sense of the right of action having "accrued": *Freundt v. Hahn*, 24 Wash. 8, 63 Pac. 1107, 85 Am. St. Rep. 939.

This section is inapplicable to actions by the city of Port Townsend to foreclose tax liens, when it contains no specific provision in regard to actions of that character, in view of the special charter of 1881 of Port Townsend, providing that the taxes levied thereunder should have the effect of a judgment, etc.: *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045.

Retroactive Operation: See *Remington's Digest*, Lim. of Act., § 3; *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Ward v. Huggins*, 7 Wash. 617, 32 Pac. 740, 36 Pac. 285; *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56; *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188; *State ex rel. McCullough v. Seattle*, 60 Wash. 241, 110 Pac. 1008. See, also, *Hanford v. King County*, 112 Wash. 659, 192 Pac. 1013.

Effect of change or repeal of limitation: See *Remington's Digest*, Lim. of Act., §§ 4—6½; *Seattle v. De Wolfe*, 17 Wash. 349, 49 Pac. 553; *Packscher v. Fuller*, 6 Wash. 534, 33 Pac. 875; *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318; *State v. Aberdeen*, 34 Wash. 61, 74 Pac. 1022; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Hoko River Boom Co. v. Fairservice*, 69 Wash. 357, 125 Pac. 145. See, also, *Hanford v. King County*, 112 Wash. 659, 192 Pac. 1013.

Limitation as affected by nature or form of remedy in general: See *Remington's Digest*, Lim. of Act., § 9; *State Medical Examining Board v. Stewart*, 46 Wash. 79, 89 Pac. 475, 123 Am. St. Rep. 915, 13 Ann. Cas. 653, 11 L. R. A. (N. S.) 557; *Hotchin v. McNaught-Collins Improvement Co.*, 67 Wash. 206, 121 Pac. 455.

Application in equitable actions and remedies in general: See *Remington's Digest*, Lim. of Act., § 24; *Wilt v. Buchtel*, 2 W. T. 417, 3 Pac. 891; *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784; *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371, 49 Pac. 514; *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060; *Childs v. Smith*, 51 Wash. 457, 99 Pac. 304, 130 Am. St. Rep. 1107;

Hotchin v. McNaught, Collins Imp. Co., 102 Wash. 161, 172 Pac. 864.

Nature and Extent of Bar: See *Remington's Digest*, Lim. of Act., § 80; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561; *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710; *Crowder v. Morphy*, 61 Wash. 626, 112 Pac. 742; *Anderson v. Hall*, 91 Wash. 376, 157 Pac. 996.

Bar of Debt as Affecting Security: See *Remington's Digest*, Lim. of Act., § 80-1; *Ekre v. Cain*, 66 Wash. 659, 120 Pac. 523.

Persons to Whom Bar is Available—In general: See *Remington's Digest*, Lim. of Act., § 81; *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786.

Personal Nature of Defense: See *Remington's Digest*, Lim. of Act., § 82; *Board of Church Erec. Fund etc. v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671.

Evidence—Presumptions and burden of proof: See *Remington's Digest*, Lim. of Act., § 91; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551; *Pt. Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045; *Gibson v. Kerry*, 19 Wash. 159, 52 Pac. 1023; *Service v. McMahon*, 42 Wash. 452, 85 Pac. 33; *Conaway v. Co-operative Homebuilders*, 65 Wash. 39, 17 Pac. 716.

ACCRUAL OF RIGHT OF ACTION OR DEFENSE—Causes of Action in General: See *Remington's Digest*, Lim. of Act., § 28; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Jacobs v. Seattle*, 100 Wash. 524, 171 Pac. 662.

Title to or Possession of Real Property: See *Remington's Digest*, Lim. of Act., § 29; *Slaght v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062; *Thornley v. Andrews*, 40 Wash. 580, 82 Pac. 899, 111 Am. St. Rep. 983, 1 L. R. A. (N. S.) 1036.

Title or Right of Parties to a Mortgage: See *Remington's Digest*, Lim. of Act., § 31; *Parker v. Dacres*, 2 W. T. 439, 7 Pac. 893; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 87 Am. St. Rep. 766, 54 L. R. A. 526; *Krutz v. Gardner*, 25 Wash. 396, 35 Pac. 771; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *Catlin v. Murray*, 37 Wash. 164, 79 Pac. 605; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625.

Contracts in General: See *Remington's Digest*, Lim. of Act., § 32; *Maitland v. Zanga*, 14 Wash. 92, 44 Pac. 117; *Paul v. Kohler & Chase*, 82 Wash. 257, 144 Pac. 64.

Covenants and Conditions: See *Remington's Digest*, Lim. of Act., § 33; *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41;

West Coast Mfg. etc. Co. v. West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763; *Litchfield v. Cowley*, 34 Wash. 566, 76 Pac. 81; *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309; *McDonald v. Ward*, 99 Wash. 354, 169 Pac. 851.

Contract of Surety: See *Remington's Digest*, Lim. of Act., § 34; *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113.

An action against the principal maker of a promissory note upon the implied obligation which arose when the surety paid it does not accrue until the note was paid, and the statute begins to run from that time: *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317.

Instruments for Payment of Money: See *Remington's Digest*, Lim. of Act., § 35; *Perkins v. Jennings*, 27 Wash. 145, 67 Pac. 590; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888.

— **Municipal Obligations:** See *Remington's Digest*, Lim. of Act., § 36; *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Seattle v. Walker*, 87 Wash. 609, 152 Pac. 330. See, also, *State ex rel. McMillan v. Miller*, 108 Wash. 390, 184 Pac. 352.

Continuing Contracts: See *Remington's Digest*, Lim. of Act., § 37; *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639; *Morrissey v. Faucett*, 28 Wash. 52, 68 Pac. 352; *Zuhn v. Horst*, 100 Wash. 359, 170 Pac. 1033. See, also, *Loewe v. Osner & Mehlhorn*, 109 Wash. 124, 186 Pac. 643.

Severable Contracts and Installments: See *Remington's Digest*, Lim. of Act., § 38; *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396; *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495; *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956. See, also, *Sibley v. Stetson & Post Lbr. Co.*, 110 Wash. 204, 188 Pac. 389; *Raymond v. Hattrick*, 104 Wash. 619, 177 Pac. 640.

Torts: See *Remington's Digest*, Lim. of Act., § 40; *Smith v. Seattle*, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910; *Doran v. Seattle*, 24 Wash. 182, 64 Pac. 230, 85 Am. St. Rep. 948, 54 L. R. A. 532; *Sterrett v. Northport Min. etc. Co.*, 30 Wash. 164, 70 Pac. 266; *Brisky v. Leavenworth Logging, Boom & Water Co.*, 68 Wash. 386, 123 Pac. 519; *Ludwigs v. Walla Walla*, 83 Wash. 205, 145 Pac. 193. See, also, *Horner v. Pierce County*, 111 Wash. 386, 191 Pac. 396.

A right of action for seduction under promise of marriage accrues at the time the promise is made; and granting that it would continue until the illicit relations

are broken off and three years thereafter, such relations must be continuous, and if abandoned and returned to under no new promise, the statute began to run at that time, and the action must be brought within three years after such an abandonment: *Rockwell v. Day*, 101 Wash. 580, 172 Pac. 754.

Reimbursement from Person Ultimately Liable: See *Remington's Digest*, Lim. of Act., § 41; *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859; *Seattle v. Northern Pac. R. Co.*, 47 Wash. 552, 92 Pac. 411. See, also, *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317.

Liabilities for Acts or Omissions in Official Capacity: See *Remington's Digest*, Lim. of Act., § 42; *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; *Spinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006; *Ska-git County v. American Bonding Co.*, 59 Wash. 1, 109 Pac. 197; *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 Pac. 775.

PERFORMANCE OF CONDITION, DEMAND AND NOTICE — Conditions Precedent in General: See *Remington's Digest*, Lim. of Act., § 43; *Bowman v. Colfax*, 17 Wash. 344, 49 Pac. 551; *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; *Spinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006; *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113; *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598.

An action does not accrue in favor of a master against a servant on account of injury to a third person, caused by the servant's negligence, until the master has been compelled to pay the party injured: *Gaffner v. Johnson*, 39 Wash. 437, 81 Pac. 859.

Demand: See *Remington's Digest*, Lim. of Act., § 44; *Sayward v. Gardner*, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389; *Bidwell v. Tacoma*, 26 Wash. 518, 67 Pac. 259; *New York Security T. Co. v. Tacoma*, 30 Wash. 661, 71 Pac. 194; *Chilberg v. Siebenbaum*, 41 Wash. 663, 84 Pac. 598; *Handley Investment Co. v. Trenholme*, 91 Wash. 146, 157 Pac. 472; *Douglas County v. Grant County*, 98 Wash. 355, 167 Pac. 928; *White v. King County*, 103 Wash. 327, 174 Pac. 3. See, also, *Raymond v. Hattrick*, 104 Wash. 619, 177 Pac. 640.

Notice: See *Remington's Digest*, Lim. of Act., § 45; *Potter v. New Whatcom*, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644; *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517; *Gove v. Tacoma*, 34 Wash. 434, 76 Pac. 73; *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636, 77 Pac. 1063; *Hemen v. Ballard*, 40 Wash. 81, 82 Pac. 277; *Chilberg v. Siebenbaum*,

41 Wash. 663, 84 Pac. 598; *University State Bank v. Bremerton*, 86 Wash. 261, 150 Pac. 439.

For text treatment of "Limitation of Actions," see 17 **B. C. L.** 651.

Constitutionality of new limitation applying to existing causes of action as dependent on its reasonableness. 8 **Ann. Cas.** 525; 14 **Ann. Cas.** 352; 7 **L. R. A. (N. S.)** 715; 21 **L. R. A. (N. S.)** 157.

Exceptions to statute of limitations impliedly excluded when not enumerated. 1 **Ann. Cas.** 643; 16 **Ann. Cas.** 906.

Retroactive operation of statute of limitations. 4 **Ann. Cas.** 166; **Ann. Cas.** 1912A, 1041.

Validity of amendatory statute shortening period of limitation as to existing causes of action. **Ann. Cas.** 1916D, 391; 1 **L. R. A. (N. S.)** 528.

When action on soldier's claim to bounty is barred. 13 **A. L. R.** 602.

Estoppel to plead statute of limitations by conduct not amounting to fraud or to express waiver of statute. 9 **Ann. Cas.** 755.

Limitation against action for wrongful act or breach of contract or duty as running from date of act or breach or from occurrence of actual damage. 13 **Ann. Cas.** 696.

§ 156. Actions to be Commenced in Ten Years.

The period prescribed in the preceding section for the commencement of actions shall be as follows:

Within ten years,—

1. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of the action. [Cf. **L.** '54, p. 363, § 2; **Cd.** '81, § 26; 2 **H. C.**, § 112; see ref. to § 155, *supra*.]

Cited in 6 Wash. 536—538; 7 Wash. 25, 636; 8 Wash. 291; 10 Wash. 104; 25 Wash. 388, 572; 27 Wash. 595; 28 Wash. 359; 36 Wash. 216; 41 Wash. 281, 611; 43 Wash. 672; 49 Wash. 334; 50 Wash. 117; 64 Wash. 663; 65 Wash. 494; 72 Wash. 228; 78 Wash. 341; 84 Wash. 44; 102 Wash. 165; 104 Wash. 568; 110 Wash. 123; 113 Wash. 208, 209, 213.

Application in General: Remaindermen are not bound to assert their title during the lifetime of the life tenant, and adverse possession under this section cannot be claimed, as against them, under a deed from the life tenant purporting to convey the fee: *McDowell v. Beckham*, 72 Wash. 224, 130 Pac. 350.

The right of action by an owner to recover land or its value, when taken by a municipality for a public use, without making compensation, falls within this section; since the city acts in its sovereign capacity and not as a wrongdoer: *Alymore v. Seattle*, 100 Wash. 515, 171 Pac. 659.

Recovery of Real Property: See *Remington's Digest*, **Lim. of Act.**, § 10; *Bul-*

lene v. Garrison, 1 **W. T.** 587; *Tacoma Bldg. & Sav. Assn. v. Clark*, 8 Wash. 289, 36 Pac. 135; *Long v. Eisenbeis*, 23 Wash. 556, 63 Pac. 249; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 87 **Am. St. Rep.** 766, 54 **L. R. A.** 526; *Lindley v. Johnston*, 42 Wash. 257, 84 Pac. 822; *Lehman v. Heuston*, 73 Wash. 154, 131 Pac. 825. See, also, *Daniel v. Daniel*, 106 Wash. 659, 181 Pac. 215.

Application of Statutory Provisions as to adverse possession: See *Remington's Digest*, **Adv. Poss.**, § 3 et seq.; *Packscher v. Fuller*, 6 Wash. 534, 33 Pac. 875; *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *McAuliff v. Parker* 10 Wash. 141, 38 Pac. 744; *Tacoma Building etc. Assn. v. Clark*, 8 Wash. 289, 36 Pac. 135; *Raymond v. Morrison*, 9 Wash. 156, 77 Pac. 318; *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330.

Suits for Partition: See *Remington's Digest*, **Lim. of Act.**, § 13; *Hyde v. Britton*, 41 Wash. 277, 83 Pac. 307; *Pilcher v. Lotzgesell*, 57 Wash. 471, 107 Pac. 340.

Actions to Quiet Title: *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 **Am. St. Rep.** 56, 15 **L. R. A.** 784.

§ 157. Within Six Years.

Within six years,—

1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States;

2. An action upon a contract in writing, or liability express or implied arising out of a written agreement;

3. An action for the rents and profits or for the use and occupation of real estate. [L. '54, p. 363, § 3; Cd. '81, § 27; 2 H. C., § 113; see ref. to § 155, supra.]

Cited in 1 Wash. 8; 7 Wash. 86; 19 Wash. 419; 25 Wash. 401; 26 Wash. 418, 419, 456, 467, 492, 500, 559; 27 Wash. 151, 595; 28 Wash. 480; 32 Wash. 468, 486; 34 Wash. 569; 41 Wash. 301, 302; 50 Wash. 490; 51 Wash. 415; 54 Wash. 606; 62 Wash. 192; 76 Wash. 93, 695; 86 Wash. 591; 87 Wash. 610; 92 Wash. 174, 604; 97 Wash. 601; 102 Wash. 165; 106 Wash. 6.

SUBDIVISION 1.—This section is applicable to domestic, as well as to foreign, judgments: *Citizens' National Bank of Crawfordsville v. Lucas*, 26 Wash. 417, 67 Pac. 252, 90 Am. St. Rep. 748, 56 L. R. A. 812.

Actions on domestic judgments fall within the provision of this section: *Shepherd v. Gove*, 26 Wash. 452, 67 Pac. 256; *Cathcart v. Bryant*, 28 Wash. 31, 68 Pac. 171.

Section 460, providing that no suit or proceeding shall ever be had on any judgment rendered in this state by which the lien or duration thereof shall be extended or continued in force for any greater period than six years from its date, does not prohibit actions on domestic judgments under this section: *Lilly-Brackett Co. v. Sonneman*, 50 Wash. 487, 97 Pac. 505.

Foreclosure of Mortgage: See *Remington's Digest*, Lim. of Act., § 12; *Krutz v. Gardner*, 25 Wash. 396, 35 Pac. 771; *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533.

SUBDIVISION 2—Written Contracts: See *Remington's Digest*, Lim. of Act., § 15; *Hurd v. Brisner*, 3 Wash. 1, 28 Pac. 371, 28 Am. St. Rep. 17; *Krutz v.*

Gardner, 25 Wash. 396, 35 Pac. 771; *Toellner v. McGinnis*, 55 Wash. 430, 104 Pac. 641, 24 L. R. A. (N. S.) 1082.

Written Instruments for Payment of Money: See *Remington's Digest*, Lim. of Act., § 16; *Bassett v. Thrall*, 21 Wash. 231, 57 Pac. 806; *Caldwell v. Hurley*, 41 Wash. 296, 83 Pac. 318; *Gasaway v. Ballin*, 57 Wash. 355, 106 Pac. 905; *Ihrke v. Continental Life Ins. & Inv. Co.*, 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F, 430; *Lindblom v. Johnston*, 92 Wash. 171, 158 Pac. 972.

See, also, written contracts: *Oregon-Washington Railroad & Nav. Co. v. Seattle Grain Co.*, 106 Wash. 1, 178 Pac. 648.

—Written agreements—Implied liability—Contribution: *Pioneer Mining & Ditch Co. v. Davidson*, 111 Wash. 262, 190 Pac. 242.

An action for contribution between co-sureties upon a promissory note is upon an implied liability arising out of an express contract, and is controlled by this section: *Caldwell v. Hurley*, 41 Wash. 296, 83 Pac. 318.

The limitation in this section against right of action upon contracts in writing is not extended in case of the death of a debtor by the provisions of sections 1470 and 1472, Rem. 1915 Code, requiring notice to creditors and the presentment of claims within one year thereafter: *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482.

SUBDIVISION 3.—An action for rent is within this section, subdivision 3: *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562.

§ 158. Within Five Years.

No action for the recovery of any real estate sold by an executor or administrator under the laws of this state, or the laws of the territory of Washington, shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within five years next after the sale, and no action for any estate sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within five years next after the termination of the guardianship, except that minors and other persons under legal disability to sue at the time when the right of action first accrued may commence such action at any time within three years after the removal of the disability. [Cf. L. '54, p. 290, §§ 137, 138; L. '90, p. 81, § 1; 2 H. C., § 114.]

Cited in 3 Wash. 517.

§ 159. Within Three Years.

Within three years,—

1. An action for waste or trespass upon real property;
2. An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
3. An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument;
4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud;
5. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and by virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution; but this subdivision shall not apply to action for an escape;
6. An action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different penalty [limitation];
7. An action for seduction and breach of promise of marriage. [Cf. L. '54, p. 363, § 4; L. '69, p. 8, § 28; Cd. '81, § 28; 2 H. C., § 115; see ref. to § 155, supra.]

See *infra*, § 573 et seq., and § 707 et seq., action to recover specific personalty.

See *infra*, § 937 et seq., action for waste, trespass, etc.

See *infra*, § 963 et seq., action for fines and forfeitures.

See *infra*, § 4169, liability of sheriff.

Cited in 7 Wash. 314; 10 Wash. 101, 215; 18 Wash. 471; 19 Wash. 419; 26 Wash. 96, 487, 559, 594; 27 Wash. 263, 396; 28 Wash. 302; 35 Wash. 4; 36 Wash. 633; 41 Wash. 301; 44 Wash. 573; 46 Wash. 344, 345; 51 Wash. 515; 53 Wash. 659; 56 Wash. 98; 59 Wash. 3, 5; 72 Wash. 452; 76 Wash. 611, 695; 78 Wash. 663; 86 Wash. 342; 87 Wash. 199, 610; 88 Wash. 454; 92 Wash. 173, 537, 604, 605; 93 Wash. 693; 94 Wash. 64; 95 Wash. 174, 314—318, 340, 672; 96 Wash. 256, 370; 99 Wash. 633; 100 Wash. 517, 528, 534; 101 Wash. 72, 581; 102 Wash. 165; 104 Wash. 568, 597; 106 Wash. 6; 108 Wash. 392; 109 Wash. 77.

SUBDIVISION 1.—An action for damages to real property through an overflow caused by the defendant's negligent construction of an irrigating canal, lawfully built, but without sufficiently providing for carrying off the surplus water or controlling the flow, is not an action for trespass within this section: *Suter v. Wenatchee Water P. Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881.

An action to recover damages to a mill site and boom grounds and to a flume, through blazing in the construction of a railroad, in violation of the terms of a written contract agreeing to preserve the plaintiff's property, is an action for a

direct trespass, within this section: *Clark Lloyd Lumber Co. v. Puget Sound & Cascade R. Co.*, 92 Wash. 601, 159 Pac. 774.

SUBDIVISION 2.—Action for the misappropriation by a city of the moneys of a special fund falls within this section: *Quaker City Nat. Bank v. Tacoma*, 27 Wash. 259, 67 Pac. 710.

The public service commission's failure to perform its duty of exacting a bond from a warehouseman, is not based upon any direct act affecting the plaintiff's property or rights, within this section, subdivision 2; *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 Pac. 775.

This section, subdivision 2, relates only to certain direct invasions or personal property rights therein enumerated and cannot be so construed as to nullify section 165: *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 Pac. 775.

This section applies to actions by the widow and minor children of one whose death is caused by the wrongful act of another, which may be commenced at any time within three years from the injury: *Robinson v. Baltimore & Seattle M. & R. Co.*, 26 Wash. 484, 67 Pac. 274.

SUBDIVISION 3—**Construction in General:** The word "liability" in subdivision 3, relates to contractual liability, especi-

ally in view of the fifth subdivision and of section 161 relating to liabilities for certain official acts or omissions: *Northern Grain & Warehouse Co. v. Holst*, 95 Wash. 312, 163 Pac. 775.

Under sections 159, 165, an action against a city to recover a refund on an excessive assessment must be commenced within at least three years after demand: *State ex rel. McCullough v. Seattle*, 53 Wash. 655, 102 Pac. 770.

Oral Contracts: See *Remington's Digest*, *Lim. of Act.*, §§ 17, 17-1; *Suter v. Wenatchee Water P. Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881; *Murray v. Wishkah Boom Co.*, 76 Wash. 605, 137 Pac. 130; *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309; *Seattle v. Walker*, 87 Wash. 609, 152 Pac. 330.

Implied contracts—Counties—Officers—Recovery of compensation for services: *State ex rel. McMillan v. Miller*, 108 Wash. 390, 184 Pac. 352.

— **Implied contracts not in writing—Freight tariffs:** *Chicago, Mil. & St. Paul R. Co. v. Frye & Co.*, 109 Wash. 68, 186 Pac. 668.

Sealed Instruments—Bond of Person Acting in Official or Fiduciary Capacity: See *Remington's Digest*, *Lim. of Act.*, § 14; *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; *Dickman v. Strobach*, 26 Wash. 558, 67 Pac. 224; *Johnson Service Co. v. Aetna Indemnity Co.*, 46 Wash. 434, 90 Pac. 590; *Kepl v. Fidelity & Deposit Co.*, 81 Wash. 135, 142 Pac. 489; *Hillyard ex rel. Tanner v. Carabin*, 96 Wash. 366, 165 Pac. 381.

Taking or Injuring Property for Public Use: See *Remington's Digest*, *Lim. of Act.*, § 19-1; *Jacobs v. Seattle*, 100 Wash. 524, 171 Pac. 662; *Alymore v. Seattle*, 100 Wash. 515, 171 Pac. 659; *Domrese v. Roslyn*, 101 Wash. 372, 172 Pac. 243.

SUBDIVISION 4.—Subdivision 4 of this section is superseded, as to actions to set aside or cancel a tax deed for fraud by the later act, section 162, providing that actions to cancel a tax deed or recover lands sold for taxes, must be brought within three years from the date of the issuance of the tax deed: *Savage v. Ash*, 86 Wash. 43, 149 Pac. 325.

Relief on Ground of Fraud: See *Remington's Digest*, *Lim. of Act.*, § 25; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055; *Union Trust Co. v. Amery*, 67 Wash. 1, 120 Pac. 539; *Golden Eagle Mining Co. v. Imperator-Qulip Co.*, 93 Wash. 692, 161 Pac. 848, L. R. A. 1917C, 113; *Bradbury v. Nethercutt*, 95 Wash. 670, 164 Pac. 194; *Ackerson v. Elliott*, 97 Wash. 31, 165 Pac. 899.

TRUST, WANT OF DILIGENCE AND FRAUD—Fraud as Ground for Relief—

Discovery of Fraud, in General: See *Remington's Digest*, *Lim. of Act.*, § 56; *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165; *Fidelity Nat. Bank v. Adams*, 38 Wash. 75, 80 Pac. 284; *Walla Walla County v. Oregon R. & Nav. Co.*, 40 Wash. 398, 82 Pac. 716; *Carroll v. Hill Tract Imp. Co.*, 44 Wash. 569, 87 Pac. 835; *Skagit County v. American Bonding Co.*, 59 Wash. 1, 109 Pac. 197; *Johnstone v. Reyton*, 59 Wash. 436, 110 Pac. 7; *Uhlbright v. Mulcahy*, 78 Wash. 9, 138 Pac. 314; *Cornell v. Edsen*, 78 Wash. 662, 139 Pac. 602, 51 L. R. A. (N. S.) 279; *McDonald v. McDougall*, 86 Wash. 339, 150 Pac. 625; *Jarvis v. Ireland*, 89 Wash. 286, 154 Pac. 455; *Hoy v. Burk*, 92 Wash. 536, 159 Pac. 701; *Grubb v. House*, 93 Wash. 200, 160 Pac. 421; *Langley v. Devlin*, 95 Wash. 171, 163 Pac. 395; *Anderson, In re*, 97 Wash. 688, 167 Pac. 71; *Larson v. McMillan*, 99 Wash. 626, 170 Pac. 324.

See, also, *Irwin v. Holbrook*, 26 Wash. 89, 66 Pac. 116; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561.

See, also, **Discovery of Fraud—Laches:** *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 Pac. 810.

— **Opportunity for discovery:** *Noyes v. Parsons*, 104 Wash. 594, 177 Pac. 651.

After a ward becomes of age she stands in the relation of a creditor of her guardian, and where she has knowledge after majority sufficient to put her on inquiry, her right of action against him would accrue from the date of such knowledge: *Wickham v. Sprague*, 18 Wash. 466, 51 Pac. 1055.

An action to quiet title as against a fraudulent conveyance of land is not an action for relief on the ground of fraud: *Wagner v. Law*, 3 Wash. 500, 28 Pac. 1109, 29 Pac. 927, 28 Am. St. Rep. 56, 15 L. R. A. 784; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

What Constitutes Discovery of Fraud: See *Remington's Digest*, *Lim. of Act.*, § 58; *Irwin v. Holbrook*, 26 Wash. 89, 66 Pac. 116; *Gove v. Tacoma*, 26 Wash. 474, 67 Pac. 261; *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561; *Griffith v. Seattle Consolidated St. R. Co.*, 36 Wash. 627, 79 Pac. 314; *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7.

SUBDIVISION 6.—What is a liability within the sixth subdivision of the section, upon a statute for a penalty or forfeiture where an action is given to the party aggrieved: *Thomas v. Richter*, 88 Wash. 451, 153 Pac. 333.

A right of action under *Rem. Code*, sections 1289 and 1292, for damages against any person having custody of a will, for failure to deliver the will for probate is an action upon the statute for a penalty, under this section, subdivision

6, which must be commenced within three years after the cause of action arose: *Myers v. Exchange National Bank*, 96 Wash. 244, 164 Pac. 951, L. R. A. 1918A, 67.

Action on implied contract arising out of fraud as within statute of limitations applicable to fraud. 3 A. L. R. 1603.

§ 160. Within Two Years.

Within two years,—

1. An action for libel, slander, assault, assault and battery, and false imprisonment;

2. An action upon a statute for a forfeiture or penalty to the state. [Cf. L. '54, p. 363, § 5; L. '69, p. 9, § 29; Cd. '81, § 29; 2 H. C., § 116; see ref. to § 155, supra.]

Cited in 41 Wash. 301; 86 Wash. 224.

Limitations in action for libel: See *Remington's Digest*, Libel, § 21; *Dick v.*

Northern Pac. R. Co., 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638.

§ 161. Within One Year.

Within one year,—

1. An action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process;

2. An action by an heir, legatee, creditor, or other party interested, against an executor or administrator, for alleged misfeasance, malfeasance or mismanagement of the estate within one year from the time of final settlement, or the time such alleged misconduct was discovered. [Cf. L. '54, p. 364, § 5; L. '69, p. 9, § 30; Cd. '81, § 30; 2 H. C., § 117; see ref. to § 155, supra.]

Cited in 4 Wash. 634; 95 Wash. 317.

An action by an administrator against a former administrator to recover money and property of the estate is not subject to the limitation imposed by subdivision 2 of this section. This subdivision has

reference to the time of the final settlement of the estate and not to the settlement of accounts of intermediate administrators in the progress of the settlement of the estate: *Bartels v. Gove*, 4 Wash. 632, 30 Pac. 675.

§ 162. Action to Cancel Tax or Tax Deed.

Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed: Provided, that this section shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act. [L. '07, p. 398, § 1.]

Cited in 55 Wash. 480; 57 Wash. 440, 655, 656, 657; 58 Wash. 460, 480; 60 Wash. 445; 64 Wash. 411, 414; 66 Wash. 656, 657; 68 Wash. 179; 71 Wash. 532; 73 Wash. 585; 74 Wash. 535; 79 Wash. 348; 86 Wash. 45; 91 Wash. 34; 93 Wash. 337; 99 Wash. 141; 112 Wash. 283.

The proviso to this section has reference to the time when the act received the final sanction necessary to constitute it a law, and not to the time when the law went into effect, ninety days after

the adjournment of the legislature: *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780.

Application of this section to actions to cancel tax titles: See *Remington's Digest*, Tax, § 206; *Ward v. Huggins*, 16 Wash. 530, 48 Pac. 240; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837; *Anderson v. Spokane, Portland & Seattle R. Co.*, 57 Wash. 439, 107 Pac. 183; *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850;

Blinn v. Grindle, 58 Wash. 679, 109 Pac. 122; Maher v. Potter, 60 Wash. 443, 111 Pac. 453; Baylis v. Kerrick, 64 Wash. 410, 116 Pac. 1082; Fish v. Fear, 64 Wash. 414, 116 Pac. 1083; Fleming v. Stearns, 66 Wash. 655, 120 Pac. 522; Buty v. Goldfinch,

74 Wash. 532, 133 Pac. 1058, Ann. Cas. 1915A, 604, 46 L. R. A. (N. S.) 1065; Keller v. Davis, 93 Wash. 336, 160 Pac. 946; Tamblin v. Crowley, 99 Wash. 133, 168 Pac. 982. See, also, Porter v. Burkley, 112 Wash. 282, 191 Pac. 799.

§ 163. Special Provisions for Action on Penalty.

An action upon a statute for a penalty given in whole or in part to the person who may prosecute for the same shall be commenced within three [one] years [year] after the commission of the offense; and if the action be not commenced within one year by a private party, it may be commenced within two years after the commission of the offense in behalf of the state by the prosecuting attorney of the county where said offense was committed. [Cf. L. '54, p. 364, § 6; Cd. '81, § 31; 2 H. C., § 118; see ref. to § 155, supra.]

§ 164. Within Three Months.

Within three months,—

(1) An appeal from any order of a board of county commissioners, or upon a claim rejected by said boards;

(2) Upon claims against an estate, rejected by an executor or administrator within three months after the rejection. [Cf. Cd. '81, § 32; 2 H. C., § 119.]

The first subdivision of this section conflicts with § 4076, *infra*.

Cited in 5 Wash. 713; 66 Wash. 311.

§ 165. Actions for Relief not Otherwise Provided for.

An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued. [L. '54, p. 364, § 7; Cd. '81, § 33; 2 H. C., § 120; see ref. to § 155, supra.]

Cited in 3 Wash. 517; 10 Wash. 215; 18 Wash. 488; 22 Wash. 295; 25 Wash. 400; 26 Wash. 418—487; 28 Wash. 538; 30 Wash. 167, 631; 35 Wash. 4; 39 Wash. 439; 46 Wash. 83, 344; 53 Wash. 659; 56 Wash. 98; 76 Wash. 93; 87 Wash. 611; 91 Wash. 353; 92 Wash. 604; 95 Wash. 315; 97 Wash. 598; 98 Wash. 358; 100 Wash. 517, 528, 533, 535; 102 Wash. 166; 103 Wash. 329; 106 Wash. 6; 108 Wash. 393.

Actions or Proceedings not Specially Provided for: See Remington's Digest, Lim. of Act., § 26; Parker v. Dacres, 2 W. T. 439, 7 Pac. 893.

Prior to the passage of Laws of 1895, an action by a city to enforce a street assessment was governed by this section: Spokane v. Stevens, 12 Wash. 667, 42 Pac. 123; Ballard v. West Coast Imp. Co., 15 Wash. 572, 46 Pac. 1055; Seattle v. De Wolfe, 17 Wash. 349, 49 Pac. 553.

An action in favor of a master against a servant on account of injury to a third person, caused by the servant's negligence, is governed by this section: Gaffner v. Johnson, 39 Wash. 437, 81 Pac. 859

Also, an action for damages to abutting property resulting from the change of a street grade: Denney v. Everett, 46 Wash. 342, 89 Pac. 934, 123 Am. St. Rep. 934.

Also, an action by tenants of a building for damages resulting from tunneling, where the damages were largely consequential for injury to business and loss of profits, and by reason of cutting off access: Welch v. Seattle & Montana R. Co., 56 Wash. 97, 105 Pac. 166, 26 L. R. A. (N. S.) 1047.

Injuries resulting to lots from a change of grade, if regarded as a trespass, would be governed by the three year limitation; and if not, by this section: Sargent v. Tacoma, 10 Wash. 212, 38 Pac. 1048.

An action by one county against a new county upon a liability created by a statute requiring the assumption of a proportionate share of the old county indebtedness falls within this section: Douglas County v. Grant County, 98 Wash. 355, 167 Pac. 928.

An action against a city for damages to property by regrading a street is governed by this section: State ex rel. Whit-

ten v. Spokane, 92 Wash. 667, 159 Pac. 805.

The right of action for the recovery of consequential damages to property not appropriated is not covered by the limitation of this section, and the owner may maintain an action in the nature of ejectment to obtain substituted relief until his title to the land is lost by adverse possession: *Aylmore v. Seattle*, 100 Wash. 515, 171 Pac. 659.

An action for negligent injury to prop-

erty falls within this section: *White v. King County*, 103 Wash. 327, 174 Pac. 3.

Applicability of statute of limitations to quo warranto proceedings. *Ann. Cas.* 1914C, 488.

Applicability of statute of limitations to mandamus proceedings. 9 *Ann. Cas.* 845; 20 *Ann. Cas.* 1114.

Limitation of action for removal of cloud created by special assessment. *Ann. Cas.* 1914A, 893.

§ 166. Actions on Mutual Open Accounts.

In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item provided in the account on either side; but whenever a period of more than one year shall have elapsed between any of the series of items or demands they are not to be deemed such an account. [L. '54, p. 364, § 8; L. '69, p. 10, § 33; Cd. '81, § 34; 2 H. C., § 121; see ref. to § 155, supra.]

Cited in 71 Wash. 52; 109 Wash. 70.

Accounts—Mutual Accounts—Accrual of Action: See *Remington's Digest*, Lim. of Act., §§ 38-1, 39; *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528; *Hendelman v. Kahan*, 50 Wash. 247, 97 Pac. 109; *Blom v. Blom Codfish Co.*, 71 Wash. 41, 127 Pac. 596; *Hills v. Hoquiam*, 94 Wash. 63, 161 Pac. 1049.

There was no "mutual, open and current account" between a shipper and a carrier, within the meaning of this section, where shipments were made during a period of

years, and bills were presented from time to time, and the shipper refused to pay particular items or paid less than the amount claimed on disputes and misunderstandings arising as to the amounts due on the shipments: *Chicago, Milwaukee & St. Paul R. Co. v. Frye & Co.*, 109 Wash. 68, 186 Pac. 668.

What constitutes an open, current account within statute of limitations. 1 *A. L. R.* 1060.

Limitation of action as applied to account stated. 14 *A. L. R.* 240.

§ 167. Actions in Name of State, etc.

The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or quasi municipality of the state, in the same manner as to actions brought by private parties: Provided, that there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: And further provided, that no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed. [L. '03, p. 26, § 1. Cf. L. '54, p. 364, § 9; L. '69, p. 10, §§ 34, 35; L. '73, p. 10, §§ 34, 35; Cd. '81, § 35; 2 H. C., § 122; see ref. to § 155, supra.]

Cited in 12 Wash. 669; 28 Wash. 359, 538; 30 Wash. 621; 34 Wash. 63, 64; 42 Wash. 453; 49 Wash. 54, 56, 334; 51 Wash. 55, 56, 606-608; 57 Wash. 609, 612; 60

Wash. 246; 64 Wash. 637; 71 Wash. 121; 78 Wash. 339; 83 Wash. 304; 89 Wash. 76; 95 Wash. 281, 282; 98 Wash. 357; 110 Wash. 177, 256.

VALIDITY.—This section, so far as the same gives title to school lands by adverse possession, is repugnant to the state constitution and to the acts of congress providing that school lands shall not be disposed of except at public auction for full market value paid or secured to the state: *O'Brien v. Wilson*, 51 Wash. 52, 97 Pac. 1115.

Under this section, title by adverse possession may be acquired under the statute of limitations as against a railroad right of way, although granted by act of congress: *Northern Pac. Ry. Co. v. Hasse*, 28 Wash. 353, 68 Pac. 882, 92 Am. St. Rep. 840.

This section, amending the general statutes of limitations by adding the proviso exempting actions brought for the benefit of municipalities or the state, does not impliedly repeal the special act of 1895 [§ 7906, *infra*], providing a limitation for the bringing of actions to enforce liens for local improvement assessments: *Mathews v. Wagner*, 49 Wash. 54, 94 Pac. 759.

APPLICATION AND CONSTRUCTION. The last clause of this section applies to actions by private parties: *Blinn v. Grindle*, 71 Wash. 120, 127 Pac. 840.

Limitation Does not Run Against State or Municipality: See *Remington's Digest*, *Lim. of Act.*, § 7; *Sumner v. Peebles*, 5 Wash. 471, 32 Pac. 21, 1000; *Laurendeau v. Fugelli*, 5 Wash. 632, 32 Pac. 466; *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549; *Rapp v. Stratton*, 41 Wash. 263, 83 Pac. 182; *Northern Pac. R. Co. v. Ely*, 25 Wash. 384, 65 Pac. 555, 87 Am. St. Rep. 766, 54 L. R. A. 526; *Port Townsend v. Eisenbeis*, 28 Wash. 533, 68 Pac. 1045; *Port Townsend v. Trumball*,

40 Wash. 386, 82 Pac. 715; *Gustaveson v. Dwyer*, 78 Wash. 336, 139 Pac. 194. See, also, *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 95 Pac. 278; *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112; *State v. Seattle*, 57 Wash. 602, 107 Pac. 827, 27 L. R. A. (N. S.) 1188.

COMMENCEMENT OF ACTION OR OTHER PROCEEDING — Proceedings Constituting Commencement of Action: See *Remington's Digest*, *Lim. of Act.*, § 64; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Lewis v. Seattle*, 28 Wash. 639, 69 Pac. 393; *Cresswell v. Spokane County*, 30 Wash. 620, 71 Pac. 195; *Service v. McMahon*, 42 Wash. 452, 85 Pac. 33; *Blacock v. Condon*, 51 Wash. 604, 99 Pac. 733; *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166; *Petree v. Washington Water Power Co.*, 64 Wash. 636, 117 Pac. 475; *Murker v. Northern Pac. R. Co.*, 95 Wash. 280, 163 Pac. 756. See, also, *Filing of Complaint: McDonald v. Prosser Falls Land & Power Co.*, 110 Wash. 175, 188 Pac. 462.

Running of statute against state as dependent on state being real party in interest. 8 Ann. Cas. 702.

Applicability of statute of limitations to action by agencies of state. 3 L. R. A. (N. S.) 746; 22 L. R. A. (N. S.) 921; L. R. A. 1916E, 96.

Right of state to plead statute of limitations as to action against it. 10 Ann. Cas. 595.

Right to plead statute of limitations against municipal corporation. 8 Ann. Cas. 98; 20 Ann. Cas. 427; 32 L. R. A. (N. S.) 245.

§ 168. Operation of Statute Suspended, When.

If the cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the state, or after the time of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action. [L. '54, p. 364, § 10; Cd. '81, § 36; 2 H. C., § 123; see ref. to § 155, *supra*.]

Cited in 5 Wash. 664; 10 Wash. 432; 26 Wash. 461, 492; 41 Wash. 533, 534; 51 Wash. 415; 69 Wash. 487; 86 Wash. 591; 90 Wash. 343.

Absence or Departure from State: See *Remington's Digest*, *Lim. of Act.*, § 53; *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Meek v. White*, 26 Wash. 491, 67 Pac. 256; *Denny v. Palmer*, 26 Wash. 469, 67 Pac. 268, 90 Am. St. Rep. 766; *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 90

Am. St. Rep. 756, 57 L. R. A. 396; *Perkins v. Bailey*, 38 Wash. 46, 80 Pac. 177, 107 Am. St. Rep. 831; *Fidelity Nat. Bank v. Adams*, 38 Wash. 75, 80 Pac. 284; *Boyer v. Price*, 45 Wash. 667, 88 Pac. 1106; *Dignam v. Shaff*, 51 Wash. 412, 98 Pac. 1113, 22 L. R. A. (N. S.) 996; *Crowder v. Morphy*, 61 Wash. 626, 112 Pac. 742; *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8.

Nonresidence: See *Remington's Digest*, *Lim. of Act.*, §§ 54, 54-1; *Adams v.*

Kelly, 2 W. T. 263, 5 Pac. 601; Weber v. Yancy, 7 Wash. 84, 34 Pac. 473; Denny v. Sayward, 10 Wash. 422, 39 Pac. 119; Marvin v. Yates, 26 Wash. 50, 66 Pac. 131; Omaha National Bank v. Lindsay, 41 Wash. 531, 84 Pac. 11; Ilse v. Aetna Indemnity Co., 69 Wash. 484, 125 Pac. 780.

Concealment of Defendant: See Remington's Digest, Lim. of Act., § 54-2; Northern Commercial Co. v. Big Four Trading Co., 86 Wash. 589, 150 Pac. 1151.

Return and residence after absence: See Remington's Digest, Lim. of Act., § 55; Lake v. Steinback, 5 Wash. 659, 32 Pac. 767; Weber v. Yancy, 7 Wash. 84, 34 Pac. 473, 32 Pac. 767; Omaha Nat. Bank v. Lindsay, 41 Wash. 531, 84 Pac. 11; McElroy v. Gates, 64 Wash. 249, 116 Pac. 845.

§ 169. Suspension for Personal Disability.

If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be, at the time the cause of action accrued, either under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of action. [Cf. L. '54, p. 364, § 11; L. '61, p. 61, § 1; L. '69, p. 10, § 38; Cd. '81, § 37; 2 H. C., § 124; see ref. to § 155, supra.]

Cited in 10 Wash. 665; 41 Wash. 611; 50 Wash. 693; 72 Wash. 453.

PERSONAL DISABILITIES AND PRIVILEGES—Disabilities in General: See Remington's Digest, Lim. of Act., § 47; McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744; Carroll v. Hill Tract Imp. Co., 44 Wash. 569, 87 Pac. 835.

Infancy: See Remington's Digest, Lim. of Act., § 48; Mabie v. Whittaker, 10 Wash. 656, 39 Pac. 172; May v. Sutherland, 41 Wash. 609, 84 Pac. 585; McMillan v. Walker, 48 Wash. 342, 93 Pac. 520.

Insanity or Other Incompetency: See

Exception as to time defendant is absent from state as applicable to nonresidence at time of accrual of action. Ann. Cas. 1912D, 467.

Absence of judgment debtor from state as affecting running of statute of limitations against action on judgment. Ann. Cas. 1914D, 743.

Absence of mortgagor from state as suspension of limitation against action for foreclosure. 8 Ann. Cas. 1173.

Applicability to limitation prescribed by statute which creates cause of action for death of rule tolling the general statute of limitations in case of nonresidence. 8 A. L. R. 149.

Remington's Digest, Lim. of Act., § 48-1; Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065; Siebs' Estate, In re, 70 Wash. 374, 126 Pac. 912, Ann. Cas. 1913E, 125; Roberts v. Pacific Tel. & Tel. Co., 93 Wash. 274, 160 Pac. 965.

Appointment of committee for incompetent or guardian for infant as affecting running of statute of limitations against him. 6 A. L. R. 1689.

Mental incapacity as affecting running of statute of limitations. 51 L. R. A. (N. S.) 834; Ann. Cas. 1912C, 1011.

§ 170. Suspension by Death.

If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of the time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration. [L. '54, p. 364, § 12; Cd. '81, § 38; 2 H. C., § 125; see ref. to § 155, supra.]

See infra, § 193, continuance of action by representative.

See infra, § 967, actions by and against executors and administrators.

Cited in 32 Wash. 468, 487; 34 Wash. 564.

Death of Person Liable, and Effect of Administration: See Remington's Digest, Lim. of Act., §§ 49—52; McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744; Brigham-Hopkins Co. v. Gross, 20 Wash. 218, 54 Pac. 1127; Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480; Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482; Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533; Frew v. Clark, 34 Wash. 561, 76 Pac. 85; Fuhrman v. Power, 43 Wash. 533, 86 Pac. 960.

It was held in *Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863, that the court was warranted in finding a party dead who had been absent from the state for seven years, where there was no evidence that he still lived, and in ordering administration upon his estate; and further, that although the supposed deceased person returned to this state he could not maintain ejectment against an innocent purchaser of his estate sold under decree in probate; but this case was reversed on writ of error: *Scott v. McNeal*, 154 U. S. 34, 35. See *State ex rel. Young v. Superior Court*, 43 Wash. 34, 85 Pac. 989.

§ 171. Suspension by War.

When a person shall be an alien subject or a citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action. [L. '54, p. 365, § 13; Cd. '81, § 39; 2 H. C., § 126; see ref. to § 155, supra.]

Cited in 111 Wash. 288.

§ 172. Suspension by Judicial Proceedings.

When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action. [L. '54, p. 365, § 14; Cd. '81, § 40; 2 H. C., § 127; see ref. to § 155, supra.]

Cited in 30 Wash. 280; 32 Wash. 205; 89 Wash. 408; 98 Wash. 361; 101 Wash. 118.

Pendency of Injunction: See Remington's Digest, Lim. of Act., §§ 60, 63; Hinchman v. Anderson, 32 Wash. 198, 72 Pac. 1018; Marshall-Wells Hardware Co. v. Title Guaranty & Surety Co. 89 Wash. 404, 154 Pac. 801; Hensen v. Peter, 95 Wash. 628, 164 Pac. 512; Douglas County v. Grant County, 98 Wash. 355, 167 Pac. 928.

The pendency of foreclosure proceedings will not suspend the operation of the statute of limitations against indorsers of the mortgage note, under this section: *Hinchman v. Anderson*, 32 Wash. 198, 72 Pac. 1018.

The last line of this section is superseded by the latter enactment of section 1368, Rem. Code, which provides that "no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of death of such decedent". *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533.

An action may be commenced against the personal representative of a deceased debtor who dies before the expiration of the time limited for the commencement thereof, under this section: *Bank of Montreal v. Buchanan*, 32 Wash. 480, 73 Pac. 482.

Effect of death of, or failure to appoint trustee, to interrupt running of limitations in favor of adverse holder of trust property. 2 A. L. R. 49.

Death of judgment debtor as affecting running of limitations against judgment. 2 A. L. R. 1706.

War as suspending running of statute of limitations. Ann. Cas. 1917C, 232.

Property in Custody of the Law: See Remington's Digest, Lim. of Act., § 61; Brigham-Hopkins Co. v. Gross, 20 Wash. 218, 54 Pac. 1127; Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480.

Pendency of Proceedings in Insolvency: See Remington's Digest, Lim. of Act., § 62; Chilberg v. Siebenbaum, 41 Wash. 633, 84 Pac. 598; McDermott v. Tolt Land Co., 101 Wash. 114, 172 Pac. 207.

Amendment of Pleadings: See Remington's Digest, Lim. of Act., § 65; Richardson v. Carbon Hill Coal Co., 18 Wash. 368, 51 Pac. 402, 1046; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Northwest Bridge Co. v. Tacoma Shipbldg. Co., 36 Wash. 333, 78 Pac. 996.

Effect of injunction or other legal proceedings on limitation of time to bring suit. 4 *Ann. Cas.* 147; *Ann. Cas.* 1912D, 1022; 30 *L. R. A.* 142.

Effect of injunction against legal proceedings to prevent running of statute of limitations. 3 *L. R. A.* (N. S.) 1187; 23 *L. R. A.* (N. S.) 673; *L. R. A.* 1918F, 688.

Institution of suit in wrong forum as arresting running of statute of lim-

itations. *Ann. Cas.* 1916A, 262; *L. R. A.* 1917C, 208.

Suit affecting title to real estate not prosecuted to an actual change of possession as tolling statute of limitations. *L. R. A.* 1918A, 1046.

Suspension of operation of statute of limitations as incident to grant or denial of equitable relief. *L. R. A.* 1918C, 123.

§ 173. Suspension by Reversal of Judgment.

If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on error or appeal, the plaintiff, or if he die and the cause of action survives, his heirs or representatives, may commence a new action within one year after reversal. [L. '54, p. 365, § 15; Cd. '81, § 41; 2 H. C., § 128; see ref. to § 155, supra.]

Cited in 58 Wash. 458, 459; 89 Wash. 409.

Pendency of appeal: See Remington's Digest, Lim. of Act., §§ 60-1, 65-1; Green v. Spokane County, 55 Wash. 308, 104 Pac. 510, 25 *L. R. A.* (N. S.) 31; Ryno v. Snider, 58 Wash. 457, 109 Pac. 55.

Effect of appeal or writ of error on

limitation of time for suit. 4 *Ann. Cas.* 150; *Ann. Cas.* 1912D, 1023.

Applicability, as affected by parties, of statute permitting new action to be brought within specified time after failure of prior action for a cause other than the merits. 3 *A. L. R.* 824.

§ 174. When Disability Available.

No person shall avail himself of a disability unless it existed when his right of action accrued. [L. '54, p. 365, § 16; Cd. '81, § 42; 2 H. C., § 129; see ref. to § 155, supra.]

§ 175. Cumulative Disabilities.

When two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed. [L. '54, p. 365, § 17; Cd. '81, § 43; 2 H. C., § 130; see ref. to § 155, supra.]

§ 176. New Promise must be in Writing.

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest. [L. '54, p. 365, § 18; Cd. '81, § 44; 2 H. C., § 131; see ref. to § 155, supra.]

Cited in 27 Wash. 421; 51 Wash. 369; 54 Wash. 607; 95 Wash. 342-345; 100 Wash. 366.

Form, Requisites and Sufficiency in General: See Remington's Digest, Lim. of Act., §§ 68, 69; Liberman v. Gurensky, 27 Wash. 410, 67 Pac. 998; Bank of Montreal v. Guse, 51 Wash. 365, 98 Pac. 1127; Thisler v. Stephenson, 54 Wash. 605, 103 Pac. 987; Zuhn v. Horst, 100 Wash. 359, 170 Pac. 1033; Byrnes v. Payne, 103 Wash. 260, 173 Pac. 1091.

Principal and surety upon a promissory note are not within the rule that acknowledgment by one partner of a partnership debt after dissolution of the partnership does not deprive the other of the benefit of the statute of limitations: Holland v. Tjosevig, 109 Wash. 142, 186 Pac. 317.

Written promise or acknowledgment relied on to take case out of statute of limitations as aided by other writings. 12 *Ann. Cas.* 811.

Person to whom new promise must be made to remove bar of statute of limitations. 5 *Ann. Cas.* 811; 19 *Ann. Cas.* 103; 25 *L. R. A. (N. S.)* 805; 33 *L. R. A. (N. S.)* 262.

Acknowledgment of debt by one of several obligors as barring defense of statute of limitations by others. 17 *Ann. Cas.* 176; 37 *L. R. A. (N. S.)* 272; 38 *L. R. A. (N. S.)* 685.

Effect of acknowledgment by mort-

gagor to toll statute as against his grantee or other person holding interest in property through him. 28 *L. R. A. (N. S.)* 169.

Act of grantee who takes subject to mortgage as reviving or keeping alive debt secured thereby. *Ann. Cas.* 1914C, 1111.

General acknowledgment or promise in statement addressed to public as removing bar of limitation. 8 *A. L. R.* 1258.

§ 177. Effect of Partial Payment.

When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made. [L. '54, p. 365, § 19; Cd. '81, § 45; 2 H. C., § 132; see ref. to § 155, supra.]

Cited in 13 Wash. 553; 20 Wash. 444; 27 Wash. 151; 95 Wash. 343—345.

Part Payment—Nature in General: See Remington's Digest, Lim. of Act., § 70; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590.

A mortgagor cannot, by means of a partial payment after the bar of the statute of limitations has become complete, revive the mortgage as against another party who had purchased the lands or acquired a lien but was not obliged to pay the debt: Damon v. Leque, 17 Wash. 572, 50 Pac. 485, 61 Am. St. Rep. 927; Raymond v. Bales, 26 Wash. 493, 67 Pac. 269; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271; De Voe v. Rundle, 33 Wash. 604, 74 Pac. 836.

— **Persons by and to Whom Made:** See Remington's Digest, Lim. of Act., §§ 71, 72; Stubblefield v. McAuliff, 20 Wash. 442, 55 Pac. 637; Bassett v. Thrall, 21 Wash. 231, 57 Pac. 886; Hannah v. Kasson, 26 Wash. 568, 67 Pac. 271; Perkins v. Jennings, 27 Wash. 145, 67 Pac. 590; Warnock v. Itawis, 38 Wash. 144, 80 Pac. 297; Old Dominion Min. etc. Co. v. Daggett, 38 Wash. 675, 80 Pac. 839.

— **Time of Making:** See Remington's Digest, Lim. of Act., § 73; Ah How v. Furth, 13 Wash. 550, 43 Pac. 639; Eureka Cedar Lumber & Shingle Co. v. Knack, 95 Wash. 339, 163 Pac. 753.

— **Sufficiency in General:** See Remington's Digest, Lim. of Act., § 74; Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co., 17 Wash. 371, 49 Pac. 514; Arthur & Co. v. Burke, 83 Wash. 690, 145 Pac. 974;

Northern Commercial Co. v. Big Four Trading Co., 86 Wash. 589, 150 Pac. 1151; Miller v. Miller, 90 Wash. 333, 156 Pac. 8; Kirkpatrick v. Collins, 95 Wash. 399, 163 Pac. 919. See, also, Holland v. Tjosevig, 109 Wash. 142, 186 Pac. 317.

Entry of Credit or Indorsement: See Remington's Digest, Lim. of Act., §§ 76, 77; Schlotfeldt v. Bull, 18 Wash. 64, 50 Pac. 590; Arthur & Co. v. Burke, 83 Wash. 690, 145 Pac. 974; Eureka Cedar Lumber & Shingle Co. v. Knack, 95 Wash. 339, 163 Pac. 753.

Revival of debt as revival of lien or other security: See Remington's Digest, Lim. of Act., § 78; Damon v. Leque, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927; George v. Bulter, 26 Wash. 456, 67 Pac. 263, 60 Am. St. Rep. 756, 57 L. R. A. 396; Raymond v. Bales, 26 Wash. 493, 67 Pac. 269; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271; De Voe v. Rundle, 33 Wash. 604, 74 Pac. 836.

Right to apply indebtedness owed by creditor to debtor for purpose of tolling statute. *Ann. Cas.* 1915A, 281; *L. R. A.* 1915E, 794.

Check, bill, note, etc., given as part payment or collateral security as starting statute of limitations running anew. 15 *Ann. Cas.* 332; 18 *L. R. A. (N. S.)* 223; 35 *L. R. A. (N. S.)* 97.

Part payment by principal as extending limitation period as to surety. *Ann. Cas.* 1916D, 327; 37 *L. R. A. (N. S.)* 272.

§ 178. Foreign Statutes of Limitations, How Applied.

When the cause of action has arisen in another state, territory, or country between nonresidents of this state, and by the laws of the state,

territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state. [L. '54, p. 365, § 20; Cd. '81, § 46; 2 H. C., § 133; see ref. to § 155, supra.]

Cited in 6 Wash. 537; 7 Wash. 315; 24 Wash. 9; 41 Wash. 533; 64 Wash. 250; 99 Wash. 630.

What Law Governs: See Remington's Digest, Lim. of Act., § 1; Adams v. Kelly, 2 W. T. 263, 5 Pac. 601; McCain v. Gibbons, 7 Wash. 314, 35 Pac. 64; Freundt v. Hahan, 24 Wash. 8, 63 Pac. 1107, 85 Am. St. Rep. 939; Childs v. Blethen, 40 Wash. 340, 82 Pac. 405; Arthur & Co. v. Burke, 83 Wash. 690, 145 Pac. 974.

Under this section a right of action arising in another state between nonresi-

dents of this state is not barred when it is not barred by the statutes of the state where it arose: McElroy v. Gates, 64 Wash. 249, 116 Pac. 845.

Running of statute against foreign cause of action. 5 Ann. Cas. 546.

Construction of statute recognizing foreign statute of limitations. 14 Ann. Cas. 42.

Extraterritorial effect of limitations on statutory cause of action. 2 Ann. Cas. 151.

CHAPTER IV.

PARTIES TO ACTIONS.

§ 179. In Whose Name Actions to be Prosecuted.

Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law. [Cf. L. '54, p. 131, § 3; L. '69, p. 3, § 4; L. '75, p. 4, § 1; L. '77, p. 4, § 4; Cd. '81, § 4; 2 H. C., § 134.]

Cited in 4 Wash. 784; 5 Wash. 362; 16 Wash. 588; 21 Wash. 454; 22 Wash. 272; 23 Wash. 444; 27 Wash. 10, 335; 28 Wash. 183; 33 Wash. 165, 678; 63 Wash. 89; 71 Wash. 557; 75 Wash. 296; 85 Wash. 177; 86 Wash. 401; 94 Wash. 228, 340; 106 Wash. 187; 107 Wash. 457; 109 Wash. 586.

Real Party in Interest: See Remington's Digest, Parties, § 2; Ainsworth v. Territory, 3 W. T. 270, 14 Pac. 590; Fidelity Nat. Bank v. Adams, 38 Wash. 75, 80 Pac. 284; Littell v. Saulsberry, 40 Wash. 550, 82 Pac. 909; Harris v. Johnson, 75 Wash. 291, 134 Pac. 1048; Broderick v. Puget Sound Traction, Light & Power Co., 86 Wash. 399, 150 Pac. 616; Alaska Pacific Steamship Co. v. Sperry Flour Co., 94 Wash. 227, 162 Pac. 26.

The payee of a promissory note for a sum to be divided between herself and another is the real party in interest entitled to sue thereon, within the meaning of this section: Harris v. Johnson, 75 Wash. 291, 134 Pac. 1048.

A vendee in possession under a conditional sales contract may maintain an action for injuries to the property, as the "real party in interest," within the meaning of this section: Stotts v. Puget Sound Traction, Light & Power Co., 94 Wash. 339, 162 Pac. 519, L. R. A. 1917D, 214.

In an action by B. Schmidt, a defect of parties plaintiff does not appear from the fact that the contract in suit was in the name of B. Schmidt & Co., where

plaintiff was the only person interested in the company: Schmidt v. Powell, 107 Wash. 53, 180 Pac. 892.

— **Effect of Assignment:** See Remington's Digest, Parties, § 3; McDaniel v. Presler, 3 Wash. 636, 29 Pac. 209; Box v. Kelso, 5 Wash. 360, 31 Pac. 973; Riddell v. Prichard, 12 Wash. 601, 41 Pac. 905; McElroy v. Williams, 14 Wash. 627, 45 Pac. 306; Seattle National Bank v. Emmons, 16 Wash. 585, 48 Pac. 262; Lodge v. Lewis, 32 Wash. 191, 72 Pac. 1009; Grant v. Walsh, 36 Wash. 190, 78 Pac. 786; Conway v. Co-operative Homebuilders, 65 Wash. 39, 117 Pac. 716; Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 146 Pac. 861; Mountain Timber Co. v. Lumber Ins. Co., 99 Wash. 243, 169 Pac. 591; Olsen v. Hagan, 102 Wash. 321, 172 Pac. 1173; State Finance Co. v. More, 103 Wash. 298, 174 Pac. 22.

See, also, Dyer v. Title Guar. & Surety Co., 106 Wash. 186, 179 Pac. 834; Rowe v. Josevig-Kennecott Copper Co., 106 Wash. 455, 180 Pac. 413; State ex rel. Alaska Pacific Navigation Co. v. Superior Court, 113 Wash. 439, 194 Pac. 412.

For text treatment of "Parties," see 20 B. C. L. 660.

Who is real party in interest within meaning of statutes defining parties by whom action must be brought. 1 Ann. Cas. 833; Ann. Cas. 1917A, 490, 64 L. B. A. 581; 17 L. B. A. (N. S.) 1113.

Who may enforce guaranty. 1
A. L. R. 861.

Who may sue to recover bounty to
soldier's family. 13 A. L. R. 604.

Necessary and proper parties plain-
tiff and defendant in taxpayer's
action. 64 L. R. A. 619; Ann. Cas.
1913C, 911.

§ 180. Executor, Trustee, etc., may Sue in Their Own Names.

An executor or administrator, or guardian of a minor or person of unsound mind, a trustee of an express trust, or a person authorized by statute, may sue without joining the person for whose benefit the suit is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another. [L. '54, p. 131, § 4; L. '69, p. 4, § 5; Cd. '31, § 5; 2 H. C., § 135.]

Cited in 23 Wash. 444; 26 Wash. 82;
27 Wash. 10; 43 Wash. 525; 44 Wash.
588; 57 Wash. 326; 86 Wash. 401; 87
Wash. 96, 388; 105 Wash. 540.

Trustee and Others Holding Legal Title:
See Remington's Digest, Parties, § 4;
Thorpe v. Tenem Ditch Co., 1 Wash. 566,
20 Pac. 588; Cole v. Satsop R. Co., 9 Wash.
487, 37 Pac. 700, 43 Am. St. Rep. 858;
Bellingham Bay Boom Co. v. Brisbois, 14
Wash. 173, 44 Pac. 153, 46 Pac. 238; Von
Tobel v. Stetson etc. Mill Co., 32 Wash.
683, 73 Pac. 788; State ex rel. Porter v.
Headlee, 18 Wash. 220, 51 Pac. 369; Citi-
zens' Nat. Bank of Dayton v. Columbia
County, 23 Wash. 441, 63 Pac. 209; United
States v. Rundle, 27 Wash. 7, 67 Pac. 395;
Sweeney v. Waterhouse & Co., 39 Wash.
507, 81 Pac. 1005; Doe v. Tenino Coal
& Iron Co., 43 Wash. 523, 86 Pac. 938;
Carr v. Cohn, 44 Wash. 586, 87 Pac. 926;
Goodfellow v. First National Bank, 71
Wash. 554, 129 Pac. 90, 44 L. R. A. (N. S.)
580; Gourley v. Smith, 78 Wash. 286,
139 Pac. 58; Broderick v. Puget Sound
Traction, Light & Power Co., 86 Wash.
399, 150 Pac. 616; Ritchie v. Trumbull,
89 Wash. 389, 154 Pac. 816. See, also,

Moore v. Baasch, 109 Wash. 568, 187 Pac.
388.

In the listing of shares of capital stock
in a banking corporation and in the pay-
ment of taxes thereon, the bank is con-
stituted by law a trustee in behalf of the
shareholders, and hence, the bank may
maintain an action in its own name for
the purpose of securing relief against
excessive taxation, under this section:
Citizens' National Bank v. Columbia
County, 23 Wash. 441, 63 Pac. 209.

Executor or administrator as real
party in interest by whom suit must
be brought. 64 L. R. A. 611.

Right of creditors to maintain action
in interest of decedent's estate. 7
A. L. R. 237.

Right of next of kin to maintain
action in interest of estate. 22
L. R. A. (N. S.) 454.

Right of trustee to redress fraud
practiced on the beneficiary of the
trust. L. R. A. 1915E, 451.

Right of insane person to institute
proceeding by next friend. 4 Ann.
Cas. 1068; 64 L. R. A. 513.

§ 181. Husband and Wife must Join—Exception.

When a married woman is a party, her husband must be joined with her, except,—

1. When the action concerns her separate property, or her right or claim to the homestead property, she may sue alone;

2. When the action is between herself and her husband, she may sue or be sued alone;

3. When she is living separate and apart from her husband, she may sue or be sued alone. [L. '54, p. 131, § 5; L. '69, p. 4, § 6; L. '75, p. 4, § 2; Cd. '81, § 6; 2 H. C., § 136.]

See infra, §§ 6892, 6893, parties to actions involving community rights.

See infra, § 6895, wife's right to bring and defend actions for personal labor.

See infra, § 6896, earnings of wife separate property, when.

See infra, § 6900, civil disabilities of wife removed.

See infra, § 6903, may sue each other.

See infra, § 6906, liability for family expenses.

Cited in 21 Wash. 236; 25 Wash. 5; 53 Wash. 318; 75 Wash. 578; 76 Wash. 505; 79 Wash. 412; 89 Wash. 41, 511.

Wife as Necessary Party: See Remington's Digest, Parties, § 23; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485; Belt v. Washington Water P. Co., 24 Wash. 387, 64 Pac. 525; McNair v. Ingebrigtsen, 36 Wash. 186, 78 Pac. 789.

A defect of parties plaintiff in not joining a wife in an action relating to community lands is waived when not raised by demurrer or answer: Hansen v. Hansen, 110 Wash. 276, 188 Pac. 460.

Rights of Action Against Husband or Wife or Both—Parties in general: See Remington's Digest, Husb. & W., § 88; Commercial Bank of Vancouver v. Scott, 6 Wash. 499, 33 Pac. 829, 34 Pac. 434 (overruled); McDonough v. Craig, 10 Wash. 239, 38 Pac. 1034; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485; Armstrong v. Oakley, 23 Wash. 122, 62 Pac. 499; Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736; Geissler v. Geissler, 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119.

— **Wife in Foreclosure of Liens upon Community Property:** See Remington's Digest, Husb. & W., § 89; Littell & Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744; Douthitt v. MacClusky, 11 Wash. 601, 40 Pac. 186; Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; McNair v. Ingebrigtsen, 36 Wash. 186, 78 Pac. 789; Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949.

SUBDIVISION 3.—A married woman living separate and apart from her hus-

band may maintain an action in her own name for personal injuries sustained by her, under this section, subdivision 3: Horton v. Seattle, 53 Wash. 316, 101 Pac. 1091.

In an action by a married woman for damages for an indecent assault, the husband is a necessary party plaintiff, under this section: Schneider v. Biberger, 76 Wash. 504, 136 Pac. 701.

A married woman, living with her husband, cannot alone make a binding contract with an attorney to prosecute an action for damages for personal injuries suffered by herself, in view of this section and section 5917, vesting in the husband the management and control of the community personalty: Hammond v. Jackson, 89 Wash. 510, 154 Pac. 1106.

A divorced woman had legal capacity to sue for breach of promise where the complaint alleged that she was unmarried at all times mentioned in the complaint: Bundy v. Dickinson, 108 Wash. 52, 182 Pac. 947.

Joinder of spouses in action relating to property held by both spouses. 6 Ann. Cas. 361.

Joinder of husband and wife in action for earnings of wife. 4 Ann. Cas. 209; L. R. A. 1917E, 298.

Consent of husband to rendition of services by wife as prerequisite to her recovery therefor. 9 A. L. R. 1303.

Joinder of husband and wife in action for boarding or lodging of, or services rendered by wife to, a third person living in the home. 46 L. R. A. (N. S.) 238.

Joinder of parties in wife's action for libel or slander. 30 L. R. A. 527.

§ 182. When Husband and Wife may Join.

Husband and wife may join in all causes of action arising from injuries to the person or character of either or both of them, or from injuries to the property of either or both of them, or arising out of any contract in favor of either or both of them. If a husband and wife be sued together, the wife may defend for her own right, and if the husband neglect to defend, she may defend for his right also. And she may defend in all cases in which she is interested, whether she is sued with her husband or not. [Cf. L. '54, p. 219, 492; L. '77, p. 4, § 7; L. '75, p. 4, § 3; Cd. '81, § 7; 2 H. C., § 137.]

See *infra*, § 6901, civil disabilities of wife abolished.

See *infra*, § 6895, right of wife to prosecute and defend, when.

Cited in 3 Wash. 596; 21 Wash. 490; 39 Wash. 298; 51 Wash. 569; 68 Wash. 362; 75 Wash. 578, 579.

For Personal Injuries: See Remington's Digest, Parties, § 39; Phelps v. Steamship City of Panama, 1 W. T. 518; Apker v. Hoquiam, 51 Wash. 567, 99 Pac. 746;

Magnuson v. O'Dea, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1915B, 1230, 48 L. R. A. (N. S.) 327.

In replevin brought against a husband and wife, who defend jointly, claiming the property as community personalty, under this section, she is entitled to defend

in her own right upon the issues raised by her answer; and a judgment of dismissal on plaintiff's failure to prove title is proper: *Glass v. Buttner*, 39 Wash. 296, 81 Pac. 699.

Right of married woman to mention civil action for assault upon her without joining her husband. 6 A. L. R. 1023.

§ 183. Right of Action for Wrongful Death.

When the death of a person is caused by the wrongful act, neglect or default of another his personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony. [L. '17, p. 495, § 1; L. '09, p. 425, § 1. Cf. L. '54, p. 220, § 496; L. '75, p. 4, § 4; Cd. '81, § 8; 2 H. C., § 138.]

See *infra*, § 194, survival of action for personal injury.

See *infra*, § 967 et seq., actions by and against executors, etc.

Former laws. Cited in 3 Wash. 194—196, 199, 225—227; 4 Wash. 401—403, 433; 5 Wash. 262; 8 Wash. 151, 152, 364; 17 Wash. 593; 19 Wash. 134, 138; 26 Wash. 489; 33 Wash. 419; 34 Wash. 47, 407; 39 Wash. 212, 214; 46 Wash. 174, 176; 58 Wash. 491; 60 Wash. 93, 294; 65 Wash. 615, 618, 622, 623; 67 Wash. 546, 547; 69 Wash. 258; 70 Wash. 257; 71 Wash. 549, 620; 72 Wash. 465; 75 Wash. 442; 88 Wash. 434; 89 Wash. 642; 92 Wash. 575; 94 Wash. 647, 648, 654, 660, 661; 97 Wash. 324; 107 Wash. 296.

Rem. Code, § 183 being in derogation of the common law is to be strictly construed in determining the persons entitled to sue, but liberally in applying the statute in their favor: *Whittlesey v. Seattle*, 94 Wash. 645, 163 Pac. 193, L. R. A. 1917D, 1084.

Rem. Code, § 183 being the later declaration of the legislative will must stand, and impliedly repeals section 717 of the Code of 1881: *Graetz v. McKenzie*, 3 Wash. 194, 28 Pac. 331; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263; *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868.

The general statutes giving a right of action for wrongful death are not superseded or impliedly repealed by the fireman's pension act, Rem. & Bal. Code, section 8068, providing a pension for certain dependents, equal to one-half of the salary of a fireman killed while in the service of the city: *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855.

The code of 1881, which includes the wrongful death act rewritten as an independent enactment, having been duly passed as appears from the council and house journals, although no mention thereof was made in the session laws of 1881, it cannot be argued that the various subdivisions of the wrongful death act are separate enactments erroneously arranged or combined by the compiler of the code as one act: *Whittlesey v. Seattle*.

94 Wash. 645, 163 Pac. 193, L. R. A. 1917D, 1084.

The basis of the cause of action for wrongful death originally given by Rem. Code, § 183, to the heirs or personal representatives of the deceased, is distinct from the basis of the cause of action given by section 184 to a father or mother for the wrongful death of a child; hence the amendment in 1909 of section 183, extending that cause of action to the "parents, sisters or minor brothers dependent" upon the deceased for support, and of section 194, extending the provision for survival of such causes to such dependents, did not impliedly repeal section 184; the one being for loss of support, and the other being for loss of service: *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917.

Grounds of Action—Loss or injury resulting from death: See *Remington's Digest*, Death, §§ 6, 7; *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714; *Klepsch v. Donald*, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936; *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Robinson v. Baltimore & S. M. & R. Co.*, 26 Wash. 484, 67 Pac. 274; *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705; *Benson v. English Lumber Co.*, 71 Wash. 616, 129 Pac. 403.

Persons Entitled to Sue: See *Remington's Digest*, Death, § 13; *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714; *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620; *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore & S. M. & R. Co.*, 26 Wash. 484, 67 Pac. 274; *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333; *Manning v. Tacoma R. & P. Co.*, 34 Wash. 406, 75 Pac. 994; *Johnson v. Seattle Electric Co.*, 39 Wash. 211, 81 Pac. 705; *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831; *Anastasakos v. International Contract Co.*,

51 Wash. 119, 98 Pac. 93, 130 Am. St. Rep. 1089, 21 L. R. A. (N. S.) 267; Longfellow v. Seattle, 76 Wash. 509, 136 Pac. 855; Koloff v. Chicago, Milwaukee & Puget Sound R. Co., 71 Wash. 543, 129 Pac. 398; Fogarty v. Northern Pac. R. Co., 85 Wash. 90, 147 Pac. 652, 4 L. R. A. 1916C, 803; Whittlesey v. Seattle, 94 Wash. 645, 163 Pac. 193, L. R. A. 1917D, 1084; Bruner v. Little, 97 Wash. 319, 166 Pac. 1166. See, also, Norton v. Seattle, 113 Wash. 408, 194 Pac. 373.

Rem. Code, § 183, is not limited to killing in a duel, but may be had where one kills another wrongfully or by some neglect amounting to a tort, as in the case of shooting in supposed self-defense without warranted justification: Welch v. Creech, 88 Wash. 429, 153 Pac. 355, L. R. A. 1918A, 353.

Under Rem. Code, § 183, and section 967, providing that all other causes of action by one person against another survive to the personal representatives of the former against the personal representatives of the latter, a cause of action for wrongful death survives only against the wrongdoer and abates upon his death: Rinker v. Hurd, 69 Wash. 257, 124 Pac. 687.

Persons for whose benefit suit may be maintained: See Remington's Digest, Death, § 14; Copeland v. Seattle, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333; Bortle v. Northern Pac. R. Co., 60 Wash. 552, 111 Pac. 788, Ann. Cas. 1912B, 731; Kanton v. Kelly, 65 Wash. 614, 118 Pac. 890, 121 Pac. 833.

Plaintiffs — Joinder: See Remington's Digest, Death, § 17; Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 Pac. 842; Riggs v. Northern Pac. R. Co., 60 Wash. 292, 111 Pac. 162.

Defenses — Contributory Negligence of Deceased: See Remington's Digest, Death, § 8; Morgan v. Carbon Hill Coal Co., 6 Wash. 577, 34 Pac. 152, 772; Brennan v. Front St. R. Co., 8 Wash. 363, 36 Pac. 272; Hamlin v. Columbia & P. S. R. Co., 37 Wash. 448, 79 Pac. 991.

— **Contributory Negligence of Plaintiff or Beneficiary:** See Remington's Digest, Death, § 9; Vinnette v. Northern Pac. R. Co., 47 Wash. 320, 91 Pac. 975, 18 L. R. A. (N. S.) 328; Tecker v. Seattle, Renton etc. R. Co., 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B, 842; Crevelli v. Chicago, Milwaukee & St. Paul R. Co., 98 Wash. 42, 167 Pac. 66. See also, Ostheller v. Spokane & Inland Empire R. Co., 107 Wash. 678, 182 Pac. 630; Heath v. Wylie, 109 Wash. 86, 186 Pac. 313; Norton v. Seattle, 113 Wash. 408, 194 Pac. 373.

DAMAGES: See Remington's Digest, Death, §§ 28—30; Hawkins v. Front St. Cable R. Co., 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808; Fogarty v. Northern Pac. R. Co., 85 Wash. 90, 147 Pac. 652, L. R. A. 1916C, 803; Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400, 30 Pac. 714; Dean v. Oregon R. & Nav. Co., 44 Wash. 564, 87 Pac. 824; Philby v. Northern Pac. R. Co., 46 Wash. 173, 89 Pac. 468, 123 Am. St. Rep. 926, 13 Ann. Cas. 742, 9 L. R. A. (N. S.) 1193; Rochester v. Seattle, Renton & So. R. Co., 67 Wash. 545, 122 Pac. 23, 39 L. R. A. (N. S.) 1156; Atkeson v. Jackson Estate, 72 Wash. 233, 130 Pac. 102; Sweeten v. Pacific Power & Light Co., 88 Wash. 679, 153 Pac. 1054.

Personal representative as proper party to maintain statutory action for death. L. R. A. 1916E, 160.

Action by personal representative in forma pauperis for wrongful death. 1 Ann. Cas. 805.

Right of foreign or domestic representative to maintain action for death of decedent under statute of another state which provides that the action shall be brought by the personal representative. 18 L. R. A. (N. S.) 1252; L. R. A. 1917A, 37.

Damages for wrongful death as recoverable for benefit of illegitimate child. 21 Ann. Cas. 929; 2 L. R. A. (N. S.) 640.

§ 183-1. Beneficiaries of Action for Wrongful Death.

Every such action shall be for the benefit of the wife, husband, child or children of the person whose death shall have been so caused. If there be no wife or husband or child or children, such action may be maintained for the benefit of the parents, sisters or minor brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his death. In every such action the jury may give such damages as, under all circumstances of the case, may to them seem just. [L. '17, p. 495, § 2.]

"Such action," see § 183.

§ 183-2. Application of Terms.

Words in this act denoting the singular shall be understood as belonging to a plurality of persons or things. The masculine shall apply also to the feminine, and the word person shall also apply to bodies politic and corporate. [L. '17, p. 495, § 3.]

"Act" refers to §§ 183 to 184.

§ 183-3. Limitations on Repeal.

This act shall not repeal or supersede chapter 74 of the Laws of 1911 and acts amendatory thereof, or any part thereof. [L. '17, p. 496, § 5.]

"Act" refers to §§ 183 to 184.

"Chapter 74," L. '11: see *infra*, § 7673 et seq.

The repeal of Rem. Code, § 183, by this act saved pending suits and causes accruing within three years after the passage of this act. See L. '17, p. 495, § 4.

§ 184. Action for Injury or Death of Child or Ward.

A father, or in case of the death or desertion of his family, the mother may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward. [L. '69, p. 4, § 9; L. '73, p. 5, § 10; Cd. '81, § 9; 2 H. C., § 139.]

Cited in 4 Wash. 401—403; 8 Wash. 150—152; 19 Wash. 135; 29 Wash. 141; 52 Wash. 301; 65 Wash. 622, 624; 72 Wash. 239; 75 Wash. 442, 445; 88 Wash. 683; 93 Wash. 634; 97 Wash. 324—326; 113 Wash. 410.

Punitive or exemplary damages cannot be recovered in an action brought under this section: *Atrops v. Costello*, 8 Wash. 149, 35 Pac. 620; *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063.

The concluding clause of section 6384, *infra*, giving a right of action against the principal and surety upon a jitney bus bond, to the surviving husband or child for the death of the wife or mother, was not intended to exclude recovery by parents for the death of a child, under this section: *Bruner v. Little*, 97 Wash. 319, 166 Pac. 1166.

In an action by husband and wife to recover damages for death of their minor child, it is proper to grant leave to dismiss the wife as a party plaintiff: *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842.

A mother may maintain an action for the death of her child, when: See, *Clark v. Northern Pac. R. Co.*, 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508.

In an action by parents for the death of their minor son who had run away from home, in which the defense is that he was emancipated and contributed nothing to the plaintiff's support, conversations and letters expressing an intent on the part of the decedent to contribute to such support are not incompetent as self-serving declarations: *Dean v. Oregon R. & Nav. Co.*, 44 Wash. 564, 87 Pac. 824.

Parent's statutory right of action for death of child. L. R. A. 1916E, 120.

Right of deserted wife to recover for death or injury to child. 31 L. R. A. (N. S.) 519.

Right of parent to recover for death of illegitimate child. 10 Ann. Cas. 810; Ann. Cas. 1916C, 720; L. R. A. 1916E, 125.

§ 185. Action by Parent for Seduction of Daughter.

A father, or in case of his death or desertion of his family, the mother may maintain an action as plaintiff for the seduction of a daughter, and the guardian for the seduction of a ward, though the daughter or the ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there be no loss of service. [L. '69, p. 4, § 10; Cd. '81, § 10; 2 H. C., § 140.]

Cited in 1 Wash. 413; 102 Wash. 580, 581.

Right of mother to maintain action
for the seduction of her daughter.
Ann. Cas. 1916E, 1275.

Accrual of father's right of action
for seduction of daughter. 1 *Ann.*
Cas. 388.

§ 186. Action by Woman for Her Own Seduction.

An unmarried female over twenty-one years of age may maintain an action as plaintiff for her own seduction, and recover therein such damages as may be assessed in her favor; but the prosecution of an action to judgment by the father, mother, or guardian, as prescribed in the preceding section, shall be a bar to an action by such unmarried female. [L. '54, p. 220, § 497; L. '69, p. 5, § 11; Cd. '81, § 11; 2 H. C., § 141.]

Cited in 51 Wash. 98; 72 Wash. 453;
102 Wash. 580, 581.

This section authorizes a suit in this state for a seduction committed in another state or territory, in the absence of allegation as to the laws of the sister state, the presumption being that they

are the same as the laws of this state: *Murrilla v. Guis*, 51 Wash. 93, 98 Pac. 100.

Right of woman to recover damages
for her own seduction. 8 *Ann. Cas.*
1115; *Ann. Cas.* 1912B, 1062.

§ 187. Appointment of Guardian Ad Litem for Infants.

When an infant is a party he shall appear by guardian, or if he has no guardian, or in the opinion of the court the guardian is an improper person, the court shall appoint one to act. Said guardian shall be appointed as follows:—

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant;

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within thirty days after the service of the summons; if he be under the age of fourteen, or neglect to apply, then upon the application of any other party to the action, or of a relative or friend of the infant. [Cf. L. '54, p. 132, §§ 6, 7; Cd. '81, § 12; L. '91, p. 69, § 1; 2 H. C., § 142.]

See, also, *infra*, § 1581.

Authority of guardians to sue: See *infra*, § 1771.

Cited in 24 Wash. 129; 71 Wash. 550,
551.

Appointment and Qualification.—Where a nonresident parent and minor children submit themselves to the jurisdiction of this state by instituting a joint action in one of its courts, it is not error for the court to appoint the parent as guardian ad litem for such minors: *Shannon v. Consol. Tiger etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169.

Upon objection that minors interested in the estate of their deceased father are necessary parties plaintiff, it is proper

to appoint their mother guardian ad litem and join them as parties plaintiff by filing an amended complaint: *Zeimautz v. Blake*, 39 Wash. 6, 80 Pac. 822.

After pleading to the merits the objection cannot be raised that parties are minors and appear without guardian ad litem: *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; *Donald v. Ballard*, 34 Wash. 576, 76 Pac. 80.

Necessity for appointment of guardian ad litem when infant defendant has general or natural guardian. *Ann. Cas.* 1912D, 63.

§ 188. Guardian Ad Litem of Insane Persons.

When an insane person is a party to an action in the superior courts he shall appear by guardian, or if he has no guardian, or in the opinion of the court the guardian is an improper person, the court will appoint

one to act as guardian ad litem. Said guardian shall be appointed as follows:

(1) When the insane person is plaintiff, upon the application of a relative or friend of the insane person.

(2) When the insane person is defendant, upon the application of a relative or friend of such insane person, such application shall be made within thirty days after the service of summons if served in the state of Washington, and if served out of the state or service is made by publication, then such application shall be made within sixty days after the first publication of summons or within sixty days after the service out of the state. If no such application be made within the time above limited, application may be made by any party to the action. [L. '99, p. 144, § 1.]

Cited in 102 Wash. 399.

§ 189. Who must be Made Parties.

All persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff: Provided, that where good cause exists, which shall be made to appear in the complaint, why a party who should be a plaintiff cannot, from a want of consent on his part or otherwise, be made such plaintiff, he shall be made a defendant. [L. '54, p. 132, § 8; Cd. '81, § 13; 2 H. C., § 143.]

See supra, § 181, husband and wife as necessary parties.

See infra, §§ 259, 264, how defect of parties taken advantage of.

See infra, § 408, subd. 5, for failure to make necessary party.

See supra, § 179, real party in interest.

See infra, §§ 196, 197, bringing in new parties.

See infra, § 191, actions by assignees.

See infra, §§ 229, 232, 239, process against unknown parties.

See infra, § 306, defendant designated by fictitious name.

Cited in 9 Wash. 159, 507; 12 Wash. 139, 167; 13 Wash. 658; 22 Wash. 378; 28 Wash. 183; 40 Wash. 584; 51 Wash. 283; 63 Wash. 89; 83 Wash. 176, 94 Wash. 340; 100 Wash. 154; 108 Wash. 646.

The object of this section is to prevent a multiplicity of suits: *Bacon v. O'Keefe*, 13 Wash. 655, 43 Pac. 886.

PLAINTIFFS—Persons Necessary to Complete Determination: See *Remington's Digest*, Parties, § 31; *State ex rel. Race v. Cranney*, 30 Wash. 594, 71 Pac. 50; *State ex rel. Reed v. Gormley*, 40 Wash. 601, 82 Pac. 929, 5 Ann. Cas. 856, 3 L. R. A. (N. S.) 256.

Unity of interest in general: See *Remington's Digest*, Parties, § 6; *Utterback v. Meeker*, 16 Wash. 185, 47 Pac. 428; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405; *Lebovitz v. Cogswell*, 83 Wash. 174, 145 Pac. 212.

Persons Who may Join: See *Remington's Digest*, Parties, §§ 8—11; *Hedican v. Pennsylvania Fire Ins. Co.*, 21 Wash. 488,

58 Pac. 574; *Harrington v. Gordon*, 42 Wash. 692, 80 Pac. 187; *Hawkins v. Front, St. etc. R. Co.*, 3 Wash. 592, 28 Pac. 1021, 28 Am. St. Rep. 72, 16 L. R. A. 808; *Ritterhoff v. Puget Sound Nat. Bank*, 37 Wash. 76, 79 Pac. 601, 107 Am. St. Rep. 791; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 29, 42 Pac. 520; *Sawyer v. Vermont Loan & T. Co.*, 41 Wash. 524, 84 Pac. 8; *O'Toole v. Faulkner*, 34 Wash. 371, 75 Pac. 975.

Persons Who Must Join—In general: See *Remington's Digest*, Parties, §§ 12—14; *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663; *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289; *Bacon v. O'Keefe*, 13 Wash. 655, 43 Pac. 886; *Beach v. Brown*, 20 Wash. 266, 55 Pac. 46, 72 Am. St. Rep. 98, 43 L. R. A. 114; *Wright v. Beardsley*, 46 Wash. 16, 89 Pac. 172; *Otey v. Bradley*, 63 Wash. 500, 115 Pac. 1045, 2 N. C. C. A. 407; *Magnuson v. O'Dea*, 75 Wash. 574, 135 Pac. 640, Ann. Cas. 1915B, 1230, 48 L. R.

A. (N. S.) 327; *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701.

DEFENDANTS—Persons Who may be Joined—In General: See *Remington's Digest, Parties*, § 15; *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781; *Frederick v. Seattle*, 13 Wash. 428, 43 Pac. 364; *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736.

— **Actions on Contract:** See *Remington's Digest, Parties*, § 16; *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855; *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Clark v. Great Northern R. Co.*, 31 Wash. 658, 72 Pac. 477; *Pacific Bridge Co. v. United States Fid. etc. Co.*, 33 Wash. 47, 73 Pac. 772; *Spokane v. Costello*, 57 Wash. 183, 106 Pac. 764; *James v. Brainard-Jackson & Co.*, 64 Wash. 15, 116 Pac. 633; *Nance v. Woods*, 79 Wash. 188, 140 Pac. 323; *Bankson v. Laflam*, 92 Wash. 437, 159 Pac. 369; *Bollen v. Wilson Creek Union Grain & Trading Co.*, 90 Wash. 400, 156 Pac. 404.

— **Indorsers:** See *Remington's Digest, Parties*, § 17; *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67; *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57; *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388, 63 Am. St. Rep. 879, 39 L. R. A. 473.

— **Actions for Tort:** See *Remington's Digest, Parties*, § 18; *Raymond v. Morrison*, 9 Wash. 156, 77 Pac. 318.

— **Title to or Interest in Property:** See *Remington's Digest, Parties*, § 19; *Dexter Horton & Co. v. Long*, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867; *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061; *Owen v. St. Paul etc. R. Co.*, 12 Wash. 313, 41 Pac. 44; *Larson v. Allen*, 34 Wash. 113, 74 Pac. 1069; *Bussell v. Ross*, 60 Wash. 344, 111 Pac. 165; *Seattle Trust Co. v. Cameron*, 100 Wash. 92, 170 Pac. 379.

— **Trustees and Other Representatives Holding Legal Title:** See *Remington's Digest, Parties*, §§ 20, 21; *Thompson v. Price*, 37 Wash. 394, 79 Wash. 951; *Merz v. Mehner*, 57 Wash. 324, 106 Pac. 1118; *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Persons Who must be Joined—In General: See *Remington's Digest, Parties*, §§ 22, 24; *State ex rel. Reed v. Gormley*, 40 Wash. 601, 82 Pac. 929, 5 Ann. Cas. 856, 3 L. R. A. (N. S.) 256; *Walla Walla County v. Oregon R. & Nav. Co.*, 40 Wash. 398, 82 Pac. 716; *Bender v. Ragan*, 53 Wash. 521, 102 Pac. 427; *Weir v. Rathbun*, 12 Wash. 84, 40 Pac. 625; *Pennsylvania Casualty Co. v. Washington Portland Cement Co.*, 63 Wash. 689, 116 Pac. 284; *Shultz v. Crewdson*, 95 Wash. 266,

163 Pac. 734; *Kanters v. Kotick*, 102 Wash. 523, 173 Pac. 329.

— **Effect of Part Payment:** See *Remington's Digest, Parties*, § 25; *Dietz v. Winehill*, 6 Wash. 109, 32 Pac. 1056.

— **Actions for Tort:** See *Remington's Digest, Parties*, § 26; *Scott v. McGraw*, 3 Wash. 675, 29 Pac. 260; *Seattle Nat. Bank v. Meerwaldt*, 8 Wash. 630, 36 Pac. 763; *Morrison v. Blue Star Nav. Co.*, 26 Wash. 541, 67 Pac. 244; *Abb v. Northern Pac. R. Co.*, 28 Wash. 428, 68 Pac. 954, 92 Am. St. Rep. 864, 58 L. R. A. 293; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30, 72 Pac. 450; *Morrison v. Northern Pac. R. Co.*, 34 Wash. 70, 74 Pac. 1064; *Winsor v. German Sav. & L. Soc.*, 31 Wash. 365, 72 Pac. 66; *German-Am. State Bank v. Seattle Grain Co.*, 89 Wash. 376, 154 Pac. 443.

— **State, Municipality or Officers Thereof:** See *Remington's Digest, Parties*, § 27; *Kitsap County v. Carson*, 1 W. T. 419; *Pacific M'g. Co. v. School Dist. No. 7*, 6 Wash. 121, 33 Pac. 68; *Romine v. State*, 7 Wash. 215, 34 Pac. 924; *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063; *Kaufman v. Tacoma, Olympia etc. R. Co.*, 11 Wash. 632, 40 Pac. 137; *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750; *Spokane & Idaho Lumber Co. v. Boyd*, 28 Wash. 90, 68 Pac. 337; *State ex rel. Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548; *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; *Abbott v. Gaches*, 20 Wash. 517, 56 Pac. 28; *Long v. Eisenbeis*, 23 Wash. 556, 63 Pac. 249.

— **Title to or Interest in Property:** See *Remington's Digest, Parties*, § 28; *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325; *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940; *Kelley v. Bausman*, 98 Wash. 686, 168 Pac. 181.

— **Pledgor or Pledgee and Lessor or Lessee:** See *Remington's Digest, Parties*, § 29; *Pain v. Isaacs*, 10 Wash. 173, 38 Pac. 1038; *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940.

— **Heirs or Legatees:** See *Remington's Digest, Parties*, § 30; *Anrud v. Scandinavian-Amer. Bank*, 27 Wash. 16, 67 Pac. 364; *Sawyer v. Vermont Loan & T. Co.*, 41 Wash. 524, 84 Pac. 8; *Schlarb v. Castaing*, 50 Wash. 331, 97 Pac. 289.

Necessity that all obligees join in action on bond. 15 Ann. Cas. 1061.

Joinder of landlord in actions by or against tenant. 5 Ann. Cas. 62.

Necessity of joining tenant as party to make foreclosure of mortgage terminate lease. 14 A. L. R. 664.

Joinder of party causing injury and his insurer or guarantor. 7 L. R. A. 1003.

Who may join as relators in proceeding for mandamus. *Ann. Cas.* 1912B, 420; *Ann. Cas.* 1918C, 873.

Joint action against several defendants as maintainable for money had

and received. *Ann. Cas.* 1913A, 935.

Effect on action at law of joinder as party plaintiff of person having no interest in subject matter. *Ann. Cas.* 1912A, 742.

§ 190. Where Parties are Numerous One or More may Sue.

When the question is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. [L. '54, p. 132, § 9; Cd. '81, § 14; 2 H. C., § 144.]

Cited in 1 Wash. 413, 414; 14 Wash. 549; 32 Wash. 167; 87 Wash. 390.

One or more suing on behalf of all interested: See Remington's Digest, Parties, § 5; Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141; Morrison v. Blue Star Nav. Co., 26 Wash. 541, 67 Pac. 244; Coleman v. Rathbun, 40 Wash. 303, 82 Pac.

410; Vashon Fruit Union v. Godwin & Co., 87 Wash. 384, 151 Pac. 797.

Effect of creditor's bill for all similarly situated. 17 L. B. A. 348.

Plaintiff's control of suit brought for all similarly situated. 46 L. B. A. 839.

§ 191. Actions on Assigned Instruments and Choses in Action.

Any assignee or assignees of any judgment bond, specialty, book account, or other chose in action, for the payment of money, by assignment in writing, signed by the person authorized to make the same, may, by virtue of such assignment, sue and maintain an action or actions in his or her name, against the obligor or obligors, debtor or debtors, therein named, notwithstanding the assignor may have an interest in the thing assigned: Provided, that any debtor may plead in defense a counterclaim or an offset, if held by him against the original owner, against the debt assigned, save that no counterclaim or offset shall be pleaded against negotiable paper assigned before due, and where the holder thereof has purchased the same in good faith and for value, and is the owner of all interest therein. [Cf. L. '54, p. 131, § 3; L. '79, p. 122, § 1; Cd. '81, § 15; L. '91, p. 69, § 2; 2 H. C., § 145.]

Cited in 14 Wash. 177; 17 Wash. 74; 25 Wash. 513; 26 Wash. 19; 28 Wash. 183; 32 Wash. 194, 688; 36 Wash. 321; 65 Wash. 44, 46; 67 Wash. 356; 72 Wash. 141; 84 Wash. 414; 102 Wash. 327; 106 Wash. 188; 107 Wash. 297, 457, 458; 111 Wash. 268; 113 Wash. 444.

In Name of Assignee: See Remington's Digest, Assign., § 29; McDonald v. Presler, 3 Wash. 636, 29 Pac. 209; Riddell v. Prichard, 12 Wash. 601, 41 Pac. 905; Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; Von Tobel v. Stetson etc. Mill Co., 32 Wash. 683, 73 Pac. 788; Grant v. Walsh, 36 Wash. 190, 78 Pac. 786; Conaway v. Co-operative Homebuilders, 65 Wash. 39, 117 Pac. 716; Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 146 Pac. 861; Olsen v. Hagan, 102 Wash. 321, 172 Pac. 1173. See, also, McGillivray v. Columbia Salmon Co., 104 Wash. 623, 177 Pac. 660; Dyer v. Title Guar. & Surety Co., 106 Wash. 186,

179 Pac. 834; Pioneer Mining & Ditch Co. v. Davidson, 111 Wash. 262, 190 Pac. 242.

An assignment of any right of action growing out of a conversion of personal property which the assignor had held as security for a debt is the assignment of "a chose in action for the payment of money," within this section, and authorizes an action for the recovery of the property or in the alternative for its value: Burke v. Wilson, 107 Wash. 454, 181 Pac. 904.

It is doubtful, in view of sections 191 and 192 whether a note and chattel mortgage can be assigned by mere delivery: Gottstein v. Harrington, 25 Wash. 508, 65 Pac. 765.

A chose in action is a right of action ex contractu, or for tort connected with a contract, which includes fraud by which money or property was obtained: Conaway v. Co-operative Homebuilders, 65 Wash. 39, 117 Pac. 716.

This section, and section 266, authorizing a setoff of any demand against the plaintiff which existed and belonged to defendant at the time of the suit and against any assigned demand if it existed at the time of the assignment, are in *pari materia*, and construed together do not authorize a setoff against the assignee of an executory contract, when both claims are not matured, and which could not have been asserted against the assignor prior to the assignment: *King v. West*

Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081.

Who is real party in interest by whom action on partial assignments must be brought. 64 L. R. A. 603.

Right of assignee of aggrieved party to maintain action to recover excessive freight charge. 13 A. L. R. 298.

Right of transferee of note to sue on the original claim for which note was given. 11 A. L. R. 449.

§ 192. Actions Against Persons Severally Liable.

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff. [L. '54, p. 132, § 10; Cd. '81, § 16; 2 H. C., § 146.]

Cited in 7 Wash. 322; 20 Wash. 707; 57 Wash. 189; 99 Wash. 605; 102 Wash. 526.

Parties and Interests Involved: See *Remington's Digest*, Action, § 24; *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934; *Utterback v. Meeker*, 16 Wash. 185, 47 Pac. 428; *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189; *Brown v. State*, 46 Wash. 399, 90 Pac. 266; *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278; *Pennsylvania Casualty Co. v. Washington Portland Cement Co.*, 63 Wash. 689, 116 Pac. 284; *Seidell v. Taylor*, 86 Wash. 645, 151 Pac. 41; *Hexter v. Crown Woolen Co.*, 95 Wash. 348, 163 Pac. 774; *Cascade Lumber & Shingle Co. v. Wright*, 99 Wash. 421, 169 Pac. 833; *State ex rel. Berger v. Haiman*, 100 Wash. 632,

171 Pac. 529; *Matson v. Kennecott Mines Co.*, 101 Wash. 12, 171 Pac. 1040. See, also, *McAllister v. Harper & Son*, 106 Wash. 373, 180 Pac. 412.

An indorser of a promissory note may be joined as defendant in an action against the makers: *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67.

Allowance of separate actions against parties severally liable: *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127.

Right to maintain joint action against maker and indorser of promissory note. *Ann. Cas.* 1912D, 1201.

Right to join agent and undisclosed principal as defendants in the same action. 26 L. R. A. (N. S.) 742.

§ 193. Action not to Abate by Disability.

No action shall abate by the death, marriage or other disability of the party, or by the transfer of any interest therein, if the cause of action survive or continue; but the court may at any time within one year thereafter, on motion, allow the action to be continued by or against his representatives or successors in interest. [Cf. L. '54, p. 132, § 11; L. '69, p. 6, § 17; Cd. '81, § 17; 2 H. C., § 147.]

See *infra*, § 967 et seq., actions by and against executors, etc.

See *infra*, §§ 1474, 1477, 1479, 1481.

See *infra*, §§ 1518-1523, certain actions by and against executors, etc.

See *infra*, §§ 1558-1564, specific performance of decedent's contracts.

Cited in 5 Wash. 362, 363; 8 Wash. 600; 27 Wash. 345; 28 Wash. 207; 33 Wash. 678; 71 Wash. 439, 465; 89 Wash. 549; 101 Wash. 267; 102 Wash. 414, 415; 107 Wash. 296; 109 Wash. 233, 235.

This section is as applicable to equitable actions as to purely legal actions: *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436.

Under this section, one to whom a lien claimant had assigned his claim after the

commencement of action to enforce his lien, is entitled at any time within a year to file and serve supplemental pleadings showing his succession in interest, and to have an adjudication upon his rights: *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 312.

The right to contest a will survives to the heirs or personal representatives of the heir of the putative testator, under this section and *Rem. Code*, section 1307,

conferring the right to contest on "any person interested" in any will: *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743.

The liability of a surety upon a supersedeas bond is continued after his death, by this and sections 236 and 967: *Olson v. Seldovia Salmon Co.*, 89 Wash. 547, 154 Pac. 1107.

Transfer of Interest: See *Remington's Digest, Abate. & R.*, §§ 16, 17; *Tacoma Lumber & Mfg. Co. v. Wolff*, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462; *Baker v. Northwest Bldg. etc. Co.*, 33 Wash. 677, 74 Pac. 825; *Stevens v. Jones*, 40 Wash. 484, 82 Pac. 754; *Ekstrand v. Barth*, 41 Wash. 321, 83 Pac. 305; *Boyer v. Robinson*, 43 Wash. 97, 86 Pac. 385; *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973.

Death of Party as Cause of Abatement: See *Remington's Digest, Abate. & R.*, § 18; *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436; *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687.

Causes That Survive in General: See *Remington's Digest, Abate. & R.*, § 19; *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032; *Seward v. Spokane & Seattle R. Co.*, 64 Wash. 516, 117 Pac. 263; *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743.

This section does not provide what causes of action survive but relates only to causes which the law already provided should survive at common law: *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685.

This section does not define what causes of action are assignable, and does not refer to the survival of actions: *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685.

Survival of Causes on Contract: See *Remington's Digest, Abate. & R.*, § 20; *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Donnerberg v. Appenheimer*, 15 Wash. 290, 46 Pac. 254; *Macdonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436, Ann. Cas. 1912A, 417; *Olson v. Seldovia Salmon Co.*, 89 Wash. 547, 154 Pac. 1107.

Actions Which Abate: See *Remington's Digest, Abate. & R.*, § 21; *Slauson v.*

Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811; *Dwyer v. Nolan*, 40 Wash. 459, 82 Pac. 746, 111 Am. St. Rep. 919, 5 Ann. Cas. 890, 1 L. R. A. (N. S.) 551.

At common law, and in this state in the absence of statute, a right of action for damages for deceit and conspiracy in a stock subscription transaction abates upon the death of the defendant, where the estate of the deceased was not enriched by the fraud: *State ex rel. Baeder v. Blake*, 107 Wash. 294, 181 Pac. 685.

Death Pending Appeal, etc.: See *Remington's Digest, Abate. & R.*, §§ 23, 24; *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811; *Wright v. Northern Pac. R. Co.*, 45 Wash. 432, 88 Pac. 832; *Naylor v. Naylor*, 99 Wash. 396, 169 Pac. 819; *Gordon v. Hillman*, 102 Wash. 411, 173 Pac. 22; *Overlock v. Shinn*, 28 Wash. 205, 68 Pac. 436.

A judgment rescinding a trade and imposing reciprocal and concurrent obligations of reconveyance, with an alternative of a future money judgment, is not in its practical effect a final judgment; and upon death of a party plaintiff more than one year prior to final judgment, the action abates, unless revived by substitution of her personal representative within one year, under this section: *Gordon v. Hillman*, 109 Wash. 223, 186 Pac. 651.

The right of survivors to substitution on the death of a party is limited to one year: *Gordon v. Hillman*, 109 Wash. 223, 186 Pac. 651.

Continuance or Revival of Action: See *Remington's Digest, Abate. & R.*, §§ 25, 26; *Baker v. Northwest Bldg. etc. Co.*, 33 Wash. 677, 74 Pac. 825; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264; *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712.

Does right of grantor to maintain a suit to set aside his conveyance for cause survive to his heir. 2 A. L. R. 431.

§ 194. Action for Personal Injury Survives to Wife, Child, or Heirs.

No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents, sisters or minor brothers; but such action may be prosecuted, or commenced and prosecuted, in favor of such wife or in favor of the wife and children, or if no wife, in favor of such child or children, or if no wife or child or children, then in favor

of his parents, sisters, or minor brothers who may be dependent upon him for support, and resident in the United States at the time of his death. [L. '09, p. 566, § 1; Cf. L. '54, p. 220, § 495; Cd. '81, § 18; 2 H. C., § 148.]

See *supra*, § 183 et seq., action for wrongful death.

See *infra*, § 967 et seq., actions by and against executors, etc.

Cited in 19 Wash. 138; 26 Wash. 486; 33 Wash. 419; 60 Wash. 92, 93, 94, 553; 65 Wash. 618; 71 Wash. 438; 75 Wash. 442, 444; 94 Wash. 653, 654.

This section was not repealed by section 184 conferring upon "heirs" a right of action from death by wrongful act: *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822.

Survival of Actions for Personal Injuries: See *Remington's Digest*, Abate. & R., § 20-1; *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795; *Thompson v. Seattle, Renton & S. R. Co.*, 71 Wash. 436, 128 Pac. 1070.

This section was not restricted to mean that no action commenced for wrongful death shall abate, by reason of the enactment at the same session of section 183, as originally enacted, giving a widow and children an independent right of action for the wrongful death of the husband

and father; but these sections are independent of each other: *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795.

A release and satisfaction by the person injured of his right of action for the injuries sustained, bars the right of the beneficiaries to maintain an action for damages for wrongful death under either section 194 or section 183, providing that an action for damages may be maintained by heirs or representatives for wrongful death; notwithstanding the two acts create distinct causes of action: *Brodie v. Washington Water Power Co.*, 92 Wash. 574, 159 Pac. 791.

Validity of statute providing for survival of action for personal injuries. *Ann. Cas.* 1917E, 1171.

Abatement and revival of actions for personal injury upon death of plaintiff. *L. R. A.* 1915E, 1104.

§ 195. Parties and Judgment in Actions for Purchase Price of Land.

In an action brought for the recovery of the purchase money against any person holding a contract for the purchase of lands, the party bound to perform the contract, if not the plaintiff, may be made a party, and the court in a final judgment may order the interest of purchaser to be sold or transferred to the plaintiff upon such terms as may be just, and may also order a specific performance of the contract in favor of the complainant, or the purchaser in case a sale be ordered. [L. '54, p. 219, 490; Cd. '81, § 19; 2 H. C., § 149.]

Cited in 64 Wash. 215.

Where the vendor of real estate retains the legal title, and afterward mortgages his interest to a third person, and also assigns to such person the purchaser's notes given for the purchase price, such mortgagee and assignee may maintain an action against the vendee on the notes, and the contract lien is secured thereby. In such case the vendor is a proper though

not a necessary party: *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061.

Where a party sells all the timber upon a tract of land, and subsequently makes another bill of sale of all the cedar timber on the same land, he is a proper party defendant to an action by his first grantees, brought to quiet title to the timber: *Larson v. Allen* 34 Wash. 113, 74 Pac. 1069.

§ 196. Bringing in New Parties.

The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in. [L. '69, p. 6, § 20; Cd. '81, § 20; 2 H. C., § 150.]

Cited in 4 Wash. 811; 12 Wash. 139, 698; 16 Wash. 129; 29 Wash. 526; 67 Wash. 357; 88 Wash. 616; 94 Wash. 340; 98 Wash. 619; 100 Wash. 154; 113 Wash. 442, 444, 445.

Bringing in New Parties: See Remington's Digest, Parties, §§ 41, 42; Murne v. Schwabacher, 2 W. T. 130, 3 Pac. 899; Moore v. Gilmore, 16 Wash. 123, 47 Pac. 239, 58 Am. St. Rep. 20; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; State ex rel. Adjustment Co. v. Superior Court, 67 Wash. 355, 121 Pac. 847; Huxtable v. Berg, 98 Wash. 616, 168 Pac. 187. See, also, State ex rel. Alaska Pacific Nav. Co. v. Superior Court, 113 Wash. 439, 194 Pac. 412.

This section authorizes the court to determine any controversy between parties before it, when it can be done without prejudice to the rights of others: Seattle v. Turner, 29 Wash. 515, 69 Pac. 1083.

Time for Bringing in New Parties and Jurisdiction: See Remington's Digest, Parties, §§ 42-1, 43; Marx v. Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849; Hannegan v. Roth, 12 Wash. 695, 44 Pac. 256; State ex rel. Nolte v. Superior Court, 15 Wash. 500, 46 Pac. 1031; Clerf, In re, 55 Wash. 465, 104 Pac. 622; Townsend v. Three Lakes Lumber Co., 67 Wash. 654, 122 Pac. 29. See, also, Nevin v. Pacific Coast & Norway Packing Co., 105 Wash. 192, 177 Pac. 739.

Mode of Bringing in Parties: See Remington's Digest, Parties, § 44; Cherry v. Western Washington etc. Co., 11 Wash. 586, 40 Pac. 136; Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822. See, also, Nevin v. Pacific Coast & Norway Packing Co., 105 Wash. 192, 177 Pac. 739.

Right to bring in new parties by cross-bill. 20 Ann. Cas. 1151.

§ 197. New Party Entitled to Service of Summons.

When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same summons, to be served in the same manner, as required for defendants in the commencement of an action. [L. '54, p. 219, § 485; L. '60, p. 99, § 477; L. '63, p. 194, § 524; L. '69, p. 172, § 684; L. '73, p. 176, § 682; L. '77, p. 151, § 747; Cd. '81, §§ 21, 742; 2 H. C., §§ 151, 793.]

In receivership proceedings, upon petition for an accounting and to discharge the receiver, parties other than the receiver cannot be cited to show cause on ten days' notice why they should not be

brought in as parties defendants, as such substitute for summons would ignore section 220, infra: Nevin v. Pacific Coast & Norway Packing Co., 105 Wash. 192, 177 Pac. 739.

§ 198. Substitution and Interpleader.

A defendant against whom an action is pending upon a contract, or for specific real or personal property, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, may apply to the court for an order to substitute such person in his place, and discharge him from liability to either party on his depositing in court the amount of the debt, or delivering the property or its value to such person as the court may direct; and the court may in its discretion make the order. [L. '54, p. 132, § 12; L. '69, p. 7, § 22; Cd. '81, § 22; H. C., § 152.]

Cited in 9 Wash. 474; 15 Wash. 281; 16 Wash. 130; 42 Wash. 167; 71 Wash. 439.

An action of interpleader under sections 199—201, being of an equitable nature, findings of fact are not necessary to sustain the judgment: Smith v. Dement Bros. Co., 100 Wash. 139, 170 Pac. 555.

And appeal lies to the supreme court regardless of the amount in controversy:

Agnew v. Barto & Son's Bank, 48 Wash. 66, 92 Pac. 885.

Substitution, Parties Entitled and Proceedings: See Remington's Digest, Parties, §§ 46—49; Liebman v. McGraw, 3 Wash. 520, 28 Pac. 1107; Hood v. California Wine Co., 4 Wash. 88, 29 Pac. 768; Box v. Kelso, 5 Wash. 360, 31 Pac. 973; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Strong v. Eldridge, 8 Wash. 595, 36 Pac.

696; *Baker v. Northwest Building etc. Co.*, 33 Wash. 677, 74 Pac. 825; *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Ellsworth v. Layton*, 37 Wash. 340, 79 Pac. 947.

A petition charging fraud and collusion in a receivership and seeking to bring in new parties is too late as a petition for intervention, when it was not filed until three years after appointment of the receiver and final judgment on plaintiff's claim: *Nevin v. Pacific Coast & Norway Packing Co.*, 105 Wash. 192, 177 Pac. 739.

Complaint: See *Remington's Digest*, Interpl., § 2; *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397; *Carstens v. Gustin*, 19 Wash. 403, 53 Pac. 550; *Belond v. Rayburn*, 38 Wash. 406, 80 Pac. 553; *Pierson v. Peirce*, 42 Wash. 164, 84 Pac. 731.

Grounds of Relief—Nature of Conflicting Claims: See *Remington's Digest*, Interpl., § 1; *Daulton v. Stuart*, 30 Wash. 562, 70 Pac. 1096; *Smith v. Dement Bros. Co.*, 100 Wash. 139, 170 Pac. 555.

Defenses and Proceedings: See *Remington's Digest*, Interpl., §§ 3—5; *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299; *Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083; *Smith v. Dement Brothers Co.*, 100 Wash. 139, 170 Pac. 555.

Necessity that bill or complaint of interpleader show that alleged claim has reasonable basis on which to rest. *Ann. Cas.* 1913C, 1166.

Privity of title between claimants in interpleader. 1 *Ann. Cas.* 513.

Substitution of receiver as party in pending action. *Ann. Cas.* 1915C, 1249.

Right to interplead different taxing districts claiming right to tax same property. 35 *L. R. A. (N. S.)* 330.

Right of bailee to interplead bailor with third person claiming paramount title. 33 *L. R. A. (N. S.)* 681.

Right of wrongdoer to maintain bill of interpleader. *L. R. A.* 1918D, 1172.

§ 199. Actions to Determine Conflicting Claims to Property.

Anyone having in his possession, or under his control, any property or money, or being indebted, where more than one person claims to be the owner of, entitled to, interested in, or to have a lien on such property, money or indebtedness, or any part thereof, may commence an action in the superior court against all or any of such persons, and have their rights, claims, interest, or liens adjudged, determined and adjusted in such action. [L. '90, p. 93, § 1; 2 H. C., § 153.]

Cited in 14 Wash. 182, 642; 15 Wash. 333; 29 Wash. 520, 521; 30 Wash. 565; 36 Wash. 88; 41 Wash. 215; 44 Wash. 359; 83 Wash. 62; 100 Wash. 144.

Where a garnishee had suffered a default, and claimed he had no notice of the defense that his debt had been assigned, his action to bring all parties before the court to determine to whom he should pay the judgment, under this sec-

tion, is a collateral attack upon the garnishee judgment, which can only be held void for reasons affirmatively appearing upon the record: *Benjamin v. Ernst*, 83 Wash. 59, 145 Pac. 79.

Right of sheriff or other officer to file bill of interpleader to determine conflicting claims to proceeds of judgment. *Ann. Cas.* 1913B, 231.

§ 200. Plaintiff may Disclaim and Deposit Property.

In all actions commenced under the preceding section, the plaintiff may disclaim any interest in the money, property, or indebtedness, and deposit with the clerk of the court the full amount of such money or indebtedness, or other property, and he shall not be liable for any costs accruing in said action. And the clerks of the various courts shall receive and file such complaint, and all other officers shall execute the necessary processes to carry out the purposes of this section, and also sections 199 and 201, of this code, free from all charge to said plaintiff, and the court, in its discretion, shall determine the liability for costs of the action. [L. '90, p. 93, § 2; 2 H. C., § 154.]

Cited in 14 Wash. 182, 642; 44 Wash. 359; 71 Wash. 439; 100 Wash. 144.

A payment by a garnishee defendant of moneys in dispute to the clerk of the

court will not discharge the garnishee from liability when the payment is made in satisfaction of a judgment against the garnishee in favor of the principal debtor, and the money is not deposited with the

clerk for the purpose of disclaiming any interest therein, as provided by sections 199 and 200: *Ward v. Ward*, 14 Wash. 640, 45 Pac. 312.

§ 201. Court may Protect Interest of Claimants.

Either of the defendants may set up or show any claim or lien he may have to such property, money or indebtedness, or any part thereof, and the superior right, title, or lien, whether legal or equitable, shall prevail. The court or judge thereof, may make all necessary orders, during the pendency of said action, for the preservation and protection of the rights, interests, or liens of the several parties. [L. '90, p. 94, § 3; 2 H. C., § 155.]

Cited in 71 Wash. 439.

§ 202. Intervention.

Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either party, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by a complaint setting forth the grounds upon which the intervention rests, filed by leave of the court or judge on the ex parte motion of the party desiring to intervene. [L. 77, p. 7, § 23; Cd. '81, § 23; 2 H. C., § 156.]

Cited in 4 Wash. 605; 7 Wash. 79; 13 Wash. 4; 21 Wash. 168; 23 Wash. 31; 25 Wash. 51; 32 Wash. 166; 36 Wash. 418; 47 Wash. 384; 53 Wash. 418; 56 Wash. 230; 58 Wash. 84; 62 Wash. 555, 556; 65 Wash. 6; 78 Wash. 566; 91 Wash. 42, 305; 95 Wash. 307; 99 Wash. 245.

Persons Entitled to Intervene: See Remington's Digest, Parties, § 33; *Langert v. Brown*, 3 W. T. 102, 13 Pac. 704; *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; *Medcalf v. Bush*, 4 Wash. 386, 30 Pac. 325; *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408; *Hindman v. Colvin*, 47 Wash. 382, 92 Pac. 139; *Murray v. O'Brien*, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998; *State ex rel. Williams v. Superior Court*, 91 Wash. 40, 157 Pac. 28.

A third party may intervene in supplemental proceedings: *Murne v. Schwabacher*, 2 W. T. 191, 3 Pac. 270.

In an action against the husband on his promissory note, the wife has a right to intervene, for the purpose of having any judgment that may be rendered against the husband adjudged that the debt was not a community debt and that it should not be satisfied out of the community real property: *Gund v. Parke*, 15 Wash. 393, 46 Pac. 408.

A lessee of property condemned, being entitled to separate damages, may intervene under this section: *North Coast R. Co. v. Gentry*, 58 Wash. 82, 107 Pac. 1060.

In an action by a councilman to enjoin the city clerk from certifying to an elector's petition for his recall, a taxpayer has no interest entitling him to intervene under this section; it not being alleged that the clerk would not defend the action: *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305.

Under this section, the receiver of an insolvent bank is entitled to intervene in an action by the trustee of a pledgee of such insolvent bank, instituted for the purpose of establishing the validity of certain city warrants, which were the subject of the pledge, and which the receiver claims had been fraudulently and collusively sold by the pledgee to itself: *Muhlenberg v. Tacoma*, 25 Wash. 36, 64 Pac. 925.

Interest in Subject of Action: See Remington's Digest, Parties, § 34; *Parker v. Esch*, 5 Wash. 296, 31 Pac. 754; *McNamara v. Crystal Min. Co.*, 23 Wash. 26, 62 Pac. 81; *Muhlenberg v. Tacoma*, 25 Wash. 36, 64 Pac. 925; *Westland Pub. Co. v. Royal*, 36 Wash. 399, 78 Pac. 1096;

Johnson v. Conner, 48 Wash. 431, 93 Pac. 914; *Coffman v. Spokane Chronicle Pub. Co.*, 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636; *Forster v. Razink*, 46 Wash. 692, 91 Pac. 252; *State ex rel. Williams v. Superior Court*, 91 Wash. 40, 157 Pac. 28; *Carnation Lumber & Shingle Co. v. Tolt Land Co.*, 103 Wash. 633, 175 Pac. 331.

Creditors: See Remington's Digest, Parties, § 35; *Thompson v. Huron Lum. Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *State ex rel. Arthur Mach. Co. v. Superior Court*, 7 Wash. 77, 34 Pac. 430; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28.

Grounds: See Remington's Digest, Parties, § 36; *Bissell v. Taylor*, 7 Wash. 324, 35 Pac. 68; *Boardman v. Hager*, 24 Wash. 487, 64 Pac. 724.

Time for Intervention: See Remington's Digest, Parties, § 37; *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Seattle & Northern R. Co. v. Bowman*, 53 Wash. 416, 102 Pac. 27; *Longmire v. Yakima Highlands Irrigation & Land Co.*, 95 Wash. 302, 163 Pac. 782; *Mountain Timber Co. v. Lumber Insurance Co.*, 99 Wash. 243, 169 Pac. 591. See, also, *Nevin v. Pacific Coast & Norway Packing Co.*, 105 Wash. 192, 177 Pac. 739.

Necessity for Leave of Court: See Remington's Digest, Parties, § 38; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

Rights and Liabilities and Proceedings: See Remington's Digest, Parties, §§ 39, 40; *Fairfield v. Binnian*, 13 Wash. 1, 42 Pac. 632; *State ex rel. Krisch v. Superior Court*, 36 Wash. 91, 78 Pac. 461; *Schnebly v. Rehmke*, 78 Wash. 565, 139 Pac. 596.

The dismissal of an action for the cancellation of a note and mortgage does not affect an intervener's right as holder to foreclose under this section and section 303, requiring the court to determine the rights of the intervener at the same time the action is decided: *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

Rights of contract creditors to intervene in equity. 3 Ann. Cas. 1091.

Right of claimant of attached property to intervene. 18 Ann. Cas. 594; 23 L. R. A. (N. S.) 536.

Right of adverse claimant to intervene in action for partition. 20 Ann. Cas. 82.

Right of state to intervene and contest appointment of administrator of intestate estate. Ann. Cas. 1913C, 1035.

Right of bankrupt or creditors of bankrupt to intervene in an action to which the trustee is a party L. R. A. 1916C, 639.

Right of creditor of individual partner or of his estate to intervene in proceedings for the settlement of the affairs of the partnership. L. R. A. 1917B, 1047.

Right of one creditor to intervene in another creditor's action after the period for beginning such action has expired. L. R. A. 1917D, 885.

Right of third person to intervene in divorce proceedings. Ann. Cas. 1913E, 429.

Right of surety to intervene in an action against principal, or principal in action against surety. 68 L. R. A. 736.

§ 203. Practice in Intervention.

When leave is given to intervene, a copy of the intervener's complaint shall be served upon the parties to the action or proceedings who have not appeared, or publication of a notice of the intervention containing a brief statement of the nature of the intervener's demand shall be made in all cases where there are absent or nonresident defendants. The notice shall be published in the same manner and for the same length of time as prescribed by law for publication of summons. And the complaint shall also be served upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint. The court shall determine upon the rights of the intervener at the same time the action is decided, and if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention: Provided, that no intervention shall be cause for delay in the trial of an action between the original parties thereto. [L. '77, p. 7, § 24; Cd. '81, § 24; 2 H. C., § 157.]

Cited in 4 Wash. 606; 13 Wash. 4; 62 Wash. 556; 65 Wash. 6; 71 Wash. 439; 78 Wash. 566.

CHAPTER V.

VENUE OF ACTIONS.

§ 204. Actions to be Commenced Where Subject is Situated.

Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated:—

1. For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage on, or for the determination of all questions affecting the title or for any injuries to real property;

2. All questions involving the rights to the possession or title to any specific article of personal property; in which last mentioned class of cases damages may also be awarded for the detention and for injury to such personal property. [L. '54, p. 133, § 13; L. '60, p. 7, § 15; L. '69, p. 12, § 48; L. '77, p. 11, § 48; Cd. '81, § 47; 2 H. C., § 158.]

See *supra*, § 32, venue of actions in certain cases.

Cited in 2 Wash. 120, 121; 3 Wash. 517; 4 Wash. 656, 657; 5 Wash. 641; 6 Wash. 347; 13 Wash. 608; 16 Wash. 400; 18 Wash. 3; 23 Wash. 578; 55 Wash. 329; 62 Wash. 13, 20; 69 Wash. 132; 82 Wash. 359; 104 Wash. 274; 108 Wash. 668.

County or District, Under Territorial Laws: See Remington's Digest, Venue, § 1; Wood v. Mastick, 2 W. T. 64, 3 Pac. 612; McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76.

This section is general, applying to actions against counties; hence such an action against two counties is local and properly brought in the county where the land was situated, notwithstanding that neither the common law, nor any express statute, authorized an action against a county beyond its limits: State ex rel. King County v. Superior Court, 104 Wash. 268, 176 Pac. 352.

Actions Relating to Real Property, When Local: See Remington's Digest, Venue, § 3; Wood v. Mastick, 2 W. T. 64, 3 Pac. 612; McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76; Reese v. Murman, 5 Wash. 373, 31 Pac. 1027; State ex rel. Collins v. Superior Court, 13 Wash. 187, 43 Pac. 19; Seymour v. La Furgey, 47 Wash. 450, 92 Pac. 267.

When Transitory: See Remington's Digest, Venue, § 3; Morgan v. Bell, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; Smith v. Allen, 8 Wash. 1, 50 Pac. 783; State ex rel. Scougale v. Superior Court, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030; Rosenbaum v. Evans, 63 Wash. 506, 115 Pac. 1054; Wilson v. Mills, 91 Wash. 71, 157 Pac. 467; State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905.

Incidentally Affecting Lands in Another County: See Remington's Digest, Venue, § 3; Carkeek v. Boston Nat. Bank of Seattle, 16 Wash. 399, 47 Pac. 884; Shep-

pard v. Coeur d'Alene Lumber Co., 62 Wash. 12, 112 Pac. 932, Ann. Cas. 1912C, 909, 44 L. R. A. (N. S.) 267.

Two mortgages securing the same debt, but covering land in different counties, may properly be foreclosed in either county: Commercial Nat. Bank of Seattle v. Johnson, 16 Wash. 536, 48 Pac. 267.

When the superior court may have jurisdiction of a lien foreclosure filed in another county, where there was no demand for a removal of the trial in view of sections 204, 208: Barbour v. Hodge, 99 Wash. 578, 170 Pac. 115.

An action by a tenant in common to recover an interest in land in possession of her cotenant holding adversely involves the title and right of possession, and must be tried in the state in which the property is situated: Daniel v. Daniel, 106 Wash. 659, 181 Pac. 215.

Local or Transitory Nature of Action in General: See Remington's Digest, Venue, §§ 2, 4, 5; North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1053; State ex rel. Campbell v. Superior Court, 7 Wash. 306, 34 Pac. 1103; State ex rel. Meeker v. Superior Court, 13 Wash. 607, 43 Pac. 887, 46 Pac. 342; Waldron v. Canadian Pac. R. Co., 22 Wash. 253, 60 Pac. 653; Stiles v. James, 2 W. T. 194, 2 Pac. 188; State ex rel. Peterson v. Superior Court, 5 Wash. 639, 32 Pac. 553; Overbeck v. Calligan, 6 Wash. 342, 33 Pac. 825.

Any superior court of the state has general jurisdiction over the subject matter of an action to foreclose a lien for the construction of a ship, regardless of the situs of the ship, and notwithstanding this section, provides that actions involving the title to any specific personal property shall be commenced in the county in which the property is situated; since the venue may be changed by consent, or the objection waived by a general appearance:

State ex rel. Christensen v. Superior Court, 108 Wash. 666, 185 Pac. 623.

Actions Arising Out of the Jurisdiction Between Nonresidents: See Remington's Digest, Venue, §§ 9, 9-1; Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40; Reynolds v. Day, 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A, 432, 5 N. C. C. A. 814; Whitman County v. United States Fidelity & Guaranty Co., 49 Wash. 150, 94 Pac. 906; State ex rel. Keyes v. Superior Court, 103 Wash. 402, 174 Pac. 646.

For text treatment of "Venue," see 27 B. C. L. 776.

Forum in which action must be

brought for damages to realty. 3 Ann. Cas. 344; 21 Ann. Cas. 1314; Ann. Cas. 1913E, 597.

Venue of condemnation proceedings as to land located in more than one county. 19 Ann. Cas. 984.

Venue of action to set aside transfer of realty within state as in fraud of creditors. Ann. Cas. 1913D, 663.

County in which action must be brought to set aside contract for sale of realty. 3 Ann. Cas. 727.

Venue of action to recover shares of corporate stock. Ann. Cas. 1913D, 506.

§ 205. Actions to be Tried Where Cause Arose.

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose:—

1. For the recovery of a penalty or forfeiture imposed by statute;
2. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, shall do anything touching the duties of such officer. [Cf. L. '54, p. 33, § 14; L. '60, p. 7, § 16; L. '69, p. 12, § 49; L. '77, p. 11, § 49; Cd. '81, § 48; 2 H. C., § 159.]

Cited in 2 Wash. 120; 18 Wash. 3; 112 Wash. 576.

Proper county for place of trial of action against public officer for tort. Ann. Cas. 1912C, 345.

§ 206. Venue of Actions Against Private Corporations.

An action against a corporation may be brought in any county where the corporation transacts business or transacted business at the time the cause of action arose; or in any county where the corporation has an office for the transaction of business or any person resides upon whom process may be served against such corporation, unless otherwise provided in this code. [L. '09, p. 69, § 1. Cf. L. '54, p. 220, § 494; L. '60, p. 101, § 488; L. '69, p. 13, § 50; L. '77, p. 11, § 50; Cd. '81, § 49; 2 H. C., § 160.]

Cited in 4 Wash. 658; 10 Wash. 149, 150; 14 Wash. 205; 23 Wash. 519; 24 Wash. 303; 40 Wash. 447; 42 Wash. 453; 43 Wash. 375; 48 Wash. 148; 54 Wash. 528; 62 Wash. 191; 73 Wash. 68; 74 Wash. 371; 79 Wash. 447; 86 Wash. 662; 109 Wash. 406; 110 Wash. 196; 113 Wash. 66, 80.

What is Transacting Business in This State: See Remington's Digest, Corp., § 263; Lee v. Fidelity Storage & Transfer Co., 51 Wash. 208, 98 Pac. 658; Arrow Lumber & Shingle Co. v. Union Pac. R. Co., 53 Wash. 629, 102 Pac. 650; Collins v. Hazel Lumber Co., 54 Wash. 524, 103 Pac. 798; Hayworth v. McDonald, 67 Wash. 496, 121 Pac. 984; Strandall v. Alaska Lumber Co., 73 Wash. 67, 131 Pac. 211; State ex rel. Seattle & Lake Washington Waterway Co. v. Superior Court, 86 Wash. 657, 150 Pac. 1149. See, also, Alaska Pac.

Nav. Co. v. Southwark Foundry & Mach. Co., 104 Wash. 346, 176 Pac. 357; Gerriek & Gerriek Co. v. Llewellyn, 105 Wash. 98, 177 Pac. 692; Grams v. Idaho National Harvester Co., 105 Wash. 602, 178 Pac. 815; Cohagen v. Big Bend Land Co., 109 Wash. 404, 186 Pac. 1070; Watson v. Oregon Moline Plow Co., 113 Wash. 110, 193 Pac. 222.

This section is applicable to original actions, and does not relate to garnishment proceedings in which the corporation is made a garnishee defendant: Title Guarantee & T. Co. v. Seattle Theater Co., 23 Wash. 517, 63 Pac. 212.

This section does not require the fact to be affirmatively alleged, nor make a complaint demurrable for want of jurisdiction, where the fact does not appear on its face, since jurisdiction will in such case be presumed: Peterson v. Pantheon Lumber Co., 62 Wash. 189, 113 Pac. 562.

Under this section, the court has no jurisdiction to enter judgment where the action was brought in the wrong county: *Richman v. Wenaha Co.*, 74 Wash. 370, 133 Pac. 467.

The fact that a foreign corporation has personal property in this state cannot be considered in aid of jurisdiction by service of summons in an action to recover a judgment in personam: *Macario v. Alaska Gastineau Mining Co.*, 96 Wash. 458, 165 Pac. 73, L. R. A. 1917E, 1152.

Under this section, the superior court has no jurisdiction of the subject matter of an action against a foreign corporation commenced in a county wherein the company has no agent, by service upon a statutory agent in another county: *Hammel v. Fidelity Mutual Aid Assn.*, 42 Wash. 448, 85 Pac. 35.

Locality of venue in an action in state court against foreign corporation. 70 L. R. A. 691.

§ 207. Venue in Cases not Before Specified.

In all other cases the action must be tried in the county in which the defendants, or some of them, reside at the time of the commencement of the action, or may be served with process, subject, however, to the power of the court to change the place of trial, as provided in the next two succeeding sections. [Cf. L. '54, p. 133, § 15; L. '60, p. 7, § 17; L. '69, p. 13, § 51; L. '75, p. 5, § 6; L. '77, p. 11, § 51; Cd. '81, § 50; L. '91, p. 71, § 1; 2 H. C., § 161.]

See notes to next section.

Cited in 5 Wash. 291; 10 Wash. 149, 150; 13 Wash. 608; 14 Wash. 116; 18 Wash. 3; 61 Wash. 682; 66 Wash. 323; 67 Wash. 324; 79 Wash. 447; 97 Wash. 361; 106 Wash. 322, 324; 111 Wash. 196; 112 Wash. 576.

Upon application for a change of venue on the ground that the action is not commenced in the county of the defendant's residence, under these sections the plaintiff may controvert the defendant's allegations as to their residence: *Critler v. Jacobson & Lindstrom*, 66 Wash. 322, 119 Pac. 819; *Agens v. Powell*, 79 Wash. 131, 139 Pac. 873.

This section provides for two classes of defendants, namely, all those having a place of residence in same county within the state, and all those who are not resi-

dents of the state: *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766.

This, and section 208, have no application to actions against corporations, such actions being governed by the provisions of section 206 prescribing in what counties actions against corporations may be commenced: *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670.

Constitutional right of defendant to be sued in the county of his residence. *Ann. Cas.* 1912C, 614.

When may local venue be disregarded upon ground that action or proceeding is ancillary or incidental. L. R. A. 1916D, 1134.

Venue of action to recover rent of realty. *Ann. Cas.* 1912C, 914.

§ 208. Proceeding When Action Commenced in Wrong County.

If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and demurs or answers, files an affidavit of merits, and demands that the trial be had in the proper county. [Cf. L. '75, p. 5, § 7; L. '77, p. 11, § 51; Cd. '81, § 50; L. '91, p. 71, § 1; 2 H. C., § 162.]

Cited in 5 Wash. 291, 519, 521; 10 Wash. 149, 150; 15 Wash. 367; 26 Wash. 404; 45 Wash. 29; 61 Wash. 682; 67 Wash. 323, 324; 74 Wash. 382, 439; 97 Wash. 361; 98 Wash. 566; 99 Wash. 588; 106 Wash. 322, 324; 108 Wash. 670; 110 Wash. 52—55; 112 Wash. 576; 113 Wash. 247.

CHANGE OF VENUE OR PLACE OF TRIAL—Power and Duty of Court in General: See *Remington's Digest*, Venue, §§ 10, 11; *State ex rel. Clark v. Neal*, 19 Wash. 642, 54 Pac. 31; *State ex rel.*

Wyman, Partridge & Co. v. Superior Court, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568; *State ex rel. Howell v. Superior Court*, 82 Wash. 356, 144 Pac. 291; *State ex rel. Port Blakely Mill Co. v. Superior Court*, 9 Wash. 673, 38 Pac. 155.

Right of Defendant to Change—In General: See *Remington's Digest*, Venue, § 12; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206; *State ex rel. Meeker v. Superior Court*, 13 Wash. 607,

43 Pac. 887, 46 Pac. 342; *Seymour v. La Furgey*, 47 Wash. 450, 92 Pac. 267; *State ex rel. Scougal v. Superior Court*, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030; *English v. Gibbons*, 79 Wash. 210, 140 Pac. 322; *Wilson v. Mills*, 91 Wash. 71, 157 Pac. 467; *State ex rel. Martin v. Superior Court*, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905; *Pfueller v. Superior Court*, 14 Wash. 115, 44 Pac. 123; *Bachelor v. Bachelor*, 30 Wash. 639, 71 Pac. 193; *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 63 Am. St. Rep. 864, 39 L. R. A. 82. See, also, *Carr v. Remele*, 74 Wash. 380, 133 Pac. 593.

See, also, *Right to change—Residence of defendant—Application—Power of court: State ex rel. McWhorter v. Superior Court*, 112 Wash. 574, 192 Pac. 903; *State ex rel. Redlinger v. Superior Court*, 113 Wash. 244, 193 Pac. 676; *State ex rel. Russell v. Superior Court*, 113 Wash. 253, 193 Pac. 678.

Under sections 207 and 208, where suit is commenced in one county and service had upon defendant there, he may, upon filing an affidavit of merits and showing that he is a resident of another county, have the place of trial changed to the county of his residence: *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766.

A defendant is not entitled to a change of venue under this section, on a mere showing that, being a newcomer in the state, he intended to reside in another county without ever having declared a residence or engaged in business therein: *Carr v. Remele*, 74 Wash. 380, 133 Pac. 593.

Sections 207—209, grant a right independent of the merits, the assertion of which, under undisputed facts, ousts the court of jurisdiction to hear and determine the cause: *State ex rel. Martin v. Superior Court*, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905.

Defendant's motion for a change of venue to the county of his residence, as a matter of right under section 208, is not affected by a further motion for the change on the ground of convenience of witnesses, under section 209, and there being no dispute as to his residence, the change should be granted without passing on the controverted facts as to convenience of witnesses: *State ex rel. Owen v. Superior Court*, 110 Wash. 49, 187 Pac. 708.

— **Codefendants:** See *Remington's Digest, Venue, § 13*; *McAllister v. Territory*, 1 W. T. 360; *State ex rel. Campbell v. Superior Court*, 7 Wash. 306, 34 Pac. 1103; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206; *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*, 67 Wash. 321, 121 Pac. 460.

Discretion of Court: See *Remington's Digest, Venue, § 14*; *State ex rel. Port Blakely Mill Co. v. Superior Court*, 9

Wash. 673, 38 Pac. 155; *State v. Straub*, 16 Wash. 111, 47 Pac. 227; *English v. Gibbons*, 79 Wash. 210, 140 Pac. 322; *Culbertson v. Gilbert Hunt Co.*, 79 Wash. 446, 140 Pac. 548. See, also, *State ex rel. Schlosberg v. Superior Court*, 106 Wash. 320, 179 Pac. 865; *State ex rel. Conley v. Superior Court*, 106 Wash. 569, 181 Pac. 50.

Affidavits for Change—Requisites in General: See *Remington's Digest, Venue, § 21*; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206; *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856; *State ex rel. Stewart & Holmes Drug Co. v. Superior Court*, 67 Wash. 321, 121 Pac. 460; *Garvey v. Skamser*, 69 Wash. 259, 124 Pac. 688; *State ex rel. Poussier v. Superior Court*, 98 Wash. 565, 168 Pac. 164.

See, also, *Prejudice of Judge—Affidavits: State ex rel. Dunham v. Superior Court*, 106 Wash. 507, 180 Pac. 481.

Affidavits for change—Requisites—Appearance: *State ex rel. Redlinger v. Superior Court*, 113 Wash. 244, 193 Pac. 676.

Waiver of Change: See *Remington's Digest, Venue, § 23*; *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766; *State ex rel. Allen v. Superior Court*, 9 Wash. 668, 38 Pac. 206; *State ex rel. Stockman v. Superior Court, Spokane County*, 15 Wash. 366, 46 Pac. 395.

See, also, *Waiver of change—Meeting issue of counter-affidavits: State ex rel. Russell v. Superior Court*, 113 Wash. 253, 193 Pac. 678.

— *Consent to issue of privilege: State ex rel. Russell v. Superior Court*, 113 Wash. 253, 193 Pac. 678.

— *Submission—General appearance: State ex rel. Redlinger v. Superior Court*, 113 Wash. 244, 193 Pac. 676.

Jurisdiction and Proceedings After Change or Refusal: See *Remington's Digest, Venue, § 24*; *State ex rel. Stockman v. Superior Court, Spokane County*, 15 Wash. 366, 46 Pac. 395 (overruled in *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395); *State ex rel. Hubbard v. Superior Court, King County*, 24 Wash. 438, 64 Pac. 727; *State ex rel. Wyman, Partridge & Co. v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568; *Seaton v. Cook*, 45 Wash. 27, 87 Pac. 914; *State ex rel. Moore v. Superior Court*, 70 Wash. 362, 126 Pac. 926.

See, also, *Discretion—Review: State ex rel. Schlosberg v. Superior Court*, 106 Wash. 320, 179 Pac. 865; *State ex rel. Conley v. Superior Court*, 106 Wash. 569, 181 Pac. 50.

Power of court to order change of venue in absence of statute. 21 Ann. Cas. 1068.

Right to change of venue as against a municipality. *Ann. Cas.* 1914C, 107; *Ann. Cas.* 1918E, 565.

Timeliness of motion for change of

venue made after trial of cause. 8 *Ann. Cas.* 758.

County chargeable with expense of trial in case of change of venue. *Ann. Cas.* 1913B, 187.

§ 209. Grounds Authorizing Change of Venue.

The court may, on motion, in the following cases, change the place of trial, when it appears by affidavit or other satisfactory proof,—

1. That the county designated in the complaint is not the proper county; or

2. That there is reason to believe that an impartial trial cannot be had therein; or

3. That the convenience of witnesses or the ends of justice would be forwarded by the change; or

4. That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; when he has been of counsel for either party in the action or proceeding. [Cf. L. '54, p. 134, § 16; L. '69, p. 13, § 52; L. '75, p. 6, § 8; L. '77, p. 12, § 52; Cd. '81, § 51; 2 H. C., § 163.]

Change by stipulation: See *infra*, § 216.

Cited in 2 Wash. 120; 3 Wash. 695; 10 Wash. 149; 19 Wash. 13; 40 Wash. 446; 61 Wash. 682; 64 Wash. 512, 513; 65 Wash. 314, 315, 630, 631; 66 Wash. 323; 67 Wash. 324; 69 Wash. 262; 70 Wash. 362; 71 Wash. 61; 77 Wash. 10; 79 Wash. 447; 82 Wash. 358, 359, 616; 88 Wash. 349; 97 Wash. 361; 106 Wash. 324; 108 Wash. 670; 110 Wash. 52—55; 112 Wash. 576.

Grounds for Change—Action not brought in proper county: See *Remington's Digest*, Venue, §§ 16, 17; *State ex rel. Cummings v. Superior Court*, 5 Wash. 518, 32 Pac. 547, 771; *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766; *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842.

See, also, Right to change—Residence of defendant: *State ex rel. Owen v. Superior Court*, 110 Wash. 49, 187 Pac. 708; *State ex rel. Russell v. Superior Court*, 113 Wash. 253, 193 Pac. 678.

— Motion based on other grounds—
Effect: *State ex rel. Owen v. Superior Court*, 110 Wash. 49, 187 Pac. 708.

Under this section, a trial judge is not disqualified from the fact that before going on the bench his law firm had represented one of the parties in other matters; especially where the challenge was not made until after the respondent had rested his case: *Fortson Shingle Co. v. Skagland*, 77 Wash. 8, 137 Pac. 304.

This section applies to garnishment proceedings; since the statute is in furtherance of justice and should be liberally construed: *State ex rel. Wyman etc. v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568.

Weight of newspaper articles as evidence of prejudice against accused entitling him to change of venue. 18 *Ann. Cas.* 789.

§ 209-1. Prejudice of Judge—Change of Venue.

No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court. [L. '11, p. 617, § 1.]

Cited in 76 Wash. 461; 77 Wash. 9, 632, 634; 78 Wash. 262, 293; 82 Wash. 421, 422; 83 Wash. 87, 89; 87 Wash. 605; 88 Wash. 345, 346, 370; 95 Wash. 511, 647—653; 96 Wash. 36; 102 Wash. 275; 106 Wash. 509, 510; 108 Wash. 637; 111 Wash. 283; 112 Wash. 573.

Disqualification or Prejudice of Judge:

See Remington's Digest, Venue, § 18; State ex rel. Nelson v. Yaakey, 64 Wash. 511, 117 Pac. 265; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594; State ex rel. Russell v. Superior Court, 77 Wash. 631, 138 Pac. 291; State v. Sefrit, 82 Wash. 520, 144 Pac. 725; State ex rel. Howell v. Superior Court, 82 Wash. 356, 144 Pac. 291; Cooper v. Cooper, 83 Wash. 85, 145 Pac. 66; State ex rel. Hannebohl v. Superior Court, 85 Wash. 663, 149 Pac. 16; State ex rel. Nixon v. Superior Court, 87 Wash. 603, 152 Pac. 1; State ex rel. O'Phelan v. Superior Court, 88 Wash. 669, 163 Pac. 1078; State ex rel. Swan v. Superior Court, 95 Wash. 510, 164 Pac. 62; State ex rel. Talens v. Holden, 96 Wash. 35, 164 Pac. 595; State ex rel. Foster v. Superior Court, 95 Wash. 647, 164 Pac. 198.

See, also, Prejudice of judge—Right to second change—Statutes—Construction: State ex rel. Sheehan v. Reynolds, 111 Wash. 281, 190 Pac. 321.

— Contempt: State ex rel. Cody v. Superior Court, 112 Wash. 501, 192 Pac. 935.

Demand for change, consent or refusal, and time for demand: See Remington's Digest, Venue, § 20; State ex rel. Cummings v. Superior Court, King County, 5 Wash. 518, 32 Pac. 451, 771; Rector v. Thompson, 26 Wash. 400, 67 Pac. 86; State ex rel. Lefebvre v. Clifford, 65 Wash. 313, 118 Pac. 40; State ex rel. Jones v. Gay, 65 Wash. 629, 118 Pac. 830; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594; State ex rel. Beeler v. Smith, 76 Wash. 460, 136 Pac. 678; Fortson Shingle

Co. v. Skagland, 77 Wash. 8, 137 Pac. 304; State ex rel. Deavers v. French, 78 Wash. 260, 138 Pac. 869; State ex rel. Gourley v. Smith, 78 Wash. 292, 139 Pac. 60; Nance v. Woods, 79 Wash. 188, 140 Pac. 323; State ex rel. Stevens v. Superior Court, 82 Wash. 420, 144 Pac. 539; Cooper v. Cooper, 83 Wash. 85, 145 Pac. 66; State ex rel. Nixon v. Superior Court, 87 Wash. 603, 152 Pac. 1; State ex rel. Talens v. Holden, 96 Wash. 35, 164 Pac. 595; State ex rel. Poussier v. Superior Court, 98 Wash. 565, 168 Pac. 164; State ex rel. Farmer v. Bell, 101 Wash. 133, 172 Pac. 221.

See, also, Time for demand: State ex rel. Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481.

— Abortive motion: State ex rel. Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481.

— Prejudice of judge—Time for application: State ex rel. Mead v. Superior Court, 108 Wash. 636, 185 Pac. 628.

— Demand for change—Answer or demurrer—Necessity: State ex rel. Owen v. Superior Court, 110 Wash. 49, 187 Pac. 708.

Hearing and Determination: See Remington's Digest, Venue, § 22; Ward v. Moorey, 1 W. T. 104; State ex rel. Nelson v. Yaakey, 64 Wash. 511, 117 Pac. 265.

The court may, where an investigation is necessary, continue the cause until such times as the investigation may be properly made: State ex rel. Giles v. French, 102 Wash. 273, 172 Pac. 1156.

Having determined to call in another judge in the court of original jurisdiction he cannot subsequently change the venue to another court: State ex rel. Giles v. French, 102 Wash. 273, 172 Pac. 1156.

Right to change of venue on ground of bias of judge in absence of express statutory provision. 10 Ann. Cas. 265.

§ 209-2. Affidavit of Prejudice.

Any party to or any attorney appearing in any action or proceeding in a superior court may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: Provided, further, that no party or attorney shall be permitted to make more than one application in any action or proceeding under this act. [L. '11, p. 617, § 2.]

Cited in 77 Wash. 632, 634; 83 Wash. 89; 85 Wash. 664; 87 Wash. 605; 88 Wash. 670, 671; 95 Wash. 647; 96 Wash. 36; 106 Wash. 509, 510; 108 Wash. 637; 111 Wash. 283.

Constitutional Provisions—Jury of vicinage: See Remington's Digest, Crim.

Law, § 29-2; State ex rel. O'Phelan v. Superior Court, 88 Wash. 669, 153 Pac. 1078.

The last clause must be construed to apply only when the accused expressly consents to be tried in another county: State ex rel. Howard v. Superior Court, 88

Wash. 344, 153 Pac. 7. See, also, *State v. Reese*, 112 Wash. 507, 192 Pac. 934.

This section permits of an affidavit upon information and belief: *State ex rel. Dunham v. Superior Court*, 106 Wash. 507, 180 Pac. 481.

Where a motion for change of venue, granted without notice, was vacated, a

second motion thereupon filed is not an abandonment of the first, within the statute prohibiting more than one application; since, if well taken, the first should have been granted, and if not well taken, it was abortive and of no legal effect: *State ex rel. Dunham v. Superior Court*, 106 Wash. 507, 180 Pac. 481.

§ 210. To What Venue Changed—Only One Allowed.

If a motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it be for the cause mentioned in subdivision 1 of section 209, and in other cases to the most convenient county where the cause alleged does not exist. Neither party shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed. [L. '69, p. 14, § 53; L. '77, p. 12, § 53; Cd. '81, § 52; 2 H. C., § 164.]

Cited in 64 Wash. 512, 513; 65 Wash. 314, 315, 630, 631; 69 Wash. 262; 70 Wash. 362; 71 Wash. 61; 82 Wash. 358.

Number of times party is entitled to change of venue. 7 Ann. Cas. 304.

§ 211. Change to Newly Created County.

Any party in a civil action pending in the superior court in a county out of whose limits a new county, in whole or in part, has been created, may file with the clerk of such superior court an affidavit setting forth that he is a resident of such newly created county, and that the venue of such action is transitory, or that the venue of such action is local, and that it ought properly to be tried in such newly created county; and thereupon the clerk shall make out a transcript of the proceedings already had in such action in such superior court, and certify it under the seal of the court, and transmit such transcript, together with the papers on file in his office connected with such action, to the clerk of the superior court of such newly created county, wherein it shall be proceeded with as in other cases. [Cf. L. '54, p. 377, § 2; L. '69, p. 14, § 54; L. '77, p. 12, § 54; Cd. '81, § 53; L. '91, p. 72, § 2; 2 H. C., § 165.]

Cited in 71 Wash. 439.

§ 215. Transmission of Record on Change—Costs.

When an order is made transferring an action or proceeding for trial the clerk of the court must transmit the pleadings and papers therein to the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made, except in the cases mentioned in subdivision 1, section 209, in which case the plaintiff shall pay costs of transfer. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein. [L. '69, p. 14, §§ 55, 56; L. '75, p. 7, § 10; L. '77, p. 12, § 55; Cd. '81, § 54; 2 H. C., § 166.]

Cited in 25 Wash. 348; 82 Wash. 358, 360; 88 Wash. 349.

Under this section, an information is amendable by the prosecuting attorney,

on leave of the court of another county to which the prosecution has been transferred: *State v. Lyts*, 25 Wash. 347, 65 Pac. 530.

As to sufficient stipulation showing parties had agreed to change of venue, see *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842.

§ 216. Change by Stipulation.

Notwithstanding the provisions of section 209, all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon. [L. '77, p. 13, § 56; Cd. '81, § 55; 2 H. C., § 167.]

Cited in 61 Wash. 683; 108 Wash. 670.

§ 217. Effect of Neglect of Moving Party.

If such papers be not transmitted to the clerk of the proper court within the time prescribed in the order allowing the change, and the delay be caused by the act or omission of the party procuring the change, the adverse party, on motion to the court or judge thereof, may have the order vacated, and thereafter no other change of the place of trial shall be allowed to such party. [Cf. L. '54, p. 135, § 21; L. '69, p. 15, § 57; L. '77, p. 13, § 57; Cd. '81, § 56; 2 H. C., § 168.]

See notes to § 208, *supra*.

§ 218. When Change Deemed Complete.

Upon the filing of the papers with the clerk of the court to which the cause is transferred, the change of venue shall be deemed complete, and thereafter the action shall proceed as though it had been commenced in that court. [L. '54, p. 135, § 22; L. '69, p. 15, § 58; L. '77, p. 13, § 58; Cd. '81, § 57; 2 H. C., § 169.]

§ 219. Clerk must Certify Entries With Transcript.

The clerk of the court must also transmit with the original papers, where an order is made changing the place of trial, a certified transcript of all record entries up to and including the order for such change. [L. '77, p. 13, § 59; Cd. '81, § 58; 2 H. C., § 170.]

CHAPTER VI.

MANNER OF COMMENCING ACTIONS.

§ 220. Service of Summons.

Civil actions in the several superior courts of this state shall be commenced by the service of a summons, as hereinafter provided, or by filing a complaint with the county clerk as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. [L. '93, p. 407, § 1; L. '95, p. 170, § 1.]

Cited in 10 Wash. 449; 12 Wash. 686; 621; 31 Wash. 319; 34 Wash. 544; 35 Wash. 629; 20 Wash. 397; 21 Wash. Wash. 111; 40 Wash. 522; 44 Wash. 284; 106; 27 Wash. 249, 330, 346; 30 Wash. 60 Wash. 620; 71 Wash. 121; 78 Wash. 473;

80 Wash. 377; 90 Wash. 673—675; 92 Wash. 526; 98 Wash. 647; 105 Wash. 196; 110 Wash. 256; 111 Wash. 675.

This act entitled "An act to provide for the manner of commencing civil actions in the superior courts, and bringing the same to trial," does not violate the constitutional inhibition against more than one subject being embraced in any bill: *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670.

Under this section a delay of three years in filing the complaint after commencement of the action by the service of summons and copy of the complaint does not deprive the court of jurisdiction to enter a default judgment: *First National Bank v. Dudley*, 80 Wash. 376, 141 Pac. 884.

A cause is pending after service of summons and after answer served and filed, even if the complaint is not filed, under this section and section 238, providing that a court acquires jurisdiction from the time of the commencement of the action by service of summons or by the filing of a complaint: *Longmore v. Puget Sound Traction, L. & P. Co.*, 78 Wash. 468, 139 Pac. 191.

Laws of 1893, page 407, repeals all former laws providing for the commencement of actions by the filing of a complaint: *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760.

But it does not repeal section 171, volume 2, Hill's Code, in so far as concerns writs of attachment to be issued after the commencement of the action, by filing of the complaint: *Cosh-Murray Co. v. Tut-tich*, 10 Wash. 449, 38 Pac. 1134; *Schwabacher Bros. & Co. v. Abrahams Grocery Co.*, 14 Wash. 225, 44 Pac. 257.

This section does not apply to special proceedings authorized by section 1015, *infra*; *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

Immunity of a nonresident from the service of summons, claimed by him on the ground that he was temporarily in this state, not established when: *Groundwater v. Town*, 93 Wash. 384, 160 Pac. 1055.

Nature and Necessity, in General: See *Remington's Digest*, Process, § 11; *Osborne & Co. v. Columbia etc. Corporation*, 9 Wash. 666, 38 Pac. 160; *Neff v. Neff*, 32 Wash. 82, 72 Pac. 1011; *Interior Warehouse Co. v. Hays*, 91 Wash. 507, 158 Pac. 99.

A court cannot acquire jurisdiction of the person of a defendant by reason of his having personal knowledge of the suit, when he was not served with process, and made no appearance: *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

Proceedings Constituting Commencement: See *Remington's Digest*, Action, § 31; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712; *State ex rel. Bittencouer v. Gordon*, 8 Wash. 488, 36 Pac. 498; *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831; *State ex rel. Quincy v. Collins*, 31 Wash. 564, 72 Pac. 98; *Snohomish Land Co. v. Blood*, 40 Wash. 626, 82 Pac. 933; *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895; *Fuhrman v. Power*, 43 Wash. 533, 86 Pac. 940; *McPhee v. Nida*, 60 Wash. 619, 111 Pac. 1049; *Blinn v. Grindle*, 71 Wash. 120, 127 Pac. 840; *City Sash & Door Co. v. Bunn*, 90 Wash. 669, 156 Pac. 854, Ann. Cas. 1918B, 31.

See, also, Service of summons without filing complaint—Statutes: *State ex rel. Tecter v. Superior Court*, 110 Wash. 255, 188 Pac. 391.

— Service and publication of summons: *Burns v. Stolze*, 111 Wash. 392, 191 Pac. 642.

— Amendment of complaint—Jurisdiction—Change in form of action—Divorce: *Schwarzmilller v. Schwarzmilller*, 111 Wash. 672, 191 Pac. 808.

Premature Commencement: See *Remington's Digest*, Action, § 29; *Rockford Shoe Co. v. Jacob*, 6 Wash. 421, 33 Pac. 1057; *Mitchell v. Matheson*, 23 Wash. 723, 63 Pac. 564; *Fernald v. Spokane & B. C. Tel. etc. Co.*, 31 Wash. 672, 72 Pac. 462; *Mann v. Provident Life etc. Co.*, 42 Wash. 581, 85 Pac. 56; *Greely v. Newcomb*, 21 Wash. 57, 58 Pac. 216; *Otto v. Griffin*, 54 Wash. 506, 103 Pac. 789; *Keeler v. Parks*, 72 Wash. 255, 130 Pac. 111. See, also, *Sussman v. Gustav*, 109 Wash. 459, 186 Pac. 882.

Rights Arising After Commencement of Action: See *Remington's Digest*, Action, § 30; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86, 132 Pac. 867, Ann. Cas. 1915A, 959.

An accrual after commencement of the action will not avail to prevent dismissal: *Commercial Bank of Tacoma v. Hart*, 10 Wash. 303, 38 Pac. 1114; *Augir v. Foreman*, 23 Wash. 595, 63 Pac. 201.

A supplemental complaint for further damages arising since the action was commenced is not barred because not filed within six months after the original breach of the bond: *Pacific Bridge Co. v. United States Fidelity Co.*, 33 Wash. 47, 73 Pac. 772.

Abandonment: See *Remington's Digest*, Action, §§ 32, 33; *First Nat. Bank of Fond du Lac v. Hunt*, 40 Wash. 190, 82 Pac. 285; *Peirce v. National Bank of Germantown*, 44 Wash. 404, 87 Pac. 488; *Congdon v. Aumiller*, 79 Wash. 616, 140

Pac. 912; *Gibbens v. Nipp*, 80 Wash. 332, 141 Pac. 689.

For text treatment of "Process," see 21 B. C. L. 1258.

§ 221. Summons, How Issued.

The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified in which there is a postoffice, within twenty days after the service of the summons, exclusive of the day of service. [L. '93, p. 407, § 2.]

Cited in 31 Wash. 345; 35 Wash. 280; 92 Wash. 526; 99 Wash. 675.

The act of 1893, embraced in this chapter, repeals and supersedes all former laws on the subject, and fixes the time for answer in response to summons as twenty days in all cases: *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670. See, also, *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171.

Nonresident attorneys who have been

admitted to the bar of this state are authorized to issue summons in actions in this state, and may perform this act outside of the state as well as within its borders, provided the summons specifies a place within the state where an answer thereto may be served: *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035.

Alias and Pluries Writs: See *Remington's Digest*, Process, § 10-1; *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

§ 222. Contents of Summons.

The summons shall also contain,—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;

2. A direction to the defendants summoning them to appear within twenty days after service of the summons, exclusive of the day of service, and defend the action;

3. A notice that, in case of failure so to do, judgment will be rendered against them, according to the demand of the complaint. It shall be subscribed by the plaintiff, or his attorney, with the addition of his postoffice address, at which the papers in the action may be served on him by mail. There may, at the option of the plaintiff, be added at the foot, when the complaint is not served with the summons, and the only relief sought is the recovery of the money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint. [L. '93, p. 407, § 3.]

Cited in 10 Wash. 148; 31 Wash. 348; 92 Wash. 527; 99 Wash. 574, 675.

Requirements as to Appearance and Substantial Compliance With Form: See *Remington's Digest*, Process, §§ 7—9; *Ralph v.*

Lomer, 3 Wash. 401, 28 Pac. 760; *Gravelle v. Canadian etc. Mtg. & T. Co.*, 42 Wash. 457, 85 Pac. 36; *Spokane Merchants' Assn. v. Acord*, 99 Wash. 674, 170 Pac. 329.

§ 223. Form of Summons.

Such summons shall be substantially in the following form:—

— Court, — County.

A B, Plaintiff, }
vs. }
C D, Defendant. }

The state of Washington, — to the said —, defendant: You are hereby summoned to appear within twenty days after service of this

summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint, which will be filed with the clerk of said court, or a copy of which is herewith served upon you.

E F, Plaintiff's Attorney.
P. O. Address, — County, Wash.

[L. '93, p. 407, § 4.]

Cited in 31 Wash. 345; 35 Wash. 280; 92 Wash. 527; 99 Wash. 574, 675.

A summons which substantially follows the sections enumerating the necessary contents of the summons is good as against a general objection raised for the first time on appeal: *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035.

Under section 7044, relating to the service of summons on insurance companies, the ordinary form of summons requiring appearance within twenty days is proper, under this section: *State ex rel. National Surety Co. v. Superior Court*, 99 Wash. 573, 170 Pac. 120.

§ 224. Summons to be Accompanied by Copy of Complaint, When.

A copy of the complaint must be served upon the defendant with the summons unless the complaint itself be filed in the office of the clerk of the superior court of the county in which the action is commenced within five days after service of such summons, in which case the service of the copy may be omitted; but the summons in such case must notify the defendant that the complaint will be filed with the clerk of said court; and if the defendant appear within ten days after the service of the summons, the plaintiff must serve a copy of the complaint on the defendant or his attorney within ten days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; and no judgment shall be entered against him for want of an answer in such case till the expiration of the time. [L. '93, p. 408, § 5.]

Cited in 27 Wash. 330; 29 Wash. 264, 701; 71 Wash. 439; 92 Wash. 527.

Service of Pleading With Process: See *Remington's Digest, Process, § 17*; *Spo-
kane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477; *Baldwin v. Baer*, 10 Wash. 414, 39 Pac. 117; *Munch v. McLaren*, 9 Wash.

676, 38 Pac. 205; *Mounts v. Goranson*, 29 Wash. 261, 69 Pac. 740.

A complaint need not be in existence at the time of serving summons, if filed within five days thereafter: *Martin v. Ewing*, 92 Wash. 525, 159 Pac. 755.

§ 225. Who shall Serve Summons—Exception.

In all cases, except when service is made by publication, as hereinafter provided, the summons shall be served by the sheriff of the county wherein the service is made or by his deputy, or by any person over twenty-one years of age, who is competent to be a witness in the action, other than the plaintiff. [L. '93, p. 408, § 6.]

Cited in 27 Wash. 173; 44 Wash. 306; 87 Wash. 436.

Authority or Capacity to Serve—Indifferent or disinterested person: See *Remington's Digest, Process, §§ 13, 14*; *Russell v. Millett*, 20 Wash. 212, 55 Pac. 44; *Washington Mill Co. v. Marks*, 27 Wash. 170, 67 Pac. 565.

Under this section and section 482, limiting costs for this item to a case where it

is paid to a county officer, costs cannot be recovered for service by a constable not directed to make the service by the superior court: *Park v. Newell*, 87 Wash. 431, 151 Pac. 783.

Validity of service of summons by plaintiff's attorney. *Ann. Cas.* 1914A, 1201.

What constitutes "personal service" of papers. 16 L. E. A. 200.

§ 226. Manner of Service of Summons.

The summons shall be served by delivering a copy thereof, as follows:—

1. If the action be against any county in this state, to the county auditor;
2. If against any town or incorporated city in the state, to the mayor thereof;
3. If against a school district, to the clerk thereof;
4. If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state;
5. If against a corporation owning or operating sleeping-cars, or hotel-cars, to any person having charge of any of its cars or any agent found within the state;
6. If against an insurance company, to any agent authorized by such company to solicit insurance within this state;
7. If against a company or corporation doing any express business, to any agent authorized by said company or corporation to receive and deliver express matters and collect pay therefor within this state;
8. If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, secretary, cashier or managing agent thereof;
9. If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof;
10. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed, if such there be;
11. If against any person for whom a guardian has been appointed for any cause, then to such guardian;
12. In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein. Service made in the modes provided in this section shall be taken and held to be personal service;
13. Whenever any domestic or foreign corporation, which has been doing business in this state, has been placed in the hands of a receiver and the receiver is in possession of any of the property or assets of such corporation, service of all process upon such corporation may be made upon the receiver thereof. [L. '93, p. 408, § 7; L. '97, p. 284, § 1.]

Cited in 9 Wash. 667; 14 Wash. 205; 24 Wash. 304; 27 Wash. 330; 29 Wash. 701; 34 Wash. 16; 41 Wash. 401, 504; 42 Wash. 450; 43 Wash. 374, 375; 51 Wash. 210; 53 Wash. 631; 54 Wash. 182; 60 Wash. 53; 61 Wash. 627; 73 Wash. 504; 79 Wash. 491; 83 Wash. 392; 84 Wash. 397, 623; 89 Wash. 505; 105 Wash. 103, 603; 113 Wash. 110.

Service of summons upon the agent of a domestic corporation, in charge of a branch store of his principal, is not sufficient, under subdivision 8 of this section: *Osborne & Co. v. Columbia County etc. Corp.*, 9 Wash. 666, 38 Pac. 160.

This section, subdivisions 8 and 9, had no application to a copartnership, and hence a service upon the resident agent

of a nonresident copartnership is not authorized: *Coughlin v. Pinkerton*, 41 Wash. 500, 84 Pac. 14.

In an action against a corporation in which there appears to have been service upon the vice-president and a trustee, and the judgment recites due service on the defendant, such officers may have been the "other head of the company" or "managing agent thereof," within this section, subdivision 8: *Silvain v. Benson*, 68 Wash. 286, 123 Pac. 457.

The service of a writ of garnishment upon a local manager of a foreign corporation is sufficient, in view of sections 687 and 226, providing for service upon non-resident corporations by delivery to any agent, cashier or secretary thereof: *Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690.

Who are Agents of Corporations: See *Remington's Digest*, Corp., § 263; *Sievers v. Dalles, P. & A. Nav. Co.*, 24 Wash. 302, 64 Pac. 539; *Rich v. Chicago & Burlington etc. R. Co.*, 34 Wash. 14, 74 Pac. 1008; *Womach v. Case Threshing Mach. Co.*, 62 Wash. 661, 114 Pac. 509; *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161; *Spokane Merchants' Assn. v. Clere Clothing Co.*, 84 Wash. 616, 147 Pac. 414.

The fact that a soliciting agent was advertised as the "General Agent" of defendant railway company does not authorize the service or process upon him, under this section, subdivision 4: *Arrow Lumber & Shingle Co. v. Union Pac. R. Co.*, 53 Wash. 629, 102 Pac. 650; *Royce v. Chicago & Northwestern R. Co.*, 90 Wash. 378, 156 Pac. 16.

The president of a local company contracting with a foreign corporation on a time and material basis to install gas engines sold to be installed in this state is not the "agent" of the foreign corporation for the purpose of service of process; the work of installation being mechanical only: *Alaska Pacific Nav. Co. v. Southwark Foundry & Machine Co.*, 104 Wash. 346, 176 Pac. 357.

In such a case, a mechanical engineer loaned by the foreign corporation to the local company, under its contract, to supervise the installation of the gas engines, who was paid by and in the service of the local company, is not an "agent" for the purpose of making service of process upon the foreign corporation: *Alaska*

Pacific Nav. Co. v. Southwark Foundry & Machine Co., 104 Wash. 346, 176 Pac. 357.

A foreign manufacturing company is doing business in this state, within subdivision 9, relating to the service of process, where it had on hand in a warehouse a large list of extras and repair parts of machines sold, to be sold and accounted for as its property by the warehouse company: *Grams v. Idaho National Harvester Co.*, 105 Wash. 602, 178 Pac. 815.

An employee of a foreign manufacturing company is an "agent" for the service of process, where he was employed to do whatever was directed by the general manager and was sent to A. county in this state to check up and take possession of the company's stock of goods: *Grams v. Idaho National Harvester Co.*, 105 Wash. 602, 178 Pac. 815.

SUBDIVISION 12 — SUBSTITUTED SERVICE—Actions and Proceedings in Which Substituted Service is Authorized: See *Remington's Digest*, Process, § 19; *Gamble v. Dawson*, 67 Wash. 72, 120 Pac. 1060, Ann. Cas. 1913D, 501; *Morris & Co. v. Belken*, 97 Wash. 457, 166 Pac. 1142.

Mode and Sufficiency of Service—Leaving Copy at Residence: See *Remington's Digest*, Process, § 20; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139; *Hoffman v. Spokane Jobbers' Assn.*, 54 Wash. 179, 102 Pac. 1045; *State ex rel. Pacific Loan & Investment Co. v. Superior Court*, 84 Wash. 392, 146 Pac. 834.

— **Leaving Copy With Member of Family:** See *Remington's Digest*, Process, § 21; *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243.

Meaning of term "carrying on business" as used in statutes relating to service of process. 18 Ann. Cas. 33; 9 L. R. A. (N. S.) 1214; 23 L. R. A. (N. S.) 834; L. R. A. 1916E, 236.

Who is "agent" within statute providing for service of process on foreign corporation. 19 Ann. Cas. 200; Ann. Cas. 1914D, 985.

Appointment of receiver for railroad as affecting service of process on agent or employee in action against company. 9 A. L. R. 228; 47 L. R. A. (N. S.) 179.

§ 227. Service of Summons on Corporation.

Whenever any corporation, created by the laws of this state, or late territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons,

writ, or other process, in the office of the secretary of state, which shall be taken, deemed and treated as personal service on such corporation: Provided, a copy of said summons, writ, or other process, shall be deposited in the postoffice, postage paid, directed to the secretary or other proper officer of such corporation, at the place where the main business of such corporation is transacted, when such place of business is known to the plaintiff, and be published at least once a week for six weeks in some newspaper printed and published at the seat of government of this state, before such service shall be deemed perfect. [L. '93, p. 409, § 8.]

See notes to § 226, *supra*.

Cited in 73 Wash. 584, 585.

Service of summons upon an officer of a foreign corporation, who is temporarily present in the state, will not confer jurisdiction over the corporation, when the latter has never done any business in the state, nor maintained an office for that purpose nor appointed an officer or agent in the state for any purpose whatever: *Carstens & Earles v. Leidigh & Haven Lbr. Co.*, 18 Wash. 450, 51 Pac. 1051, 63 Am. St. Rep. 906, 39 L. R. A. 548.

Service on a soliciting agent of a foreign railway is not service on the company: *Rich v. Chicago B. & Q. R. Co.*, 34 Wash. 14, 74 Pac. 1008.

A tax foreclosure being a proceeding in rem, service of summons upon a corporation appearing upon the tax-rolls as owner of the property, and also by publication in accordance with this section when such company disclaimed interest, is sufficient without service of process upon the actual owner of the property: *Dabney v. Stearns*, 73 Wash. 583, 132 Pac. 400.

A service upon the statutory agent of a foreign corporation by mail is insufficient: *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

§ 228. Service of Summons by Publication.

When the defendant cannot be found within the state (of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is *prima facie* evidence), and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons (substantially in the form prescribed in section 233 of said [these] codes and statutes) and complaint in the postoffice, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases:

1. When the defendant is a foreign corporation, and has property within the state;
2. When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent;
3. When the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action;
4. When the action is for divorce in the cases prescribed by law;
5. When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein;

6. When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same;

7. When the action is against any corporation, whether private or municipal, organized under the laws of the state and the proper officers on whom to make service do not exist or cannot be found. [L. 1915, p. 146, § 1. Cf. L. '93, p. 410, § 9.]

Cited in 24 Wash. 142; 29 Wash. 701, 702, 728; 31 Wash. 514; 32 Wash. 151, 174; 34 Wash. 296; 36 Wash. 544, 545; 41 Wash. 102; 43 Wash. 470; 56 Wash. 455; 62 Wash. 185, 187; 63 Wash. 453; 77 Wash. 436; 88 Wash. 615; 89 Wash. 505; 92 Wash. 123, 124; 111 Wash. 412, 676.

Jurisdiction in an action where summons is served by publication depends upon a strict compliance with the terms of the statute: *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827.

The direction requiring that service by mailing be "directed to the defendant" must be strictly followed: *Yarbrough v. Pugh*, 63 Wash. 140, 114 Pac. 918, 33 L. R. A. (N. S.) 351.

Under this section, subdivision 4, the affidavit in support of service by publication is sufficient to authorize a decree disposing of the property described in the summons, although it states conclusions instead of probative facts, and although it makes no reference to the property of the parties: *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092.

Under this section no judicial determination or order of court upon the probative facts is required: *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092.

Statement as to Nature, Form or Cause of Action: See *Remington's Digest, Process*, § 10; *De Corvet v. Dolan*, 7 Wash. 365, 35 Pac. 72, 1072; *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889.

Actions and Proceedings in Which Publication is Authorized: See *Remington's Digest, Process*, § 23; *Wilson v. Beyers*, 5 Wash. 303, 32 Pac. 90, 34 Am. St. Rep. 858; *Shook v. Sexton*, 37 Wash. 509, 79 Pac. 1093; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005; *Moynahan v. Superior Court*, 42 Wash. 172, 84 Pac. 655; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256; *Nixon v. Hendy*

Machine Works, 51 Wash. 419, 99 Pac. 11; *Clifford v. Pateros Transfer Co.*, 71 Wash. 665, 129 Pac. 369; *Pullman v. Pullman*, 92 Wash. 120, 158 Pac. 746; *Kelley v. Bausman*, 98 Wash. 686, 168 Pac. 181.

Grounds and Conditions Precedent: See *Remington's Digest, Process*, § 24; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441; *Dittenhoeffer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Cosh-Murray Co. v. Tuttish*, 10 Wash. 449, 38 Pac. 1134.

Application for Order for Publication—Affidavits: See *Remington's Digest, Process*, § 25; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827; *De Corvet v. Dolan*, 7 Wash. 365, 35 Pac. 72, 1072; *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092; *Swanson v. Hoyle*, 32 Wash. 169, 72 Pac. 1011; *Moynahan v. Superior Court*, 42 Wash. 172, 84 Pac. 655; *Mosley v. Donnell*, 42 Wash. 518, 85 Pac. 259; *Felsing v. Quinn*, 62 Wash. 183, 113 Pac. 275; *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038; *Musselman v. Knottingham*, 77 Wash. 435, 137 Pac. 1012.

See, also, Affidavit — Evidence — Sufficiency: *Burns v. Stolze*, 111 Wash. 392, 191 Pac. 642.

— Publication of summons—Fraud: *Schmelling v. Hoffman*, 111 Wash. 408; 191 Pac. 618.

Mailing in Addition to Publication: See *Remington's Digest, Process*, § 30; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827; *Noble v. Aune*, 50 Wash. 73, 96 Pac. 688; *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7; *Musselman v. Knottingham*, 77 Wash. 435, 137 Pac. 1012.

Character of inquiry as to whereabouts of party necessary to sustain constructive service of process. 37 L. R. A. (N. S.) 206.

Constructive service of process on nonresident alien enemies. 13 A. L. R. 578; L. R. A. 1918B, 196.

§ 228-1. Saving Clause.

No action or proceeding commenced or right existing when this act shall take effect, shall be affected or impaired thereby, but such action or proceeding shall be prosecuted and continued and such right remain as if this act has [had] not been passed. [L. 1915, p. 147, § 2.]

§ 229. Process Against "Unknown Heirs."

When the heirs of any deceased person are proper parties defendant to any action relating to real property in this state, and when the names and residences of such heirs are unknown, such heirs may be proceeded against under the name and title of "The unknown heirs" of the deceased. [L. '03, p. 277, § 1.]

Cited in 73 Wash. 82.

Validity of statute providing for constructive service of "unknown claimants." *Ann. Cas.* 1914D, 677.

§ 230. Affidavit as to Unknown Heirs—Publication of Summons.

Upon presenting an affidavit to the court or judge, showing to his satisfaction that the heirs of such deceased person are proper parties to the action, and that their names and residences cannot with use of reasonable diligence be ascertained, such court or judge may grant an order that service of the summons in such action be made on such "Unknown heirs" by publication thereof in the same manner as in actions against nonresident defendants. [L. '03, p. 278, § 2.]

§ 231. Title of Cause—Unknown Claimants—Service of Summons.

In any action brought to determine any adverse claim, estate, lien, or interest in real property, or to quiet title to real property, the plaintiff may include as a defendant in such action and insert in the title thereof, in addition to the names of such persons or parties as appear of record to have, and other persons or parties who are known to have, some title, claim, estate, lien, or interest in the lands in controversy, the following, viz.: "Also all other persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein." And service of summons may be had upon all such unknown persons or parties defendant by publication as provided by law in case of nonresident defendants. [L. '03, p. 278, § 3.]

§ 232. Judgment—Rights of Unknown Heirs and Parties.

All such unknown heirs of deceased persons, and all such unknown persons or parties, so served by publication as in the preceding section of this act, provided, shall have the same rights as are provided by law in case of all other defendants upon whom service is made by publication, and the action shall proceed against such unknown heirs, or unknown persons or parties, in the same manner as against defendants, who are named, upon whom service is made by publication, and with like effect; and any such unknown heirs or unknown persons or parties who have or claim any right, estate, lien, or interest in the said real property in controversy, at the time of the commencement of the action, duly served as aforesaid, shall be bound and concluded by the judgment in such action, if the same is in favor of the plaintiff therein as effectually as if the action was brought against such defendant by his or her name and constructive service of summons obtained: Provided, however, that such judgments shall not bind such unknown heirs, or unknown persons or parties, defendant, unless the plaintiff shall file a notice of lis pendens in the office of the auditor of each county in which said

real estate is located, in the manner provided by law, before commencing the publication of said summons. [L. '03, p. 278, § 4.]

Where judgment was rendered against unknown heirs in an action to quiet title, it will be presumed in an action attacking the judgment that a lis pendens was filed in the action to quiet title, as re-

quired by this section in the absence of any allegation to the contrary: *Phillips v. Thompson*, 73 Wash. 78, 131 Pac. 461, Ann. Cas. 1914D, 672.

§ 233. Manner of Publication and Form of Summons.

The publication shall be made in a newspaper printed and published in the county where the action is brought (and if there be no newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capital of the state) once a week for six consecutive weeks: Provided, that publication of summons shall not be had until after the filing of the complaint, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons; and said summons for publication shall also contain a brief statement of the object of the action. Said summons for publication shall be substantially as follows:—

In the superior court of the state of Washington for the county of —
 —, Plaintiff, }
 vs. } No. —
 —, Defendant. }

The state of Washington to the said (naming the defendant or defendants to be served by publication):

You are hereby summoned to appear within sixty days after the date of the first publication of this summons to wit, within sixty days after the — day of —, 1—, and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff—, and serve a copy of your answer upon the undersigned attorneys for plaintiff—, at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. (Insert here a brief statement of the object of the action.)

—, —,
 Plaintiff's Attorneys.
 P. O. Address —
 County —
 Washington.

[L. '93, p. 411, § 10; L. '95, p. 171, § 2.]

Cited in 32 Wash. 503, 507; 34 Wash. 457; 35 Wash. 279; 41 Wash. 101; 44 Wash. 107; 46 Wash. 480; 49 Wash. 433; 54 Wash. 81; 56 Wash. 149, 456; 77 Wash. 366, 374; 99 Wash. 676.

Under this section, a defendant in a tax foreclosure suit under the revenue law of 1897 would have sixty days for appearance after the completion of the publica-

tion of summons: *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

Under this and the next section, a non-resident defendant is not entitled to have a default set aside, and to defend as a matter of right at any time before judgment, except upon sufficient cause shown: *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45.

Mode and Sufficiency of Publication—Notice and Other Matters to be Published: See *Remington's Digest*, Process, § 28; *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043; *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385; *Bartels v. Christensen*, 46 Wash. 478, 90 Pac. 658; *Stubbs v. Continental Timber Co.*, 49 Wash. 431, 95 Pac. 1011; *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Hays v. Peavey*, 54 Wash. 78,

102 Pac. 889; *Gould v. Stanton*, 54 Wash. 363, 103 Pac. 459; *Security Sav. Soc. v. Collins*, 56 Wash. 455, 105 Pac. 1034; *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193; *Worthington v. La Violette*, 60 Wash. 525, 111 Pac. 784; *Old Republic Mining Co. v. Ferry County*, 69 Wash. 600, 125 Pac. 1018.

— **Time and Number of Publications:** See *Remington's Digest*, Process, § 29; *Montgomery v. Manning*, 1 W. T. 434; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827; *Deming Inv. Co. v. Ely*, 21 Wash. 102, 57 Pac. 353; *Tilton v. O'Shea*, 31 Wash. 513, 72 Pac. 106; *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; *Fuhrman v. Power*, 43 Wash. 533, 86 Pac. 960.

§ 234. Personal Service Out of State.

Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state. [L. '93, p. 411, § 11; L. '95, p. 172, § 3.]

Cited in 29 Wash. 728; 36 Wash. 545; 41 Wash. 414; 42 Wash. 427; 56 Wash. 149; 88 Wash. 615, 616.

Personal Service Out of Jurisdiction in Lieu of Publication: See *Remington's Digest*, Process, § 31; *Jennings v. Rocky Bar Gold Min. Co.*, 29 Wash. 726, 70 Pac. 136; *Lawyer Land Co. v. Steel*, 41 Wash. 411, 83 Pac. 896; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256; *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593; *State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 153 Pac. 315.

This section authorizes personal service in an action commenced by attaching the property of a foreign corporation: *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40.

Personal service out of state on non-resident. 50 L. R. A. 585.

When personal service without state complete so as to start time to answer running. *Ann. Cas.* 1914A, 113.

§ 235. If No Personal Service, Who may Appear—Opening Default.

If the summons is not served personally on the defendant in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, except in an action for divorce, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and if the defense is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs. [L. '93, p. 411, § 12.]

This section by inadvertence says "last two sections," when it should refer to the last three sections.

Cited in 23 Wash. 248; 24 Wash. 534; 32 Wash. 152, 174, 496; 33 Wash. 321; 34 Wash. 294; 35 Wash. 281; 39 Wash. 375; 40 Wash. 275; 41 Wash. 106; 43 Wash. 469; 56 Wash. 149, 150; 58 Wash. 582; 67 Wash. 492; 68 Wash. 348, 350; 95 Wash. 207.

Right to Defend After Judgment on Service by Publication or Other Constructive Service: See *Remington's Digest*, Judgm., § 39; *Sander-Bowman Co. v. Yesler's Estate*, 2 Wash. 429, 27 Pac. 269; *Whitney v. Knowlton*, 33 Wash. 319, 74 Pac. 469; *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45.

See, also, *Bruhn v. Pasco Land Co.*, 67 Wash. 490, 121 Pac. 981.

Under this section, a nonresident defendant, served by publication, in a tax lien foreclosure, is not entitled to the vacation of a default judgment within one year as a matter of right, but good cause must be shown: *Whitney v. Knowlton*, 33 Wash. 319, 74 Pac. 469.

Necessity for showing sufficient cause and for an application containing traversible allegations of fact: *McCaffrey v. Snapp*, 95 Wash. 202, 163 Pac. 406.

Where a defendant seeks to have a judgment vacated because it appears on the face of the record that no service of summons was made upon him, his application therefor is governed by this section and may properly be made by motion and served in the manner prescribed for the service of motions: *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858.

The court has no power to vacate a decree of divorce, under this section, where there was no want of jurisdiction, nor fraud practiced in the procurement of the decree: *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535.

Under this section, an order setting aside a default and vacating a judgment entered in such a case is not the grant of a new trial under section 1716, or appeal-

able as such: *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043.

The provisions of this section do not apply to an appeal from an order refusing to vacate a judgment of foreclosure, but they only apply to an appeal from the judgment of foreclosure: *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606.

A petition to vacate a judgment for fraud, under section 464, where there was no personal service on the defendant, is limited to one year under this section, although an independent suit in equity to vacate for fraud might be maintained after the expiration of two years: *Bruhn v. Pasco Land Co.*, 67 Wash. 490, 121 Pac. 981.

An action to forfeit a land contract and remove the cloud upon the title, the complaint alleging that the defendants were nonresidents and not seeking any award of possession, is barred after one year, under the provisions of sections 235, 464, 466, providing for the vacation of judgments in other cases within one year: *Smith v. Stiles*, 68 Wash. 345, 123 Pac. 448.

Absolute right of defendant not personally served to have judgment opened and to defend. 12 *Ann. Cas.* 992; *Ann. Cas.* 1912A, 1164; *Ann. Cas.* 1916B, 565.

§ 236. Service on Joint Defendants.

When the action is against two or more defendants and the summons is served on one or more but not on all of them, the plaintiff may proceed as follows:—

1. If the action is against the defendants jointly indebted upon a contract, he may proceed against the defendants served unless the court otherwise directs; and if he recovers judgment it may be entered against all the defendants thus jointly indebted so far only as it may be enforced against the joint property of all and the separate property of the defendants served;

2. If the action is against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants;

3. Though all the defendants may have been served with the summons, judgment may be taken against any of them severally, when the plaintiff would be entitled to judgment against such defendants if the action had been against them alone. [L. '93, p. 411, § 13.]

Cited in 27 Wash. 108; 63 Wash. 89; 82 Wash. 587, 588; 89 Wash. 549.

The subsequent appearance of another defendant after issues joined and the case set for trial as to some of the defendants, upon whom prior service had been had, will not entitle the latter, under this section, to have the case delayed for the making up of issues as to the defendant subsequently appearing: *National*

Bank of Commerce v. Galland, 14 Wash. 502, 45 Pac. 35.

Under this section, in an action against defendants jointly indebted upon a contract, plaintiff may proceed against the defendants served and have judgment entered against all the defendants jointly indebted, "so far only as it may be enforced against the joint property of all and the separate property of the defend-

ant served": *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599.

Error cannot be urged in that a judgment for rent in an action against joint tenants was not entered against one of the joint debtors, nor against the defendants jointly indebted as provided by this section, where such joint debtor was a nonresident, and there was no evidence that the defendants had any joint property in this state: *Brownfield v. Holland*, 63 Wash. 86, 114 Pac. 890.

Provisions for the enforcement of joint judgments against persons not served are in the nature of an exclusive and statutory action on the judgment, which must be in the form provided in this section: *Nolan v. McNamee*, 82 Wash. 585, 144 Pac. 904.

In case of the failure of the plaintiff, suing the members of an association, to

enter a judgment enforceable against the joint property of all the defendants, as required by this section, his only remedy against members not served is by way of an independent proceeding in which all existing defenses may be urged: *Nolan v. McNamee*, 82 Wash. 585, 144 Pac. 904.

After judgment, the burden is upon the person attacking the service to show by clear and convincing evidence that the same was irregular: *Allen v. Starr*, 104 Wash. 246, 176 Pac. 2.

Validity and effect, as against defendant not personally served within state, of a judgment in personam against joint debtors. 35 L. R. A. (N. S.) 312.

Sufficiency of service on single partner in action against partnership. 20 Ann. Cas. 1238; Ann. Cas. 1914A, 389; 50 L. R. A. 595.

§ 237. Proof of Service.

Proof of service shall be as follows:—

1. If served by the sheriff or his deputy, the return of such sheriff or his deputy indorsed upon or attached to the summons;

2. If by any other person, his affidavit thereof indorsed upon or attached to the summons; or

3. In case of publication, the affidavit of the printer, publisher, foreman, principal clerk or business manager of the newspaper showing the same, together with a printed copy of the summons as published; or

4. The written admission of the defendant;

5. In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or a clerk of a court of record. In case of service otherwise than by publication, the return, admission or affidavit must state the time, place and manner of service. [L. '93, p. 412, § 14.]

Cited in 27 Wash. 330, 347; 29 Wash. 701, 702; 89 Wash. 361.

Under this section, the original summons for publication in a tax foreclosure is sufficiently "subscribed" by the attorney for the plaintiff although the signature is printed: *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033.

Proof of publication of the summons in a tax foreclosure made by the "cashier" of a newspaper is insufficient to confer jurisdiction to enter judgment, in view of this section, subdivision 3: *Rockwood v. Turner*, 89 Wash. 356, 154 Pac. 465.

The original summons for publication need not be filed, but jurisdiction is conferred by the publication and proof of service, under this section: *Security Sav. Soc. v. Collins*, 6 Wash. 455, 105 Pac. 1034.

RETURN AND PROOF OF SERVICE
—**Form and Requisites of Return or Certificate—In General:** See Remington's Digest Process, §§ 32—34; *Driver v. McAllister*, 1 W. T. 367; *Collins v. King*

County, 1 W. T. 416; *Waterman v. Phinney*, 1 W. T. 415; *Cunningham v. Spokane Hydraulic Co.*, 18 Wash. 524, 52 Pac. 235; *State Savings Bank v. Davis*, 22 Wash. 406, 61 Pac. 43; *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235.

Proof of Service by Publication and Effect: See Remington's Digest, Process, §§ 36—38; *Garrison v. Cheeney*, 1 W. T. 489; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827; *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235; *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139; *Wilbert v. Day*, 83 Wash. 390, 145 Pac. 446.

Evidence as to Service: See Remington's Digest, Process, §§ 40—43.

—**Presumptions and Burden of Proof:** *Rodolph v. Mayer*, 1 W. T. 133; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; *Northwestern & P. H. Bank v. Ridpath*, 29

Wash. 687, 70 Pac. 139. See, also, *Allen v. Starr*, 104 Wash. 246, 176 Pac. 2.

— **Evidence to Impeach Return of Service:** *Johnson v. Gregory*, 4 Wash. 109, 29 Pac. 831, 31 Am. St. Rep. 907; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

— **Weight and Sufficiency:** *Scott v. Patterson*, 1 Wash. 487, 20 Pac. 593; *Parker v. Dacres*, 1 Wash. 190, 24 Pac. 192; *Johnstone v. Peyton*, 59 Wash. 436, 110 Pac. 7; *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018.

Acceptance or Acknowledgment of Service: See *Remington's Digest*, Process,

§ 18; *Port Blakely Mill Co. v. Clymer*, 1 W. T. 607; *Downs v. Board of Directors etc.*, 4 Wash. 309, 30 Pac. 147.

An attorney cannot accept service of an original process for his client, as a part of his duty as an attorney: *Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161.

Form and Requisites of Affidavit of Service: See *Remington's Digest*, Process, § 35; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256; *French v. Ajax Oil & Dev. Co.*, 44 Wash. 305, 87 Pac. 359.

§ 238. Jurisdiction Acquired, When.

From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him. [L. '93, p. 412, § 15; L. '95, p. 172, § 4.]

Cited in 16 Wash. 631; 22 Wash. 443; 71 Wash. 439; 78 Wash. 473; 83 Wash. 437; 98 Wash. 647.

The question of the sufficiency of the summons to confer jurisdiction would be determined by the law in force at the time of its issuance: *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

Waiver of Defects and Objections by Appearance: See *Remington's Digest*, Process, § 48; *Williams v. Miller*, 1 W. T. 88; *Meigs v. Keach*, 1 W. T. 305; *Schwabacher v. Wells*, 1 W. T. 506; *Clarke County v. Brazee*, 1 W. T. 199; *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *McClellan v. Gaston*, 18 Wash. 472, 51 Pac. 1062.

§ 239. Publication of Notice in Exercise of Eminent Domain.

If a party having or claiming a share or interest in or lien upon any property sought to be appropriated for public use be unknown, and such fact be made to appear by affidavit filed in the office of the clerk of the court, the notice required by law in such cases may be served by publication as in the case of nonresident owners, and such notice shall be directed by name to every owner of a share or interest in or lien upon the property sought to be so appropriated, and generally to all persons unknown having or claiming an interest or estate in the property or any portion thereof, and all such unknown parties shall in all papers and proceedings be designated as "unknown owners," and shall be bound by the provisions and be entitled to the benefits of the judgment the same as if they had been known and duly named. [L. '95, p. 352, § 1.]

§ 240. Selection of Newspaper—Evidence of Payment.

In any suit or proceeding, in any court of this state, requiring a legal publication, said publication shall be made in any newspaper of general circulation in the county, designated by the party or his attorney, at whose instance the said publication is made. A tender of a receipt from the publisher of the said newspaper, as full payment for said publication shall be accepted by the sheriff, or court, as pay-

ment in lieu of the cash payment of fees for same. [L. '93, p. 62, § 1.]

Publication may be made in a paper owned by the plaintiff: *Callison v. Smith*, 44 Wash. 202, 87 Pac. 120.

§ 241. Appearance, What Constitutes.

A defendant appears in an action when he answers, demurs, makes any application for an order therein, or gives the plaintiff written notice of his appearance. After appearance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notice or papers in the ordinary proceedings in an action need not be made upon him. Every such appearance made in an action shall be deemed a general appearance, unless the defendant in making the same states that the same is a special appearance. [Cf. 2 H. C., § 181; L. '93, p. 412, § 16.]

Cited in 15 Wash. 592; 16 Wash. 631; 21 Wash. 107; 22 Wash. 443; 27 Wash. 655; 29 Wash. 564; 31 Wash. 167; 32 Wash. 505; 33 Wash. 556; 37 Wash. 560; 43 Wash. 440; 52 Wash. 14; 60 Wash. 334; 71 Wash. 439; 92 Wash. 232; 95 Wash. 105, 106; 101 Wash. 19, 20, 23; 103 Wash. 501.

Necessity of Notice, under this section: *Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161; *Molloy v. Union Transfer, Moving & Storage Co.*, 60 Wash. 331, 111 Pac. 160.

This section is not applicable where defendant has been adjudged to be in default, and hence notice of proceedings subsequent to default is unnecessary: *Norris v. Campbell*, 27 Wash. 654, 68 Pac. 339.

Proceedings Constituting Appearance—In general: See *Remington's Digest*, *Appear.*, §§ 1, 2; *McCoy v. Bell*, 1 Wash. 504, 20 Pac. 595; *Yesler v. Oblesbee*, 1 W. T. 604; *Walla Walla Printing etc. Co. v. Budd*, 2 W. T. 336, 5 Pac. 602; *Jones v. Wolverton*, 15 Wash. 590, 47 Pac. 36; *Cornell University v. Denny Hotel Co.*, 15 Wash. 433, 46 Pac. 654; *Robertson Mortgage Co. v. Thomas*, 60 Wash. 514, 111 Pac. 795; *Myhren's Estate*, *In re*, 95 Wash. 101, 163 Pac. 388.

— **Filing of a Plea, Answer or Demurrer**: See *Remington's Digest*, *Appear.*, § 3; *Schwabacher v. Wells*, 1 W. T. 506; *Williams v. Miller*, 1 W. T. 88; *Walla Walla Printing etc. Co. v. Budd*, 2 W. T. 336, 5 Pac. 602; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662; *Springfield Shingle Co. v. Edgcomb Mill Co.*, 52 Wash. 620, 101 Pac. 233, 35 L. R. A. (N. S.) 258; *State ex rel. Trichel v. Superior Court*, 52 Wash. 13, 100 Pac. 155; *Calhoun v. Nelson*, 47 Wash. 617, 92 Pac. 448; *State ex rel. Hannebohl v. Superior Court*, 85 Wash. 663, 149 Pac. 16; *Freeborn v. Chewelah Copper King Min. Co.*, 89 Wash. 519, 154 Pac. 1095.

— **General or Special Appearance**: See *Remington's Digest*, *Appear.*, § 4; *Dem-*

ing Inv. Co. v. Ely, 21 Wash. 102, 57 Pac. 353; *Haas v. Gaddis*, 1 Wash. 89, 23 Pac. 1010; *Walters v. Field*, 29 Wash. 558, 70 Pac. 66; *Bain v. Thoms*, 44 Wash. 382, 87 Pac. 504; *State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 153 Pac. 315; *National Union Fire Insurance Co. of Pittsburg v. Dickinson*, 92 Wash. 230, 159 Pac. 125, *Ann. Cas.* 1918C, 1042; *Macario v. Alaska Gastineau Min. Co.*, 96 Wash. 458, 165 Pac. 73, *L. R. A.* 1917E, 1152; *Matson v. Kennecott Mines Co.*, 103 Wash. 499, 175 Pac. 181. See, also, *Alaska Pac. Nav. Co. v. Southwark Foundry & Mach. Co.*, 104 Wash. 346, 176 Pac. 357.

Operation and Effect—Jurisdiction Acquired: See *Remington's Digest*, *Appear.*, § 5; *Baxter v. Scoland*, 2 W. T. 86, 3 Pac. 638; *Meigs v. Keach*, 1 W. T. 305; *Seattle v. O'Connell*, 16 Wash. 625, 48 Pac. 412; *American Paper Co. v. Sullivan*, 34 Wash. 391, 75 Pac. 991. See, also, *State ex rel. Rothwell v. Superior Court*, 111 Wash. 63, 189 Pac. 556.

Where a judgment was void by reason of defective process it would not be validated by the fact that the defendants subsequently made a general appearance in the action for the purpose of moving its vacation: *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

In an action to foreclose liens upon a ship, brought in the wrong county, a general appearance and participation in a trial without objection to the venue precludes any right to question the court's jurisdiction and creates the same situation as though the party had consented to a change of venue: *State ex rel. Christensen v. Superior Court*, 108 Wash. 666, 165 Pac. 623.

Waiver of Objections: See *Remington's Digest*, *Appear.*, §§ 6, 7; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441; *Bennett v. Supreme Tent etc. Maccabees*, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; *Williams v. Miller*, 1 W. T. 88; *Meigs v. Keach*, 1 W. T. 305; *Schwabacher v. Wells*,

1 W. T. 506; *Clarke County v. Brazee*, 1 W. T. 199; *Mulholland v. Washington Match Co.*, 35 Wash. 315, 77 Pac. 497; *Gaffney v. Johnson*, 39 Wash. 437, 81 Pac. 859; *French v. Ajax Oil & Dev. Co.*, 44 Wash. 305, 87 Pac. 359; *French v. Ajax Oil & Dev. Co.*, 44 Wash. 697, 87 Pac. 360; *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843; *Olson Land Co. v. Alki Park Co.*, 63 Wash. 521, 115 Pac. 1083, Ann. Cas. 1912D, 365; *Steenstrup v. Toledo Foundry & Machine Co.*, 66 Wash. 101, 119 Pac. 16, Ann. Cas. 1913C, 427; *Martin's Estate*, In re, 82 Wash. 226, 144 Pac. 42.

Effect of General Appearance After Special Appearance: See *Remington's Digest*, *Appear.*, § 8; *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *Teater v. King*, 35 Wash. 138, 76 Pac. 688; *Larsen v. Allan Line Steamship Co.*, 37 Wash. 555, 80 Pac. 181; *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202; *Hammel v. Fidelity Mutual Aid Assn.*, 42 Wash. 448, 85 Pac. 35; *International Development Co. v. Sanger*, 75 Wash. 546, 135 Pac. 28; *Columbia & Puget Sound R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439; *Martin's Estate*, In re,

82 Wash. 226, 144 Pac. 42; *Matson v. Kennecott Mines Co.*, 103 Wash. 499, 175 Pac. 181.

See, also, effect of general or special—Answer to merits—Waiver: *Kubey v. Travelers Protective Assoc.*, 109 Wash. 453, 187 Pac. 335; *Platt v. Magagnini*, 110 Wash. 39, 187 Pac. 716.

Where, upon hearing a motion under special appearance to quash service of summons, plaintiff requested leave to amend the complaint, objection thereto does not constitute a general appearance waiving the special appearance. *Alaska Pac. Nav. Co. v. Southwark Foundry & Mach. Co.*, 104 Wash. 346, 176 Pac. 357.

Test as to whether appearance is general or special. *Ann. Cas.* 1914A, 1189.

Moving to set aside order in cause for want of jurisdiction as general or special appearance. *Ann. Cas.* 1917B, 454.

Moving to set aside attachment for lack of jurisdiction as general or special appearance. 18 *Ann. Cas.* 913.

§ 242. Notice—Service by Mail, etc.

When a party to an action has appeared in the same, he shall be entitled to at least three days' notice of any trial, hearing, motion, application, sale or proceeding therein; which notice shall be in writing specifying the time and place where the same will be had or made, and which shall be served on him or his attorney, but if neither such party nor his attorney reside in the county in which the action or proceeding is pending or where such application or motion is made, then service by mail may be had on such party or his attorney by mailing to either of them a copy of such notice, properly addressed with postage thereon fully prepaid, at least ten days before the time appointed for such hearing, application or sale. [Cd. '81, § 2140; 2 H. C., § 822; L. '97, p. 282. § 1.]

Cited in 14 Wash. 457; 18 Wash. 209; 25 Wash. 656; 31 Wash. 167; 32 Wash. 94; 51 Wash. 474; 69 Wash. 262.

Necessity of notice under this section: *Garvey v. Skamser*, 69 Wash. 259, 124 Pac. 688.

This section has no application to proceedings had after or to enforce the judgment, but merely defines the rights of the respective parties before judgment: *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046; *Galler v. McMahon*, 51 Wash. 473, 99 Pac. 309.

Notice of motion to publish depositions

is not necessary, since this section is not applicable to motions which cannot be contested: *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872.

Sufficiency of notice under this section: *Haggard v. Sanglin*, 31 Wash. 165, 71 Pac. 711; *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92.

This section is not applicable to motions which cannot be contested: *Mendenhall v. Kratz*, 14 Wash. 453, 44 Pac. 872. And it is not applicable to proceedings after judgment: *Galler v. McMahon*, 51 Wash. 473, 99 Pac. 309.

§ 243. Actions Affecting Title to Real Estate—Lis Pendens.

In an action affecting the title to real property the plaintiff, at the time of filing the complaint, or at any time afterwards, or whenever a writ of attachment of property shall be issued, or at any time afterwards,

the plaintiff or a defendant, when he sets up an affirmative cause of action in his answer, and demands substantive relief at the time of filing his answer, or at any time afterwards, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: Provided, however, that such notice shall be of no avail unless it shall be followed by the first publication of the summons, or by the personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record. [L. '93, p. 412, § 17.]

Cited in 10 Wash. 450; 16 Wash. 663; 18 Wash. 86; 24 Wash. 406; 29 Wash. 678; 38 Wash. 206, 207; 44 Wash. 622; 47 Wash. 92, 93; 60 Wash. 481; 63 Wash. 4; 85 Wash. 245; 86 Wash. 528; 95 Wash. 608; 97 Wash. 337; 99 Wash. 459.

Actions and Proceedings in Which Notice is Necessary or Authorized: See Remington's Digest, Lis Pen., §§ 1—3; Frank v. Jenkins, 11 Wash. 611, 40 Pac. 220; Washington Dredge & Imp. Co. v. Kinnear, 24 Wash. 405, 64 Pac. 522; King v. Branscheid, 32 Wash. 634, 73 Pac. 668; May v. Sutherland, 41 Wash. 609, 84 Pac. 585; Portland & Seattle R. Co. v. Ladd, 47 Wash. 88, 91 Pac. 573.

The filing of notice of the pendency of an action to foreclose a mortgage, under this section, is notice to the holder of an unrecorded conveyance which is junior and inferior to the mortgage, and such holder is bound absolutely by the judgment the same as though he had been made a party to the action, although the mortgagee had actual notice of the conveyance prior to the commencement of the action: Payson v. Jacobs, 38 Wash. 203, 80 Pac. 429.

The meaning is that the purchaser is bound by the judgment rendered and not merely by the judgment that might have been rendered had he appeared and de-

fended: Ellis v. McCoy, 99 Wash. 457, 169 Pac. 973.

A lis pendens notice may properly be signed by the attorney as well as by the party himself: Eldridge v. Stenger, 19 Wash. 697, 54 Pac. 541.

The provision in this section for cancellation of the notice is cumulative of the remedy provided by section 809, in so far as it is applicable to persons not parties to the action in which the notice was filed: King v. Branscheid, 32 Wash. 634, 73 Pac. 668.

— **Filing and Recording:** See Remington's Digest, Lis Pen., § 5; Bigelow v. Brewer, 29 Wash. 670, 70 Pac. 129; Sawyer v. Vermont Loan & T. Co., 41 Wash. 524, 84 Pac. 8; Burwell v. Smith, 63 Wash. 1, 114 Pac. 876.

Upon dismissal of a case on the merits, it is proper to clear the record of any cloud by releasing the lis pendens: Cashmere State Bank v. Richardson, 105 Wash. 105, 177 Pac. 727.

Operation and Effect in General: See Remington's Digest, Lis Pen., § 7; Kley v. Geiger, 4 Wash. 484, 30 Pac. 727; Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213; Spokane v. Amsterdamsch Trustees etc., 18 Wash. 81, 50 Pac. 1088; Johnson v. Irwin, 16 Wash. 652, 48 Pac.

345; Trumbull v. Jefferson County, 60 Wash. 479, 111 Pac. 569, 140 Am. St. Rep. 943; Merriek v. Pattison, 85 Wash. 240, 147 Pac. 1137; State v. Terry, 99 Wash. 1, 168 Pac. 513.

— **Extent of Notice by Lis Pendens:** See Remington's Digest, Lis Pen., § 8; Nason v. Northwestern Mill & P. Co., 17 Wash. 142, 49 Pac. 235; Payson v. Jacobs, 38 Wash. 203, 80 Pac. 429; Hyde v. Heaton, 43 Wash. 433, 86 Pac. 664; Biggs v. Hoffman, 60 Wash. 495, 111 Pac. 576; Skinner v. Hunter, 95 Wash. 607, 164 Pac. 244.

Purchasers Pending Suit and Persons Bound by Judgment: See Remington's Digest, Lis Pen., §§ 9, 10; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; El-

dridge v. Stenger, 19 Wash. 697, 54 Pac. 541; Dow v. Ballard, 28 Wash. 87, 68 Pac. 176; Wright v. Jessup, 44 Wash. 618, 87 Pac. 930; Burwell v. Smith, 63 Wash. 1, 114 Pac. 876.

Statute requiring filing of formal notice of lis pendens in certain classes of cases as affecting common-law doctrine of lis pendens in other cases. 10 A. L. R. 306.

Protection of lis pendens notice during time allowed for appeal or motion for new trial. 10 A. L. R. 415.

Who is purchaser pendente lite. Ann. Cas. 1918C, 53, 81, 83, 86, 90.

§ 244. Notice, upon Whom Served.

Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections where not otherwise provided by statute. [L. '93, p. 413, § 18.]

Cited in 24 Wash. 668; 69 Wash. 262.

§ 245. Manner of Making Service of Notice.

The services may be personal or by delivery to the party or attorney on whom service is required to be made, or it may be as follows:—

1. If upon an attorney, it may be made during his absence from his office by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of six in the morning and nine in the evening in a conspicuous place in the office; or, if it is not open to admit of such service then by leaving it at the attorney's residence with some person of suitable age and discretion;

2. If upon a party, it may be made by leaving the papers at his residence between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion. [L. '93, p. 413, § 19.]

Cited in 25 Wash. 155; 27 Wash. 331; 54 Wash. 260, 262.

Service of a proposed statement made upon a lawyer's clerk, under this section, is insufficient when the attorney himself is present in the office: Times Printing Co. v. Seattle, 25 Wash. 149, 64 Pac. 940.

Under this section a service is good when made by dropping a copy through the transom on the floor of the office in front of the front door, which was locked, no one being in the office: Spencer v. Arlington, 54 Wash. 259, 103 Pac. 30.

§ 246. Service by Mail, When may be Made.

Service by mail may be made when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail. [L. '93, p. 414, § 20.]

Cited in 7 Wash. 470; 24 Wash. 612; 63 Wash. 443.

Service of a notice of appeal by mail

is sufficient when the person making the service and the person upon whom service is made reside in different places

between which there is regular communication by mail: *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795.

Service by mail of notice required by employers' liability acts. 28 L. R. A. (N. S.) 238.

§ 247. Service by Mail, Manner of.

In case of service by mail, the papers shall be deposited in the post-office, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case the time of service shall be double that required in case of personal service. [L. '93, p. 414, § 21.]

Cited in 19 Wash. 319; 24 Wash. 612; 26 Wash. 366; 71 Wash. 439.

Under this section service of a statement of facts by mail is completed when the copy is deposited in the postoffice properly addressed: *State ex rel. Palmer*

Mountain Tunnel & Power Co. v. Superior Court, 63 Wash. 442, 115 Pac. 845.

When service by mail is complete. 18 Ann. Cas. 286.

Sending newspapers containing advertisement as valid service of notice. Ann. Cas. 1912D, 1000.

§ 248. Service When No Attorney Appears.

Where a plaintiff or defendant who has appeared resides out of the state and has no attorney in the action, the service may be made by mail if his residence is known; if not known, on the clerk for him. But where a party, whether resident or nonresident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. But if the attorney shall have removed from the state, such service may be made upon him personally either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail upon the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made upon the clerk for the attorney. [L. '93, p. 414, § 22.]

§ 249. Not Applicable to Service of Summons, etc.

The provisions of the four preceding sections do not apply to the service of a summons or other process, or of any paper to bring a party into contempt. [L. '93, p. 414, § 23.]

See *infra*, §§ 1049-1062, contempts and punishment thereof.

This section inferentially forbids service of summons by mail, and a service upon the statutory agent of a foreign corporation by mail is insufficient: *Ben-*

nett v. Supreme Tent etc. Maccabees, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389.

§ 250. Effect of Imperfect Paper—Amendments.

A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceedings; and in furtherance of justice upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice of paper filed or served, or may, on such terms as are just, permit the same to be done or supplied after the time

therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party permitted to bring such writ of error or appeal after the time therefor has expired. [L. '93, p. 414, § 24.]

Cited in 12 Wash. 100; 15 Wash. 127; 26 Wash. 2; 51 Wash. 474; 68 Wash. 484.

Defects and Irregularities in Service or Return of Proof Thereof: See Remington's Digest, Proc., §§ 44—46; Washington Mill Co. v. Kinneer, 1 W. T. 99; Embree v. McLennan, 18 Wash. 651, 52 Pac. 241; Moynahan v. Superior Court, 42 Wash. 172, 84 Pac. 655; Holford v. Trewella, 36 Wash. 654, 79 Pac. 308.

Amendment of Defects—Return of Proof of Service in, General: See Remington's Digest, Proc., § 47; Knoff v. Puget Sound Co-op. Colony, 1 Wash. 57, 24 Pac. 27; Washington Mill Co. v. Kinneer, 1 W. T. 99; Lutkens v. Young, 63 Wash. 452, 115 Pac. 1038.

This section does not relate to proceedings after judgment: National Bank of

Commerce of Seattle v. Seattle Pickle etc. Works, 15 Wash. 126, 45 Pac. 731.

Under this section, the trial court may extend the time for filing exceptions to the report of a referee or permit the filing of amended exceptions: Pederson v. Parke, 68 Wash. 482, 123 Pac. 777.

Effect of defects or informalities as to appearance or return day in summons or notice of commencement of action. 6 A. L. R. 841.

Construction of requirement of publication once per week for certain number of weeks. Ann. Cas. 1917B, 209.

Validity of notice sent by telegraph. 61 L. R. A. 933.

Services of writ or process by telephone. Ann. Cas. 1917B, 903; L. R. A. 1915D, 427.

§ 251. Assessment of Damages.

A defendant who has appeared may, without answering, demand in writing an assessment of damages, of the amount which the plaintiff is entitled to recover, and thereupon such assessment shall be had or any such amount ascertained in such manner as the court on application may direct, and judgment entered by the clerk for the amount so assessed or ascertained. [L. '93, p. 415, § 25.]

Cited in 98 Wash. 567.

§ 252. Computation of Time.

The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day falls on a Sunday it shall be excluded. [L. '93, p. 415, § 26.]

Cited in 10 Wash. 310; 25 Wash. 657; 27 Wash. 151; 32 Wash. 212; 61 Wash. 257; 99 Wash. 676, 677.

§ 253. Weekly Publication, How Made.

The publication of legal notices required by law, or by an order of a judge or court, to be published in a newspaper once in each week for a specified number of weeks, shall be made on the day of each week in which such newspaper is published. [L. '93, p. 415, § 27.]

§ 253-1. "Legal Newspaper" Defined.

No newspaper shall be considered a legal newspaper for the publication of any advertisement, notice, summons, report, proceeding or other official document now or hereafter required by law to be published unless such newspaper shall have been published in the English language continually (legal holidays and Sundays excepted) as a daily or weekly newspaper, as the case may be, in the city or town where the same

is published at the time of the publication of such official document, for at least six months prior to the date of such publication, and shall be printed either in whole or in part in an office maintained at the place of publication: Provided, that in case of the consolidation of two or more newspapers such consolidated newspaper shall be considered a legal newspaper if either or any of the papers so consolidated would be a legal newspaper at the date of such legal publication, had not such consolidation taken place: Provided, further, that nothing in this section shall be construed to invalidate any publication in a foreign language prior to the taking effect of this act. [L. '21, p. 293, § 1. Cf. L. '17, p. 219, § 1.]

§ 253-2. Affidavit of Publication—Presumption.

All legal and other official notices shall be published in a legal newspaper as defined in the preceding section and the affidavit of publication shall state that such newspaper is a legal newspaper and shall be prima facie evidence of that fact. [L. '21, p. 294, § 2.]

§ 253-3. Scope of Act.

The provisions of the two preceding sections shall not apply in counties where no newspaper has been published for a period of one year prior to the publication of such legal or other official notices. [L. '21, p. 294, § 3.]

§ 253-4. Publication Fees.

In all cases where publication of legal notices of any kind is required or allowed by law, the person or officer desiring such publication shall be required to pay on a basis of one dollar and forty cents per folio of one hundred words for the first insertion and eighty cents per folio of one hundred words for each subsequent insertion, or its equivalent in number of words: Provided, that any newspaper having a circulation of over 20,000 copies each issue may charge such additional rate as it may deem necessary and just and any person or officer authorizing the publication of any legal notice in such newspaper may legally pay such rate as is charged by such newspaper, and: Provided, further, that this section shall not apply to the amount to be charged for the publication of any legal notice or advertisement for any school district, village, town, city, county, state, municipal or quasi-municipal corporation or the United States government. [L. '21, p. 294, § 4.]

§ 253-5. Selection of Legal Newspaper.

Any summons, citation, notice of sheriff's sale, or legal advertisement of any description, the publication of which is now or may be hereafter required by law, may be published in any daily or weekly legal newspaper of general circulation published in the county where the action, suit or other proceeding is pending, or is to be commenced or had, or in which such notice, summons, citation, or other legal advertisement is required to be given: Provided, however, that if there be more than one legal newspaper in which any such legal notice, summons, citation or legal advertisement might lawfully be published, then the plaintiff or moving party in the action, suit or proceeding shall have the

exclusive right to designate in which of such qualified newspaper such legal notice, summons, citation, notice of sheriff's sale or other legal advertisement shall be published. [L. '21, p. 294, § 5.]

§ 253-6. Legal Holidays and Sundays—Omission.

Where any law or ordinance of any incorporated city or town in this state provides for the publication of any form of notice or advertisement for consecutive days in a daily newspaper, the publication of such notice on legal holidays and Sundays may be omitted without in any manner affecting the legality of such notice or advertisement: Provided, that the publication of the required number of notices is complied with. [L. '21, p. 295, § 6.]

§ 253-7. Payment of Fee—Affidavit.

The affidavit of publication of all notices required by law to be published shall state the full amount of the fee charged for such publication and that the fee has been paid in full. [L. '21, p. 295, § 7.]

§ 254. Service of Writ by Telegraph.

Any writ or order in any civil suit or proceeding, and all the papers requiring service, may be transmitted by telegraph for service in any place, and the telegraphic copy of such writ or order or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him, if any return be requisite, in the same manner, and with the same force and effect in all respects, as the original thereof might be, if delivered to him, and the officer or person serving or executing the same shall have the same authority, and be subject to the same liabilities, as if the said copy were the original. The original, when a writ or order, shall also be filed in the court from which it was issued, and a certified copy thereof shall be preserved in the telegraph office from which it was sent; in sending it, either the original or certified copy may be used by the operator for that purpose. [L. '66, p. 69, § 17; Cd. '81, § 2358; 1 H. C., § 1558.]

See *infra*, § 11346, notice by telegraph, effect of.

CHAPTER VII.

PLEADINGS.

§ 255. Rules to Determine Sufficiency.

All the forms of pleadings heretofore existing in civil actions inconsistent with the provisions of this code are abolished, and hereafter the forms of pleading and the rule by which the sufficiency of the pleadings is to be determined shall be as herein prescribed. [Cf. L. '54, p. 138, § 36; L. '69, p. 17, § 71; Cd. '81, § 73; 2 H. C., § 185.]

Cited in 3 Wash. 203, 587, 588; 5 Wash. 662; 17 Wash. 5; 24 Wash. 329; 27 Wash. 396; 43 Wash. 221; 81 Wash. 36.

Abolition of Common-law Forms and Distinctions: See Remington's Digest, Plead., § 2; Newberg v. Farmer, 1 W. T. 182; Renton v. St. Louis, 1 W. T. 215; Garrison v. Cheeney, 1 W. T. 489; Puget Sound Iron Co. v. Worthington, 2 W. T.

472, 7 Pac. 882, 886; State ex rel. Holgate v. Superior Court, 21 Wash. 33, 56 Pac. 932; State ex rel. Hawes v. Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, 4 Ann. Cas. 197; Port Blakely Mill Co. v. Hartford Fire Ins. Co., 50 Wash. 657, 97 Pac. 781.

For text treatment of "Pleading," see 21 B. C. L. 431.

§ 256. What Pleadings There shall be.

The only pleadings on the part of the plaintiff shall be,—

1. The complaint;
2. The demurrer;
3. The reply.

And on the part of the defendant,—

1. The demurrer;
2. The answer. [L. '54, p. 139, § 37; L. '69, p. 20, § 72; Cd. '81, § 74; 2 H. C., § 186.]

Cited in 3 Wash. 587, 588; 27 Wash. 397; 29 Wash. 532.

§ 257. First Pleading—Complaint.

The first pleading on the part of the plaintiff shall be the complaint. [L. '54, p. 139, § 38; Cd. '81, § 75; 2 H. C., § 187.]

Cited in 29 Wash. 532.

§ 258. What Complaint shall Contain.

The complaint shall contain,—

1. The title of cause, specifying the name of the court, the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant;

2. A plain and concise statement of facts, constituting the cause of action, without unnecessary repetition;

3. A demand for the relief which plaintiff claims; if the recovery of money or damages be demanded, the amount thereof shall be stated. [Cf. L. '54, p. 139, § 39; L. '77, p. 17, § 76; Cd. '81, § 76; L. '91, p. 106, § 1; 2 H. C., § 188.]

Cited in 3 Wash. 271; 9 Wash. 549; 23 Wash. 606; 27 Wash. 407, 409; 57 Wash. 21; 72 Wash. 170, 220; 76 Wash. 205; 79 Wash. 544; 89 Wash. 438, 471; 94 Wash. 384.

COMPLAINT—Form and Requisites of Complaint, in General—Names, Description and Caption: See Remington's Digest, Plead., §§ 24, 25; Vasele v. Grant St. Elec. R. Co., 16 Wash. 602, 48 Pac. 249; Nickels v. Griffin, 1 W. T. 374.

Statement of Cause of Action in General: See Remington's Digest, Plead., § 26; Distler v. Dabney, 3 Wash. 200, 28 Pac. 335; First Nat. Bank of Pullman v. Young, 20 Wash. 337, 55 Pac. 215; Grant v. Walsh, 36 Wash. 190, 78 Pac. 786; Johnson v. San Juan Fish & P. Co., 31 Wash. 238, 71 Pac. 787.

A complaint upon a written contract cannot be aided by pleading an interpretation of it contrary to the legal effect of the agreement: Miller v. Kemper, 107 Wash. 274, 181 Pac. 859.

Theory and Form of Action: See Remington's Digest, Plead., § 27; Smith v. Wingard, 3 W. T. 291, 13 Pac. 717; Casey v. Oakes, 17 Wash. 409, 50 Pac. 53; Dunlap v. Rauch, 24 Wash. 620, 64 Pac. 807;

Damon v. Leque, 14 Wash. 253, 44 Pac. 261; Watson v. Glover, 21 Wash. 677, 59 Pac. 516; Dermitzer v. German Sav. & L. Soc., 23 Wash. 132, 62 Pac. 862; Yarwood v. Johnson, 29 Wash. 643, 70 Pac. 123; Brown v. Calloway, 34 Wash. 175, 75 Pac. 630; McKay v. Calderwood, 37 Wash. 194, 79 Pac. 629; Lawrence v. Halverson, 41 Wash. 534, 83 Pac. 889; Park v. Northport Smelting & Ref. Co., 47 Wash. 597, 92 Pac. 442; Hotchkin v. McNaught-Collins Improvement Co., 67 Wash. 206, 121 Pac. 455; Galbraith v. Devlin, 85 Wash. 482, 148 Pac. 589; Smith v. Driscoll, 94 Wash. 441, 162 Pac. 572, L. R. A. 1917C, 1128.

Anticipating Defenses: See Remington's Digest, Plead., § 31; Johnson v. Bellingham Bay Imp. Co., 13 Wash. 455, 43 Pac. 370; Randall v. Hoquiam, 30 Wash. 435, 70 Pac. 1111; Malloy v. Benway, 34 Wash. 315, 75 Pac. 869; State v. Davis, 43 Wash. 116, 86 Pac. 201.

Allegations on Information and Belief: See Remington's Digest, Plead., § 32; Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140.

In an action for an injunction, the objection that the amount of damages was not stated in the complaint as required by

this section cannot be urged at the trial, in the absence of demurrer or motion, where the complaint alleged the facts from which the damages flowed and that the same could not be estimated, and prayed that they be determined and for general relief: *Loutzenhiser v. Peck*, 89 Wash. 435, 154 Pac. 814.

Prayer for Judgment: See Remington's Digest, Plead., § 33; *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100; *Smith v. Allen*, 18 Wash. 1, 50 Pac. 783, 63 Am. St. Rep. 864, 39 L. R. A. 82; *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 62 Pac. 862; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123; *MacKay v. Smith*, 27 Wash. 442, 67 Pac. 928; *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534; *Bank of British Columbia v. Port Townsend*, 16 Wash. 450, 47 Pac. 896; *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19; *Bader v. Johnson*, 78 Wash. 350, 139 Pac. 32.

Damages: See Remington's Digest, Plead., § 34; *Hart Lumber Co. v. Everett Land Co.*, 20 Wash. 71, 54 Pac. 767; *Belt v. Washington Water P. Co.*, 24 Wash. 387, 64 Pac. 525; *Houchen v. Oregon & Wash. R. & Nav. Co.*, 103 Wash. 598, 175 Pac. 316.

Pleading in Avoidance of Defense of Statute of Limitations: See Remington's Digest, Lim. of Act., § 82-1; *Evert v. Tower*, 51 Wash. 514, 99 Pac. 580, 21 L. R. A. (N. S.) 950.

Pleading in Anticipation of Defense—Matters Avoiding Bar of Statute: See Remington's Digest, Lim. of Act., § 83; *Stearns v. Hochbrunn*, 24 Wash. 206, 64 Pac. 165; *Gay v. Havermale*, 27 Wash.

390, 67 Pac. 804; *Gehres v. Orłowski*, 36 Wash. 156, 78 Pac. 792.

Part Payment: See Remington's Digest, Lim. of Act., § 84; *Yesler v. Oglesbee*, 1 W. T. 604.

Effect of omission of ad damnum clause in complaint. 21 Ann. Cas. 241.

General allegation of indebtedness as legal conclusion. 14 Ann. Cas. 839.

Necessity of pleading public acts in action based thereon. 1 Ann. Cas. 947.

Necessity of setting up ratification of alteration in action on altered instrument. Ann. Cas. 1917D, 345.

May original complaint which states no cause of action be aided by supplemental pleading. L. R. A. 1916D, 676.

Necessity of alleging in complaint compliance with statute of limitations. 1 Ann. Cas. 85.

Right to join in one complaint claims of ordinary and gross negligence arising out of one state of facts. 31 L. R. A. (N. S.) 158.

Alleging in single count two or more acts of negligence capable of contributing to injury. Ann. Cas. 1913C, 101; 27 L. R. A. (N. S.) 792.

Necessity of claiming interest in pleading. Ann. Cas. 1912A, 1223.

Necessity of the theory of the case in pleading. 50 L. R. A. (N. S.) 4.

Necessity that plaintiff in equitable action to set aside judgment should plead meritorious defense thereto. Ann. Cas. 1913E, 124.

§ 259. Grounds of Demurrer of Defendant.

The defendant may demur to the complaint when it shall appear upon the face thereof either,—

1. That the court has no jurisdiction of the person of the defendant or of the subject matter of the action;
2. That the plaintiff has no legal capacity to sue; or
3. That there is another action pending between the same parties for the same cause; or
4. That there is a defect of parties, plaintiff or defendant; or
5. That several causes of action have been improperly united;
6. That the complaint does not state facts sufficient to constitute a cause of action;
7. That the action has not been commenced within the time limited by law. [Cf. L. '54, p. 139, § 40; Cd. '81, § 77; L. '86, p. 75, § 1; L. '91, p. 106, § 2; 2 H. C., § 189.]

Cited in 4 Wash. 810; 12 Wash. 598; 17 Wash. 576; 19 Wash. 665; 27 Wash. 86; 28 Wash. 479; 29 Wash. 532; 31 Wash. 36; 34 Wash. 433; 42 Wash. 88; 51 Wash. 634; 635; 56 Wash. 238; 58 Wash. 491; 69 Wash. 557; 75 Wash. 296; 78 Wash. 472; 84 Wash. 122; 100 Wash. 601; 108 Wash. 37; 110 Wash. 257.

DEMURRER.—Under this and section 261, the objection to defect of parties must be by special demurrer or answer: *Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072.

Grounds for Demurrer in General—Uncertainty or Indebtedness: See *Remington's Digest*, Plead., § 76; *Renton v. St. Louis*, 1 W. T. 215; *Chambers v. Hoover*, 3 W. T. 107, 13 Pac. 466; *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195, 23 Pac. 415; *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879; *Wiest v. Coal Creek R. Co.*, 42 Wash. 176, 84 Pac. 725; *Allen v. Baxter*, 42 Wash. 434, 85 Pac. 26; *Schaad v. Robinson*, 50 Wash. 283, 97 Pac. 104; *White Bros. & Crum Co. v. Watson*, 64 Wash. 666, 117 Pac. 497, 44 L. R. A. (N. S.) 254; *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289.

— **Conclusions of Law:** See *Remington's Digest*, Plead., § 77; *Chambers v. Hoover*, 3 W. T. 107, 13 Pac. 466; *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549; *Grandin v. Tacoma*, 87 Wash. 98, 151 Pac. 254. See, also, *Shell Co. v. State*, 113 Wash. 632, 194 Pac. 835.

— **Irrelevant and Immaterial Matters:** See *Remington's Digest*, Plead., § 78; *Puget Sound Iron Co. v. Worthington*, 2 W. T. 472, 7 Pac. 882, 886.

— **Pendency of Another Action or Previous Adjudication:** See *Remington's Digest*, Plead., § 79; *Lowman v. West*, 8 Wash. 355, 36 Pac. 258; *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41; *Seattle Nat. Bank v. School Dist.*, 20 Wash. 368, 55 Pac. 317.

A complaint is not demurrable on the ground that another action is pending, where the fact does not appear on the face of the complaint: *Womach v. Sandygren*, 107 Wash. 80, 180 Pac. 922.

Where a former action for breach of promise based on a prior promise was dismissed by stipulation although defendant withheld the stipulation from the files, its pendency cannot be pleaded in bar of a subsequent action based upon a promise made after the settlement of the first action: *Bundy v. Dickinson*, 108 Wash. 52, 182 Pac. 947.

Grounds for Demurrer to Complaint—Insufficiency of Facts to Constitute Cause of Action: See *Remington's Digest*, Plead., § 80; *Smith v. Ellis*, 3 W. T. 328, 21 Pac. 385; *Wilkeson Coal & Coke Co. v. Driver*, 9 Wash. 177, 37 Pac. 307.

— **Limitations and Laches:** See *Remington's Digest*, Plead., § 81; *Wilt v. Buchtel*, 2 W. T. 417, 7 Pac. 891.

— **Misjoinder of Causes of Actions:** See *Remington's Digest*, Plead., § 82; *Times Pub. Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865; *Gilmore v.*

Skookum Box Factory, 20 Wash. 703, 56 Pac. 934; *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68.

Grounds for Demurrer to Plea or Answer, or to Defense Therein: See *Remington's Digest*, Plead., § 83; *Bennett v. Tacoma L. & W. Co.*, 3 Wash. 337, 28 Pac. 520; *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976; *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063; *Silsby v. Tacoma etc. R. Co.*, 6 Wash. 295, 32 Pac. 1067; *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300; *Anderson v. Carothers*, 18 Wash. 520, 52 Pac. 229; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

Grounds for Demurrer to Counterclaim or Cross-complaint: See *Remington's Digest*, Plead., § 84; *Caine v. Seattle & Northern R. Co.*, 12 Wash. 596, 41 Pac. 904.

Sufficiency of Demurrer—Specification of Grounds: See *Remington's Digest*, Plead., § 85; *Renton v. St. Louis*, 1 W. T. 215; *Lowman v. West*, 8 Wash. 355, 36 Pac. 258.

Scope and Extent of Demurrer in General: See *Remington's Digest*, Plead., § 86; *Tacoma Hotel Co. v. Tacoma Light & W. Co.*, 3 Wash. 316, 28 Pac. 516, 28 Am. St. Rep. 35, 14 L. R. A. 669; *Lowman v. West*, 8 Wash. 355, 36 Pac. 258; *Brinker v. Oldham & Sons*, 63 Wash. 620, 116 Pac. 263; *Rehlow v. Schmitt*, 63 Wash. 666, 116 Pac. 267.

Demurrer to Pleading Good in Part: See *Remington's Digest*, Plead., § 87; *McCartney v. Glassford*, 1 Wash. 579, 20 Pac. 423; *Chevret v. Mechanics' Mill & Lum. Co.*, 4 Wash. 721, 31 Pac. 24; *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371, 49 Pac. 514; *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932; *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302, 74 Pac. 470; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Humphries v. Cooper*, 55 Wash. 376, 104 Pac. 606, 133 Am. St. Rep. 1036; *Beyer v. Bullock*, 56 Wash. 110, 105 Pac. 155; *Peterson v. Pantheon Lumber Co.*, 62 Wash. 189, 113 Pac. 562; *Otey v. Bradley*, 63 Wash. 500, 115 Pac. 1045, 2 N. C. C. A. 407.

Objections Raised Under General Demurrer: See *Remington's Digest*, Plead., § 88; *Rice v. Yakima & Pac. Coast R. Co.*, 4 Wash. 724, 31 Pac. 23; *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485, 68 Pac. 871.

— **Capacity to Sue:** See *Remington's Digest*, Plead., § 89; *Birmingham v. Cheetham*, 19 Wash. 657, 54 Pac. 37; *James v. James*, 35 Wash. 655, 77 Pac. 1082.

— **Misjoinder of Causes:** See *Remington's Digest*, Plead., § 90; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *Ames v. Kinnear*, 42 Wash. 80, 84 Pac. 629.

See, also, misjoinder of causes of action: *Hughes v. McVay*, 113 Wash. 333, 194 Pac. 565.

A demurrer for improperly uniting two causes of action, must, under this section, subdivision 5, be sustained, unless the complaint did not state sufficient facts to constitute one of the causes attempted to be stated: *Konick v. Champneys*, 108 Wash. 35, 183 Pac. 75, 6 A. L. R. 459.

Limitation of Action: See *Remington's Digest*, Plead., § 91; *Board of Church Erection Fund v. First Pres. Church*, 19 Wash. 455, 53 Pac. 671; *George v. Butler* 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888.

Special Demurrer: See *Remington's Digest*, Plead., § 92; *Lafleur v. Douglass*, 1 W. T. 185; *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59; *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517; *Ihrke v. Continental Life Ins. & Inv. Co.*, 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F, 430.

The objection to defect of parties must be by special demurrer or answer: *Buckles v. Reynolds*, 58 Wash. 485, 108 Pac. 1072.

Demurrer Raising Defense of Statute of Limitations—In General: See *Remington's Digest*, Lim. of Act., § 85; *Board of Church Erec. Fund etc. v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671; *Roche v. Spokane*, 22 Wash. 121, 60 Pac. 59.

— **Matters Appearing on the Face of the Pleadings:** See *Remington's Digest*, Lim. of Act., § 86; *Wilt v. Buchtel*, 2 W. T. 417, 7 Pac. 891; *Damon v. Leque*, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927; *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888; *Hays v. Peavey*, 43 Wash. 163, 86 Pac. 170; *Ihrke v. Continental Life Ins. & Inv. Co.*, 91 Wash. 342, 157 Pac. 866, L. R. A. 1916F, 430.

Demurrer Ore Tenus: See *Remington's Digest*, Plead., § 93; *Greene v. Finnell*, 22 Wash. 186, 60 Pac. 144; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822; *Belknap Glass Co. v. Kelleher*, 72 Wash. 529, 130 Pac. 1123; *Manns v. Boston Harbor Railroad, Steamship & Land Co.*, 82 Wash. 411, 144 Pac. 535.

Abandonment or Waiver of Demurrer: See *Remington's Digest*, Plead., § 94; *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397; *Hardin v. Mullen*, 16 Wash. 647, 48 Pac. 349; *Watson v. Kent*, 35 Wash. 21, 76 Pac. 207; *Healy v. King County*, 37 Wash. 184, 79 Pac. 624; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184.

The statute of limitations is a defense that is waived by default or failure to interpose it: *State ex rel. Tecter v. Superior Court*, 110 Wash. 255, 188 Pac. 391.

Admissions by Demurrer: See *Remington's Digest*, Plead., § 95; *Soule v. Seattle*, 6 Wash. 315, 33 Pac. 384, 1080; *Brookman v. State Ins. Co.*, 15 Wash. 29, 45 Pac. 655, 46 Pac. 243; *Olympia Waterworks v. Gelbach*, 16 Wash. 482, 48 Pac. 251; *Franklin Sav. Bank v. Moran*, 19 Wash. 200, 52 Pac. 858; *Hester v. Thomson*, 35 Wash. 119, 76 Pac. 734; *MacMartin v. Stevens*, 37 Wash. 616, 79 Pac. 1099; *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886, Ann. Cas. 1913D, 786; *Longfellow v. Seattle*, 76 Wash. 509, 136 Pac. 855.

An allegation that defendant was the proponent of a contract must be taken as true, for the purpose of testing the sufficiency of the complaint: *Mikus v. Beeman*, 110 Wash. 658, 188 Pac. 780.

Hearing and Determination on Demurrer: See *Remington's Digest*, Plead., § 96; *Williams v. Miller*, 1 W. T. 88; *Roder v. Brown*, 1 W. T. 112; *Penter v. Staight*, 1 Wash. 365, 25 Pac. 469; *Jackson v. McAuley*, 13 Wash. 298, 43 Pac. 41; *Meek v. White*, 26 Wash. 491, 67 Pac. 256; *Schell v. Walla Walla*, 44 Wash. 43, 86 Pac. 1114.

Where a statute of limitation is pleaded in the complaint, it may be invoked by the defendant, although not pleaded in his answer: *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317.

Operation and Effect of Decision on Demurrer—In General: See *Remington's Digest*, Plead., § 97; *Burrows v. McCalley*, 17 Wash. 269, 49 Pac. 508; *Johnson v. Seattle Elec. Co.*, 39 Wash. 211, 81 Pac. 705; *Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646; *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733.

— **Amendment After Demurrer Sustained:** See *Remington's Digest*, Plead., § 98; *Renton v. St. Louis*, 1 W. T. 215; *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

Raising bar of statute of limitations by demurrer. 1 Ann. Cas. 85.

Demurrer for misjoinder of causes of action. 3 Ann. Cas. 287.

Raising objection of duplicity by demurrer. 49 L. R. A. (N. S.) 454.

Demurrer to general allegation of fraud as confession thereof. 14 Ann. Cas. 368.

Right of one defendant to benefit of another's demurrer. 33 L. R. A. (N. S.) 310.

Speaking demurrers. 14 Ann. Cas. 348.

Conclusiveness of judgment on demurrer. 13 A. L. R. 1104.

Whether demurrer to separate defense may be carried back to the complaint where defendant has also pleaded a general denial. 26 L. R. A. (N. S.) 117.

§ 260. Grounds of Demurrer, How Specified.

The demurrer may specify the grounds of objection in the statutory language of the last preceding section, or the grounds may be distinctly specified; it may be taken to the whole complaint, or to any one of the alleged causes of action stated therein. [Cf. L. '54, p. 139, § 41; L. '77, p. 18, § 78; Cd. '81, § 78; 2 H. C., § 190.]

See notes to § 259.

Cited in 27 Wash. 86; 110 Wash. 257.

§ 261. Objections, When to be Taken by Answer.

When any of the matters enumerated in section 259 do not appear upon the face of the complaint, the objection may be taken by answer. [L. '54, p. 139, § 42; Cd. '81, § 79; 2 H. C., § 191.]

Cited in 4 Wash. 810; 12 Wash. 598; 31 Wash. 36; 34 Wash. 433; 51 Wash. 635; 56 Wash. 238; 58 Wash. 491; 74 Wash. 213; 78 Wash. 472; 110 Wash. 257.

DILATORY PLEAS AND MATTER IN ABATEMENT—Plea to the Jurisdiction: See Remington's Digest, Plead., § 45; Ritchie v. Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

Plea in Abatement: See Remington's Digest, Plead., § 46; State ex rel. Holgate v. Superior Court, 21 Wash. 33, 56 Pac. 932.

— **Another Action Pending:** See Remington's Digest, Plead., § 47; State ex rel. Scandinavian Amer. Bank v. Tallman, 29 Wash. 411, 69 Pac. 1115. See also, Remington's Digest, Abate. & R., §§ 2—11, and cases cited.

The plea of another action pending may be entered by a plaintiff to the defendant's counterclaim, as the counterclaim is to be treated as a cross-complaint: Caine v. Seattle & N. R. Co., 12 Wash. 596, 41 Pac. 904.

Under this section, a plea in abatement is good, where it appears that, after issue joined, an attempt was made to discharge the attorney without complying with section 133, failing which, the former action was ignored and another commenced: Longmore v. Puget Sound Traction, L. & P. Co., 78 Wash. 468, 131 Pac. 191.

Pleading in Bar Matter in Abatement: See Remington's Digest, Plead., § 48; Staver & Walker v. Missinmer, 6 Wash. 173, 32 Pac. 995, 36 Am. St. Rep. 142; Commercial Bank v. Hart, 10 Wash. 303, 38 Pac. 1114.

Decision of Issue and Proceedings Thereon: See Remington's Digest, Plead., § 49; State ex rel. McLeod v. Superior Court, 9 Wash. 366, 37 Pac. 454; State ex rel. Holgate v. Superior Court, 21 Wash. 33, 56 Pac. 932.

Service of new answer to amended bill or complaint. **Ann. Cas.** 1918A, 205, 226.

§ 262. Proceedings When Complaint is Amended.

If the complaint be amended, a copy thereof shall be served on the defendant or his attorney, and the defendant shall answer the same within such time as may be prescribed by the court; and if he omit to do so, the plaintiff may proceed to obtain judgment as in other cases of failure to answer. [L. '69, p. 20, § 78; Cd. '81, § 80; 2 H. C., § 192.]

Cited in 74 Wash. 213, 371.

§ 263. Objections not Taken Deemed Waived.

If no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting always the objection that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, which objection can be made at any stage of the proceedings, either in the superior or supreme court. [L. '54, p. 139, § 43; Cd. '81, § 81; 2 H. C., § 193.]

Cited in 1 Wash. 500; 3 Wash. 411; 4 Wash. 810; 12 Wash. 697; 15 Wash. 335; 16 Wash. 76; 19 Wash. 616; 27 Wash. 86; 28 Wash. 492; 31 Wash. 36; 34 Wash. 433; 35 Wash. 24; 39 Wash. 54; 43 Wash. 519—521; 47 Wash. 421, 687; 51 Wash.

635; 56 Wash. 238; 74 Wash. 213; 75 Wash. 296; 83 Wash. 60; 87 Wash. 129; 100 Wash. 601; 103 Wash. 147.

In an action brought by a taxpayer against the officers of a school district and a contractor to restrain the payment of the warrants issued, a defect of parties by reason of the fact that the contractor had sold the warrants before the action was commenced is waived by failing to raise the point of demurrer or answer: *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420, 75 Pac. 984.

The objection that a corporation had not paid its annual license fee last due, relates only to the plaintiff's capacity to sue, and if objection is not taken by demurrer or answer, the same is waived and the action cannot be dismissed for failure to prove payment of the fee: *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031.

DEFECTS AND OBJECTIONS, WAIVER AND AIDER BY VERDICT OR JUDGMENT—Waiver of Objections to Pleadings in General: See *Remington's Digest, Plead.*, § 192; *Renton v. St. Louis*, 1 W. T. 215; *Clambey v. Corliss*, 41 Wash. 327, 83 Pac. 422; *Erickson v. McLellan & Co.*, 46 Wash. 661, 91 Pac. 249; *Kelly v. Lum*, 75 Wash. 135, 134 Pac. 819, 49 L. A. A. (N. S.) 1151. See, also, *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916, 6 A. L. R. 676.

Cure by Subsequent Pleading—In General: See *Remington's Digest, Plead.*, § 193; *Ward v. Ward*, 14 Wash. 640, 45 Pac. 312; *Weatherwax Lumber Co. v. Ray*, 38 Wash. 545, 80 Pac. 775.

— **Pleading of Adverse Party:** See *Remington's Digest, Plead.*, § 194; *Schulte v. Littlejohn*, 2 Wash. 129, 26 Pac. 79; *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121, 31 Pac. 428; *Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249, 44 Pac. 264; *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032; *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Rattelmiller v. Stone*, 28 Wash. 104, 68 Pac. 168; *Curtis v. Parks*, 57 Wash. 223, 106 Pac. 740; *Chute v. Attalia Land Co.*, 91 Wash. 4, 156 Pac. 849. See, also, *Hansen v. Hansen*, 110 Wash. 276, 188 Pac. 460.

Waiver of Objections to Complaint—In General: See *Remington's Digest, Plead.*, § 195; *Galliher v. Cadwell*, 3 W. T. 501, 18 Pac. 68; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455, 43 Pac. 370; *Selby v. Vancouver Water Works Co.*, 32 Wash. 522, 73 Pac. 504; *Wheatman v. Kane*, 55 Wash. 226, 104 Pac. 258; *Wild Rose Orchard Co. v. Critzer*, 79 Wash. 462, 140 Pac. 561.

— **Pleading Over and Trial on Merits:** See *Remington's Digest, Plead.*, § 196; *Bell*

v. Waudby, 4 Wash. 743, 31 Pac. 18; *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393; *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528; *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982. See, also, *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916, 6 A. L. R. 676.

— **Failure to Make Allegations:** See *Remington's Digest, Plead.*, § 197; *Tolmie v. Dean*, 1 W. T. 46; *Galliher v. Cadwell*, 3 W. T. 501, 18 Pac. 68; *Coats v. West Coast Fire etc. Ins. Co.*, 4 Wash. 375, 30 Pac. 404, 850.

— **Failure to State Cause of Action:** See *Remington's Digest, Plead.*, § 199; *Renton v. St. Louis*, 1 W. T. 215; *Lyen v. Bond*, 3 W. T. 407, 19 Pac. 35; *Blumenthal v. Pacific Meat Co.*, 12 Wash. 331, 41 Pac. 47; *State ex rel. Abernethy v. Moss*, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; *Jones v. St. Paul etc. R. Co.*, 16 Wash. 25, 47 Pac. 226; *State ex rel. Jenkins v. Equitable Indemnity Assn.*, 18 Wash. 514, 52 Pac. 234; *Watson v. Kent*, 35 Wash. 21, 76 Pac. 297; *Healy v. King County*, 37 Wash. 184, 79 Pac. 624; *Wappenstein v. Aberdeen*, 39 Wash. 189, 81 Pac. 686; *Harrington v. Gordon*, 42 Wash. 692, 80 Pac. 187. See, also, *Parkes' Estate, In re*, 105 Wash. 586, 178 Pac. 830.

If the objection that the complaint does not state a cause of action is presented by demurrer, which is withdrawn or not prosecuted, it is thereby waived, and will not be considered in the supreme court notwithstanding this section: *Mosher v. Bruhn*, 15 Wash. 332, 46 Pac. 397; *Hardin v. Mullen*, 16 Wash. 647, 48 Pac. 349.

Where the answer in quo warranto is, in effect, a demurrer on the ground that the complaint fails to state facts constituting a cause of action, such objection under this section can be urged in the supreme court although no ruling thereon was had in the superior court: *State ex rel. Attorney General v. Seattle Gas etc. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

After trial on the merits under a defective complaint, capable of amendment, all amendments will, on appeal, be considered as made, as required by section 1752, which is a later statute and controls this section, providing that objection that the complaint fails to state a cause of action may be made at any time: *Messick v. National Council of Knights & Ladies of Security*, 103 Wash. 143, 173 Pac. 940.

Objection to Jurisdiction.—An objection that the court has no jurisdiction, first raised by demurrer, is not waived by failing to except to the order overruling the demurrer, where the answer expressly reserved the point and at the trial the evidence was objected to for the same reason, this section providing that objection to

the jurisdiction can be made at any time: *West v. Martin*, 47 Wash. 417, 92 Pac. 334.

Waiver of Objections to Plea or Answer or Want Thereof: See *Remington's Digest*, Plead., § 200; *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328; *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926; *Howard v. Hibbs*, 22 Wash. 513, 61 Pac. 159.

Waiver of Objections to Setoff or Counterclaim or Cross-complaint: See *Remington's Digest*, Plead., § 201; *Baxter v. Seattle*, 3 Wash. 352, 28 Pac. 537; *Jacobson v. Aberdeen Pack. Co.*, 26 Wash. 175, 66 Pac. 419; *Reynolds v. Dickson*, 48 Wash. 407, 93 Pac. 910.

Waiver of Objections to Republication or Reply or Want Thereof: See *Remington's Digest*, Plead., § 202; *Asplund v. Mattson*, 15 Wash. 328, 46 Pac. 341; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101.

See, also, Trial without reply: *Allen v. Schultz*, 107 Wash. 393, 181 Pac. 916, 6 A. L. R. 676.

Objections to Amendments and Rulings Relating Thereto: See *Remington's Digest*, Plead., § 206; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Edmunds v. Black*, 13 Wash. 490, 43 Pac. 330; *Ellsworth v. Layton*, 37 Wash. 340, 79 Pac. 947.

Objections to Bill of Particulars: See *Remington's Digest*, Plead., § 207; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835.

Proceeding to trial on the merits, after overruling a motion to require the plaintiff to separately state his causes of action, waives the objection: *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

PARTIES—Want of Capacity or Interest—Necessity and Mode of Objection: See *Remington's Digest*, Parties, § 51; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 480; *Dew v. Pearson*, 73 Wash. 602, 132 Pac. 412; *Harris v. Johnson*, 75 Wash. 291, 134 Pac. 1048. See, also, *Foy v. Power & Light Co.*, 105 Wash. 525, 178 Pac. 452.

Nonjoinder of Party Plaintiff—Waiver of Defects and Objections: See *Remington's Digest*, Parties, § 52; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 256; *Jenkins v. Columbia Land etc. Co.*, 13 Wash. 502, 43 Pac. 328; *Budlong v. Budlong*, 48 Wash. 645, 94 Pac. 478; *State ex rel. Abrashin v. Terry*, 74 Wash. 208, 133 Pac. 386; *Lamb v. Connor*, 84 Wash.

121, 146 Pac. 174. See, also, *Hansen v. Hansen*, 110 Wash. 276, 188 Pac. 460.

Necessity and Mode of Objection: See *Remington's Digest*, Parties, § 54; *Grove v. Moses*, 1 W. T. 17; *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325; *Greene v. Finnell*, 22 Wash. 186, 60 Pac. 144; *Scott v. Hallock*, 16 Wash. 439, 47 Pac. 968; *Sander v. Wilson*, 34 Wash. 659, 76 Pac. 280.

— **Waiver of Defects and Objections:** See *Remington's Digest*, Parties, § 55; *Baxter v. Seoland*, 2 W. T. 86, 3 Pac. 638; *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Criswell v. Directors School Dist. No. 24*, 34 Wash. 420, 75 Pac. 984; *Grisson v. Hofius*, 39 Wash. 51, 80 Pac. 1002, 4 Ann. Cas. 125.

Misjoinder of Parties Plaintiff—Nature of Defect: See *Remington's Digest*, Parties, § 56; *Washburn v. Case*, 1 W. T. 253; *State ex rel. Dye v. Reilly*, 40 Wash. 217, 82 Pac. 287.

— **Necessity and Mode of Objection:** See *Remington's Digest*, Parties, § 57; *Phelps v. S. S. City of Panama*, 1 W. T. 518; *Chevret v. Mechanics' Mill & Lumber Co.*, 4 Wash. 721, 31 Pac. 24.

— **Waiver of Defects and Objections:** See *Remington's Digest*, Parties, § 58; *Shepard v. Hill*, 6 Wash. 605, 34 Pac. 159; *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 47 Pac. 894.

Misjoinder of Parties Defendant—Operation and Effect: See *Remington's Digest*, Parties, § 59; *Jackson v. McAuley*, 13 Wash. 198, 43 Pac. 41.

— **Mode of Objection:** See *Remington's Digest*, Parties, § 60; *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446.

Amendment of Defects: See *Remington's Digest*, Parties, § 61; *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355; *State v. Lorenz*, 22 Wash. 289, 60 Pac. 644; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784; *Rodda v. Needham*, 78 Wash. 636, 139 Pac. 628.

Submission on agreed statement of facts or on agreed case as waiver of defect in pleading. 8 A. L. R. 1172.

Inconsistent defenses as constituting waiver in pleading. Ann. Cas. 1917C, 740; 48 L. R. A. 203.

Other pleading filed as waiver of objection to overruling demurrer. Ann. Cas. 1913B, 388.

§ 264. What Answer shall Contain.

The answer of the defendant must contain,—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief;

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition. [Cf. L. '54, p. 139, § 44; L. '69, p. 21, § 80; L. '77, p. 18, § 82; Cd. '81, § 82; 2 H. C., § 194.]

Cited in 3 Wash. 720; 5 Wash. 662; 6 Wash. 246; 7 Wash. 230; 9 Wash. 463; 11 Wash. 574; 12 Wash. 693; 18 Wash. 99; 32 Wash. 653; 48 Wash. 446; 58 Wash. 304; 62 Wash. 498; 70 Wash. 584; 83 Wash. 244; 86 Wash. 439; 88 Wash. 384; 89 Wash. 471; 94 Wash. 511; 102 Wash. 136; 103 Wash. 375—377.

PLEA OR ANSWER AND CROSS-COMPLAINT—Nature and Scope of Defense: See Remington's Digest, Plead., § 35; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Washington Printing Co. v. Osner, 99 Wash. 537, 169 Pac. 988. See, also, Schmelling v. Hoffman, 111 Wash. 408, 191 Pac. 618.

Necessity for Defense: See Remington's Digest, Plead., § 36; Chapin v. Bockee, 4 Wash. 1, 29 Pac. 936; Myers v. Landrum, 4 Wash. 762, 31 Pac. 33; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Whidby Land etc. Co. v. Nye, 5 Wash. 301, 31 Pac. 752; Leo Kee v. Wah Sing Chong, 31 Wash. 678, 72 Pac. 473; Roy & Roy v. Northern Pac. R. Co., 42 Wash. 572, 85 Pac. 53, 7 Ann. Cas. 728, 6 L. R. A. (N. S.) 302.

Matter Constituting Defense in General: See Remington's Digest, Plead., § 37; Meeker v. Wren, 1 W. T. 73; Roeder v. Brown, 1 W. T. 112; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886.

Partial Defenses: See Remington's Digest, Plead., § 38; McDaniel v. Pressler, 3 Wash. 636, 29 Pac. 209; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763.

Right to Defend, and Leave of Court: See Remington's Digest, Plead., § 39; State ex rel. Jefferson County v. Hatch, 36 Wash. 164, 78 Pac. 796.

Time to Plead in General: See Remington's Digest, Plead., § 40; McMaster v. Advance Thresher Co., 10 Wash. 147, 38 Pac. 670; Plummer v. Weil, 15 Wash. 427, 46 Pac. 648; Eldridge v. Young America etc. Min. Co., 27 Wash. 297, 67 Pac. 703; Wright v. Northern Pac. R. Co., 38 Wash. 64, 80 Pac. 197; Woodham v. Anderson, 32 Wash. 500, 73 Pac. 536.

TRAVERSES OR DENIALS AND ADMISSIONS—Sufficiency of Denials—Form and Requisites in General: See Remington's Digest, Plead., § 50; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767; Carter v. Seattle, 19 Wash. 597, 53 Pac. 1102; Abbott v. Gaches, 20 Wash. 517, 56 Pac. 28; Cameron v. Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886; Trum-

bull v. Jackman, 9 Wash. 524, 37 Pac. 680; Peterson v. Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 513, 53 L. R. A. 586; Johnston v. McCart, 24 Wash. 19, 63 Pac. 1121; Adams v. Casey, 39 Wash. 37, 80 Pac. 853; State v. Postal Tel. Cable Co., 101 Wash. 630, 172 Pac. 902. See, also, Johnson v. Western Express Co., 107 Wash. 339, 181 Pac. 693.

Denial of Knowledge or Information: See Remington's Digest, Plead., § 51; Colby v. Spokane, 12 Wash. 690, 42 Pac. 112; Raymond v. Johnson, 17 Wash. 232, 49 Pac. 492, 61 Am. St. Rep. 908.

Denial on Information and Belief: See Remington's Digest, Plead., § 52; Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. 458; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Sumpter v. Burnham, 51 Wash. 599, 99 Pac. 752; Belknap Glass Co. v. Brown, 69 Wash. 127, 124 Pac. 390; Olympia v. Turpin, 70 Wash. 581, 127 Pac. 210; White v. Jansen, 81 Wash. 435, 142 Pac. 1140; Canyon Lumber Co. v. Sexton, 93 Wash. 620, 161 Pac. 841; Title Guaranty & Surety Co. v. First National Bank of Hoquiam, 94 Wash. 55, 162 Pac. 23. See, also, Olsen v. Bremerton, 110 Wash. 572, 188 Pac. 772.

General Denial. See Remington's Digest, Plead., § 53; Penter v. Staight, 1 Wash. 365, 25 Pac. 469; Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926; Ryan v. Lambert, 49 Wash. 649, 96 Pac. 232; Peters v. McPherson, 62 Wash. 496, 114 Pac. 188.

Traverse or Denial of Immaterial Allegations: See Remington's Digest, Plead., § 54; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767.

Negative Pregnant: See Remington's Digest, Plead., § 55; Gammon v. Dyke, 2 W. T. 266, 5 Pac. 845; Seattle v. Buzby, 2 W. T. 25, 3 Pac. 180; Dillon v. Spokane County, 3 W. T. 498, 17 Pac. 889; Hansen v. Doherty, 1 Wash. 461, 25 Pac. 297; Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Columbia Nat. Bank v. Western Iron & Steel Co., 14 Wash. 162, 44 Pac. 145; Cole v. Noerdlinger, 22 Wash. 51, 60 Pac. 57; O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399; Peters v. McPherson, 62 Wash. 496, 114 Pac. 188.

Matter Available Under General Denial: See Remington's Digest, Plead., § 59-1; Neilson v. Hovander, 56 Wash. 83, 105 Pac. 172, 21 Ann. Cas. 113; Brown v. Haley, 56 Wash. 218, 105 Pac. 478; Kimble v. Stackpole, 60 Wash. 35, 110 Pac. 677, 35 L. R. A. (N. S.) 148; Davidson Fruit Co. v. Produce Distributors Co., 74

Wash. 551, 134 Pac. 510; *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. 635, 135 Pac. 472; *Price v. Partridge*, 78 Wash. 362, 139 Pac. 34; *Whitaker v. Ellis*, 102 Wash. 43, 172 Pac. 881. See, also, *Howatt v. Clark*, 112 Wash. 137, 192 Pac. 7.

Pleading Statute of Limitations as Defense—Necessity: See *Remington's Digest*, *Lim. of Act.*, § 87; *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414; *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553; *Paul v. Kohler & Chase*, 82 Wash. 257, 144 Pac. 64. See, also, *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317; *State ex rel. Teeter v. Superior Court*, 110 Wash. 255, 188 Pac. 391.

— **Sufficiency of Denials and Allegations:** See *Remington's Digest*, *Lim. of Act.*, § 88; *Gammon v. Dyke*, 2 W. T. 266, 5 Pac. 845; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767; *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533.

§ 265. Counterclaim Defined.

The counterclaim mentioned in the preceding section must be one existing in favor of a defendant, and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:—

1. A cause of action arising out of the contract, or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;

2. In an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. [Cf. L. '54, p. 140, § 45; L. '69, p. 21, § 81; L. '77, p. 19, § 83; Cd. '81, § 83; 2 H. C., § 195.]

Cited in 3 Wash. 368; 7 Wash. 560; 8 Wash. 646; 9 Wash. 463; 10 Wash. 194; 11 Wash. 574; 12 Wash. 598; 16 Wash. 373, 566; 26 Wash. 182; 28 Wash. 236; 32 Wash. 653; 33 Wash. 469, 621; 48 Wash. 446; 51 Wash. 665; 58 Wash. 305; 67 Wash. 356; 72 Wash. 141; 82 Wash. 221; 94 Wash. 511; 103 Wash. 50, 376; 106 Wash. 307; 111 Wash. 87.

Matter Available Under Special Plea: See *Remington's Digest*, *Plead.*, § 60; *Scott v. Hallock*, 16 Wash. 439, 47 Pac. 968.

Under this section, if a counterclaim be not barred by the statute of limitations at the commencement of the action in which it is pleaded, it does not become so afterward during the pendency of that action: *Shelton v. Conant*, 10 Wash. 193, 38 Pac. 1013.

The statute of limitations as to actions does not bar defenses against a party who was not seeking any affirmative relief during the lapse of time: *Buck v. Equitable Life Assur. Soc.*, 96 Wash. 683, 165 Pac. 878.

NATURE AND GROUNDS OF SET-OFF—Nature of Remedy: See *Remington's*

Sufficiency of general averment of want of consideration. L. R. A. 1917F, 581.

Availability of plea of limitation and plea of general issue against same cause of action. L. R. A. 1917C, 72.

Necessity of pleading the statute of frauds as a defense. 49 L. R. A. (N. S.) 1.

Sufficiency of general denial coupled with admissions. 13 Ann. Cas. 884.

Sufficiency of general denial to raise defense of statute of frauds. 49 L. R. A. (N. S.) 11.

Effect of denial upon information and belief of matter necessarily or presumptively within knowledge of defendant. Ann. Cas. 1912C, 149; 30 L. R. A. (N. S.) 771.

Digest, *Setoff*, § 1; *Niver v. Nash*, 7 Wash. 558, 35 Pac. 380; *Sheafe v. Hastie*, 16 Wash. 563, 48 Pac. 246.

Actions in Which Remedy is Available

— **In General:** See *Remington's Digest*, *Setoff*, § 2; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317; *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760; *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476.

— **On Contracts:** See *Remington's Digest*, *Setoff*, § 3; *Hughes v. Bravinder*, 9 Wash. 595, 38 Pac. 209; *Sheiton v. Conant*, 10 Wash. 193, 38 Pac. 1013; *Duggar v. Dempsey*, 13 Wash. 396, 43 Pac. 357; *Graham v. McCoy*, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

— **For Torts:** See *Remington's Digest*, *Setoff*, § 4; *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421.

Estoppel or Waiver: See *Remington's Digest*, *Setoff*, § 5; *Maney v. Hart*, 11 Wash. 67, 39 Pac. 268; *Spaulding v. Burke*, 33 Wash. 679, 74 Pac. 829; *Perlus v. Market Investment Co.*, 95 Wash. 484, 164 Pac. 65.

SUBJECT MATTER—Nature of Indebtedness or Liability in General: See Remington's Digest, Setoff, § 7; Meeker v. Wren, 1 W. T. 73; Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317; Potwin v. Blacher, 9 Wash. 460, 37 Pac. 710; New Whatecom v. Bellingham Bay Imp. Co., 16 Wash. 138, 47 Pac. 1102; Gordon v. Decker, 19 Wash. 18, 52 Pac. 856; Peterson v. Johnson, 20 Wash. 497, 55 Pac. 932; Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; Singmaster v. Hall, 98 Wash. 134, 167 Pac. 136.

Tendency to Diminish or Defeat Plaintiff's Recovery: See Remington's Digest, Setoff, § 8; Ankeny v. Clark, 1 Wash. 549, 20 Pac. 583; Donaldson v. Brewster, 103 Wash. 65, 173 Pac. 1018.

Subsisting Right of Action of Defendant: See Remington's Digest, Setoff, § 9; Sheafe v. Hastie, 16 Wash. 563, 48 Pac. 246; Fishburne v. Merchants' Bank of Pt. Townsend, 42 Wash. 473, 85 Pac. 38, 7 Ann. Cas. 848.

Claims Arising Out of Same Contract or Transaction, or Connected With Subject of Action: See Remington's Digest, Setoff, § 11; Peters v. Lewis, 33 Wash. 617, 74 Pac. 815; Brodek v. Farnum, 11 Wash. 565, 40 Pac. 189; Niver v. Nash, 7 Wash. 558, 35 Pac. 380; Tacoma Mill Co. v. Perry, 32 Wash. 650, 73 Pac. 801; Codliss v. Dunning, 8 Wash. 332, 35 Pac. 1074; First Nat. Bank of Snohomish v. Parker, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828; Federal Iron & Brass Bed Co. v. Hock, 42 Wash. 668, 85 Pac. 418; Reynolds v. Dickson, 48 Wash. 407, 93 Pac. 910; Gilbert Co. v. Husted, 50 Wash. 61, 96 Pac. 835; Boston Tow Boat Co. v. Sesnon Co., 64 Wash. 375, 116 Pac. 1083.

In a landlord's action for rent, involving an accounting upon a cropping lease, in which it appeared that the landlord had collected the money due to the tenant for his part of the crop sold, the claim of the tenant therefor is a proper subject of counterclaim, arising out of the original contract of lease: Gentry v. Krause, 106 Wash. 474, 180 Pac. 474.

Causes of Action on Other and Distinct Contracts or Transactions: See Remington's Digest, Setoff, § 12; Hill v. Frink, 11 Wash. 562, 40 Pac. 128; Conner v. Scott, 16 Wash. 371, 47 Pac. 761; Kane v. Borthwick, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486; First National Bank v. Fowler, 54 Wash. 65, 162 Pac. 1038; Morrison v. Bernot, 58 Wash. 302, 108 Pac. 772; Hyde v. Clausin, 82 Wash. 218, 144 Pac. 50; Rubin v. Lucerne & Aurelia Crown R. Co., 87 Wash. 198, 151 Pac. 500; Russell v. Union Machinery & Supply Co., 88 Wash. 532, 153 Pac. 341; Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870; Evers v. Burbank Co., 97 Wash. 220, 166 Pac. 656;

Seattle v. Puget Sound Tr. L. & P. Co., 103 Wash. 41, 174 Pac. 464. See, also, Hendrickson v. Smith, 111 Wash. 82, 189 Pac. 550.

In an action to quiet title deeded by warranty deed intended as a mortgage, a demurrer is properly sustained to an affirmative defense the object of which was to change the action into one for an accounting: Manahan v. Aumiller, 110 Wash. 673, 188 Pac. 789.

Demands not Liquidated: See Remington's Digest, Setoff, § 13; Niver v. Nash, 7 Wash. 558, 35 Pac. 380; Shelton v. Conant, 10 Wash. 193, 38 Pac. 1013; Sheape v. Hastie, 16 Wash. 563, 48 Pac. 246.

Claims on Which Action is Pending: See Remington's Digest, Setoff, § 13-1; Veysey v. Thompson, 49 Wash. 571, 95 Pac. 1096.

Parties to and Mutuality of Cross-demands in General: See Remington's Digest, Setoff, § 14; Williams v. Miller, 1 W. T. 88.

Demands Against Codefendants and Joint and Several Claims: See Remington's Digest, Setoff, § 15; Brodek v. Farnum, 11 Wash. 565, 40 Pac. 189. See, also, Green v. Harris, 113 Wash. 259, 193 Pac. 690.

Setoffs and Counterclaims Against Receiver: See Remington's Digest, Receivers, § 40; Sheafe v. Hastie, 16 Wash. 563, 48 Pac. 246.

COUNTERCLAIM AND CROSS-COMPLAINT—Nature and Office of Pleading: See Remington's Digest, Plead., § 61; Caine v. Seattle & N. R. Co., 12 Wash. 596, 41 Pac. 904.

Matter of Setoff: See Remington's Digest, Plead., § 61-1; Jameson v. Kempton, 52 Wash. 106, 100 Pac. 186; Miller v. Commercial Union Assurance Co., 69 Wash. 529, 125 Pac. 782. See, also, Green v. Harris, 113 Wash. 259, 193 Pac. 690.

Counterclaim in Answer: See Remington's Digest, Plead., § 62; Newberg v. Farmer, 1 W. T. 182; Jaklewicz v. Lenhart, 86 Wash. 138, 149 Pac. 642.

Cross-complaint Against Plaintiff: See Remington's Digest, Plead., § 63; Distler v. Dabney, 7 Wash. 431, 35 Pac. 138, 1119; Northwestern & P. H. Bank v. Ridpath, 29 Wash. 687, 70 Pac. 139.

Cross-complaint Against Codefendant or Third Parties: See Remington's Digest, Plead., § 64; Hill v. Frink, 11 Wash. 562, 40 Pac. 128.

MATTER IN AVOIDANCE—Nature and Office of Pleading in Confession and Avoidance: See Remington's Digest, Plead., § 58; Roberts v. Center, 26 Wash. 435, 67 Pac. 151.

Statement of New or Affirmative Matter Constituting Defense: See Remington's Digest, Plead., § 59; McKenzie v. Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748; Lake

v. Steinbach, 5 Wash. 659, 32 Pac. 767; Wadhams v. Page, 6 Wash. 103, 32 Pac. 1068; Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117; Damon v. Leque, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927; Griffith v. Wright, 21 Wash. 494, 58 Pac. 582; Lord v. Miller, 86 Wash. 436, 150 Pac. 631; Northwest Land & Colonization Co. v. Ad-dington, 98 Wash. 576, 168 Pac. 164.

Necessity of designating plea as counterclaim. **Ann. Cas.** 1913A, 1079.

When may claim on which counterclaim is based be deemed to have arisen out of the contract or transaction upon which plaintiff's claim is founded, or be connected with the subject of plaintiff's action. **L. R. A.** 1916C, 445.

Counterclaims in tort in actions on contract. **L. R. A.** 1916C, 497.

Use of cross-bill or cross-complaint to bring in new parties. 26 **L. R. A. (N. S.)** 127.

Right to set up by cross-bill inequitable conduct of plaintiff in respect

of subject matter not involved in original bill. 13 **L. R. A. (N. S.)** 408.

Rule that recoupment is available to defendant only where he could enforce claim in action against plaintiff. **Ann. Cas.** 1914A, 386.

Necessity that setoff, recoupment or counterclaim should exist at time of commencement of action. 17 **Ann. Cas.** 425.

Right of surety or principal to interpose independent cause of action in favor of latter as defense or counterclaim. 18 **L. R. A. (N. S.)** 600.

Necessity that counterclaim based on contract arising out of independent transaction be such as to qualify or defeat plaintiff's claim. 12 **L. R. A. (N. S.)** 126.

Right to set up counterclaim or setoff against demand for wages which are exempt from execution. **Ann. Cas.** 1914A, 1183.

§ 266. Setoff, When Allowed.

The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him. [Cd. '81, § 497; 2 H. C., § 806.]

See notes to § 265.

Cited in 64 Wash. 379; 72 Wash. 141, 142; 94 Wash. 511, 518, 519.

Setoffs and counterclaims against assigned causes of action: See Remington's Digest, Setoff, §§ 16, 17; Kempe v. Johnson, 57 Wash. 154, 106 Pac. 619; King v. West Coast Grocery Co., 72 Wash. 132, 129 Pac. 1081. See, also, State ex rel. Alaska Pacific Navigation Co. v. Superior Court, 113 Wash. 439, 194 Pac. 412.

Availability as setoff or counterclaim in favor of one alone of several defendants. 10 **A. L. R.** 1252.

Right of party to set off claim assigned to him before suit. 19 **Ann. Cas.** 323.

Right to set off individual demand in action on joint and several note. 2 **Ann. Cas.** 600.

§ 267. Demand Against Beneficiary Set Off in Action by Trustee.

If the plaintiff be a trustee to any other, or if the action be in a name of the plaintiff who has no real interest in the contract upon which the action is founded, so much of a demand existing against those whom the plaintiff represents or for whose benefit the action is brought, may be set off as will satisfy the plaintiff's debt, if the same might have been

set off in an action brought by those beneficially interested. [Cd. '81, § 498; 2 H. C., § 807.]

Cited in 113 Wash. 441, 442, 444.

§ 268. Demand Against Decedent in Action by Executor.

In actions brought by executors and administrators, demands against their testators and intestates, and belonging to defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased. [Cd. '81, § 499; 2 H. C., § 808.]

In an action by an executor or administrator, a demand against the deceased, belonging to the defendant at the time of the death of plaintiff's decedent, may be offset without the defendant's having presented any claim therefor against the estate; but he is limited to the extinguishment of the debt if no claim has been presented against the estate: Fishburne

v. Merchant's Bank of Pt. Townsend, 42 Wash. 473, 85 Pac. 38, 7 Ann. Cas. 848; Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 17 Ann. Cas. 179, 21 L. R. A. (N. S.) 914.

Setoff by personal representative in action brought against him as such. 8 Ann. Cas. 307.

§ 269. Effect of Judgment Against Executor.

When a setoff shall be established in an action brought by executors or administrators, and a balance found due to the defendant, the judgment rendered thereon against the plaintiff shall have the same effect as if the action had been originally commenced by the defendant. [Cd. '81, § 500; 2 H. C., § 809.]

§ 270. Setoff in Action Against Executor.

In actions against executors and administrators and against trustees and others, sued in their representative character, the defendants may set off demands belonging to their testators or intestates or those whom they represent, in the same manner as the person so represented would have been entitled to set off the same, in an action against them. [Cd. '81, § 501; 2 H. C., § 810.]

§ 271. Setoff must be Pleaded.

To entitle a defendant to a setoff he must set the same forth in his answer. [Cd. '81, § 502; 2 H. C., § 811.]

§ 271½. Judgment for Balance Only.

If the amount of the setoff, duly established, be equal to the plaintiff's debt or demand, judgment shall be rendered that the plaintiff take nothing by his action; if it be less than the plaintiff's debt or demand, the plaintiff shall have judgment for the residue only. [Cd. '81, § 503; 2 H. C., § 812.]

Cited in 113 Wash. 441, 442, 444.

§ 272. No Judgment for Balance if Contract shall have been Assigned.

If there be found a balance due from the plaintiff in the action to the defendant, judgment shall be rendered in favor of the defendant for the amount thereof, but no such judgment shall be rendered against the plaintiff when the contract, which is the subject of the action, shall

have been assigned before the commencement of such action nor for any balance due from any other person than the plaintiff in the action. [Cd. '81, § 504; 2 H. C., § 813.]

Cited in 113 Wash. 441, 442, 444.

§ 273. Answer—Contents—Separate Statement of Defenses.

The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have heretofore been denominated legal or equitable, or both. They shall each be separately stated, and refer to the causes of action which they are intended to answer, in such a manner that they may be intelligibly distinguished. [L. '54, p. 140, § 45; Cd. '81, pt. of § 83; 2 H. C., pt. of § 195.]

Cited in 22 Wash. 10; 24 Wash. 329; 30 Wash. 482; 33 Wash. 621; 67 Wash. 357; 102 Wash. 308; 106 Wash. 306; 113 Wash. 442, 443, 444.

Pleading Different Defenses Together: See Remington's Digest, Plead., § 41; Hanna v. Reeves, 22 Wash. 6, 60 Pac. 62.

Pleading Inconsistent Defenses—In General: See Remington's Digest, Plead., § 42; Brown v. Porter, 7 Wash. 327, 34 Pac. 1105; Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; Allen v. Olympia Light & P. Co., 13 Wash. 307, 43 Pac. 55; Spencer v. Terrel, 17 Wash. 514, 50 Pac. 468; Davis v. Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526; Lord v. Horr, 30 Wash. 477, 71 Pac. 23; Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Bluett v. Wilce, 43 Wash. 492, 86 Pac. 853; Gerber v. Gerber, 52 Wash. 253, 100 Pac. 735; Hart-Parr Co. v. Keeth, 62 Wash. 464, 114 Pac. 169, Ann. Cas. 1912D, 243; Cooper v. Farmers & Merchants' Bank, 68 Wash. 310, 123 Pac. 465; Lord v. Wapato Irr. Co., 81

Wash. 561, 142 Pac. 1172; Nance v. Valentine, 99 Wash. 323, 169 Pac. 862. See, also, Betcher v. Kunz, 112 Wash. 563, 192 Pac. 955; Southern Alaska Canning Co. v. Smith, 113 Wash. 400, 194 Pac. 383.

Joinder of Denial and Affirmative Matter: See Remington's Digest, Plead., § 43; Lynch v. Richter, 10 Wash. 486, 39 Pac. 125; Seattle Nat. Bank v. Carter, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177; Lamberton v. Shannon, 13 Wash. 404, 43 Pac. 336; Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132; Pugh v. Oregon Imp. Co., 14 Wash. 331, 44 Pac. 547, 689; Davis v. Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393; Olympia v. Stevens, 15 Wash. 601, 47 Pac. 11; Loveland v. Jenkins-Boys Co., 49 Wash. 369, 95 Pac. 490; Bowers v. Good, 52 Wash. 384, 100 Pac. 848; Kimble v. Stackpole, 60 Wash. 35, 110 Pac. 677, 35 L. R. A. (N. S.) 148; Gibson v. Feeney, 66 Wash. 531, 120 Pac. 97; Williams v. Wright, 68 Wash. 341, 123 Pac. 446; Bunck v. McAulay, 84 Wash. 473, 147 Pac. 33; National Surety Co. v. Fry Co., 86 Wash. 118, 149 Pac. 637.

§ 274. Demur to One or More Causes and Answer the Residue.

The defendant may demur to one or more of several causes of action stated in the complaint, and answer the residue. [L. '54, p. 140, § 46; Cd. '81, § 84; 2 H. C., § 196.]

§ 275. Answer may be Stricken.

Sham, frivolous, and irrelevant answers and defenses may be stricken out on motion, and upon such terms as the court may in its discretion impose. [Cf. L. '54, p. 140, § 47; L. '69, p. 21, § 83; Cd. '81, § 85; 2 H. C., § 197.]

Cited in 4 Wash. 59.

Where the answer contains superfluous matter, this defect can only be reached by motion, and not by demurrer: Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976.

In the particular case, held error to strike certain paragraphs from answer: Distler v. Dabney, 7 Wash. 431, 35 Pac. 138, 1119.

In an action for breach of contract to clear land, an answer which admits the contract, but denies a breach thereof, and shows affirmatively the defendants were proceeding with due performance thereof until requested by plaintiff to desist, cannot be said to be either sham, frivolous or immaterial: Brown v. Porter, 7 Wash. 327, 34 Pac. 1105.

A general denial of the material allegations of a complaint cannot be stricken out on the ground that it is a sham or frivolous pleading: *Larsen v. Winder*, 14 Wash. 647, 45 Pac. 315.

A sham pleading is one good in form but false in fact: *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105.

A denial of payment on certain particular dates is sham: *Distler v. Dabney*, 7 Wash. 431, 35 Pac. 138, 1119.

Motion to strike a motion will not be allowed: *Mann v. Young*, 1 W. T. 454.

A refusal to strike out a pleading cannot be reviewed where a new pleading was filed and no exception taken: *Kratz v. Dawson*, 3 W. T. 100, 13 Pac. 663.

Where a party refuses to answer interrogatories, the only judgment authorized is one of dismissal of his action, where no default is taken for his failure to reply to an affirmative defense, and no proof is introduced in support of the matters alleged in such defense: *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81.

The failure of a defendant in a divorce case to comply with an order for the payment of alimony and suit money to the plaintiff will not warrant the court in striking the defendant's answer: *Bachelor v. Bachelor*, 30 Wash. 639, 71 Pac. 193.

It is not error to strike an answer in a proceeding in which none is required to be filed: *State ex rel. Ami Co. v. Superior Court*, 42 Wash. 675, 85 Pac. 669.

Insufficient allegations or denials are not grounds for striking an answer: See *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063; *Silsby v. Tacoma etc. R. Co.*, 6 Wash. 295, 32 Pac. 1067.

It is proper to strike an amended answer containing the same matters as the original answer held bad on demurrer: See *Noyes v. Longhead*, 9 Wash. 325, 37 Pac. 452. See, also, *Rochford v. Doty*, 37 Wash. 232, 79 Pac. 782.

Striking out general denial as sham or frivolous. **Ann. Cas.** 1917D, 1177.

§ 276. Demur to Answer—Reply.

The plaintiff may demur to an answer containing new matter, when it appears upon the face thereof that such new matter does not constitute a defense or counterclaim, or he may for like cause demur to one or more of such defenses or counterclaims, and reply to the residue. [L. '54, p. 140, § 48; L. '69, p. 22, § 85; Cd. '81, § 87; 2 H. C., § 198.]

Since the enactment of this section in 1854 the grounds of demurrer extended to defendant by section 259 supra, have been enlarged, but the grounds open to plaintiff are confined to this section: See on this subject, *Pom. Rem.*, §§ 586, 595.

If an answer to a complaint raises material issues upon the matters alleged therein, it is not demurrable for want of facts: *Bennett v. Tacoma L. & W. Co.*, 3 Wash. 337, 28 Pac. 520.

An objection that answer does not state facts sufficient to constitute a defense is more properly raised by demurrer than by an objection to the evidence: *Anderson v. Carothers*, 18 Wash. 520, 52 Pac. 229.

No reply is necessary where by stipulation the facts are admitted, or where

the allegations in an answer amount to mere denials: *Fife v. Olson*, 5 Wash. 789, 32 Pac. 766; *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

A plaintiff is not called upon to reply to an affirmative defense while his demurrer to a special defense remains undetermined: *Ewing v. Van Wagenen*, 6 Wash. 39, 32 Pac. 1009.

An affirmative defense setting up a different version of a contract than that alleged in the complaint cannot be construed as adding more than a general denial already made, and hence is properly demurrable: *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586.

§ 277. Reply—Contents—New Matter.

When the answer contains new matter constituting a defense or counterclaim, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him, or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to such new matter in the answer. [Cf. L. '54, p. 140, § 48; L. '69, p. 22, § 84; L. '77, p. 19, § 86; Cd. '81, § 86; 2 H. C., § 199.]

Cited in 3 Wash. 204; 15 Wash. 115; 17 Wash. 674; 51 Wash. 445.

REPLICATION OR REPLY—Necessity for Pleading in Reply—In General: See Remington's Digest, Plead., § 65; Fife v. Olson, 5 Wash. 789, 32 Pac. 766; Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009; Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318; Hester v. Stone, 46 Wash. 469, 90 Pac. 594; Dueber v. Wolfe, 47 Wash. 634, 92 Pac. 455; Wohlforth v. Kuppler, 77 Wash. 339, 137 Pac. 477.

— **New Matter in Answer:** See Remington's Digest, Plead., § 67; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886; Fife v. Olson, 5 Wash. 789, 32 Pac. 766; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767; Frank v. Jenkins, 11 Wash. 611, 40 Pac. 220; Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

Matters Arising After Commencement of Suit and Before Replication or Reply: See Remington's Digest, Plead., § 68; Boyle v. Great Northern R. Co., 13 Wash. 383, 43 Pac. 344.

Under this section, if a counterclaim be not barred by the statute of limitations at the commencement of the action in which it is pleaded, it does not become so afterward during the pendency of that action: Shelton v. Conant, 10 Wash. 193, 38 Pac. 1013.

Time for Filing or Service: See Remington's Digest, Plead., § 69; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81; Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287; Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740.

Form and Requisites of Reply: See Remington's Digest, Plead., § 70; Hill v. Young, 7 Wash. 33, 34 Pac. 144.

Traverses or Denials: See Remington's Digest, Plead., § 71; Davis v. Oldaks, 3 W. T. 593, 19 Pac. 150; Ryan v. Lambert, 49 Wash. 649, 96 Pac. 232.

Admissions: See Remington's Digest, Plead., § 72; Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. 133, 23 Pac. 928; Johnson v. Maxwell, 2 Wash. 482, 27 Pac. 1071; Childs Lum. & Mfg. Co. v. Page, 32 Wash. 250, 73 Pac. 353; Collier v. Great Northern R. Co., 40 Wash. 639, 82 Pac. 935. See, also, Strang v. Person, 108 Wash. 503, 185 Pac. 944.

Departure from Complaint: See Remington's Digest, Plead., § 73; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886; Distler v. Dabney, 3 Wash. 200, 28 Pac. 335; Bell v. Waudby, 4 Wash. 743, 31 Pac. 18; Clark v. Sherman, 5 Wash. 681, 32 Pac. 771. Osten v. Winehill, 10 Wash. 333, 38 Pac. 1123; Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Gile v. Baseel, 38 Wash. 212, 80 Pac. 437; Erickson v. McLellan & Co., 46 Wash. 661, 91 Pac. 249; Smart v. Burquoin, 51 Wash. 274, 98 Pac. 666; Ferrandini v. Bankers' Life Assn., 51 Wash. 442, 99 Pac. 6; Clemmons v. McGeer, 63 Wash. 446, 115 Pac. 1081; Ford v. Aetna Life Ins. Co., 70 Wash. 29, 126 Pac. 69; Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co., 73 Wash. 403, 131 Pac. 1156, 45 L. R. A. (N. S.) 40; Linsted v. National Casualty Co., 73 Wash. 624, 132 Pac. 403; Crab Creek Lumber Co. v. Town of Othello, 81 Wash. 52, 142 Pac. 429; Bjornsen v. Northern Pac. R. Co., 84 Wash. 220, 146 Pac. 575; Perlus v. Market Investment Co., 95 Wash. 484, 164 Pac. 65.

Where plaintiffs, lessors, sued to recover possession of leased premises, alleging that the lease had expired, and defendants answered that they had elected to and were holding under their option to renew the lease for a further term, a reply alleging defendants' breach of conditions of the lease forfeiting their right to a renewal does not constitute a departure in pleadings: Henry v. Bruhn & Henry, 110 Wash. 321, 188 Pac. 506.

— **New Matter not Inconsistent With Complaint:** See Remington's Digest, Plead., § 74; Ankeny v. Clark, 1 Wash. 549, 20 Pac. 583; Commercial Electric Light & P. Co. v. Tacoma, 17 Wash. 661, 50 Pac. 392; Childs Lum. & Mfg. Co. v. Page, 32 Wash. 128, 68 Pac. 373; McCorkle v. Malory, 30 Wash. 632, 71 Pac. 186; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791; Duncan v. Parker, 81 Wash. 340, 142 Pac. 657, L. R. A. 1915A, 804.

Necessity of reply where answer pleads statute of limitations. **Ann. Cas.** 1914D, 892.

Departure in reply in actions for conversion. **8 L. R. A. (N. S.)** 291.

§ 278. Judgment for Failure to Plead to New Matter.

If the answer contain a statement of new matter constituting a defense or counterclaim, and the plaintiff fail to reply or demur thereto within the time prescribed by law, the defendant may move the court for such judgment as he is entitled to on the pleadings, and if the case require it, he may have a jury called to assess the damages. [Cf. L. '54, p. 140, § 49; L. '69, p. 22, § 86; Cd. '81, § 88; 2 H. C., § 200.]

Cited in 4 Wash. 373; 5 Wash. 662; 108 Wash. 507.

Under this section, read in connection with other parts of the Practice Act al-

lowing amendments, relief from defaults, and for trial on the merits when justice demands it, a reply admitting the mutual rescission of an executory contract for the sale of lands does not conclusively presume an obligation to return the purchase price so as to entitle defendant to judgment on the pleadings: *Strang v. Person*, 108 Wash. 503, 185 Pac. 944.

Where defendant set up a mutual rescission of an executory contract, a reply admitting that the contract was "rescinded and forfeited" and denying that defendant was damaged, is not such an unqualified admission of the facts as to entitle plaintiff to judgment on the pleadings, after a trial on the merits, in view of the power of the court to relieve from defaults or consider the pleading amended to conform to proofs: *Strang v. Person*, 108 Wash. 503, 185 Pac. 944.

If the answer fails to controvert the material allegations of the complaint, plaintiff is entitled to judgment for failure to answer, although plaintiff may have filed a reply to such defective answer: *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328; such judgment is not technically a judgment on the pleadings, but a judgment authorized by § 411, *infra*, on failure to answer; *Id.*; see *Dillon v. Spokane Co.*, 3 W. T. 498, 17 Pac. 889; *King v. Ilwaco R. & N. Co.*, 1 Wash. 127, 23 Pac. 924; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767.

It is only to new matter, inconsistent with the complaint, that reply is necessary: See *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767; *Frank v. Jenkins*, 11 Wash. 611, 40 Pac. 220.

An affirmative answer to which there is no reply operates as a finding of the court: *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

Judgment on pleadings is erroneous, when grounded on plaintiff's failure to reply to an allegation of the answer which is merely a denial of a corresponding allegation of the complaint: *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

Judgment on the pleadings is not authorized where a reply, though insufficient in law, has actually been filed to the affirmative matter in the answer: *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

Where a plea of another action pending has been interposed, a reply that, subsequent to the filing of the plea, the suit whose pendency was alleged had been dismissed is good against demurrer: *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344.

Judgment on insufficient reply: *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

Where the burden of an issue is on defendant, judgment in his favor on the pleadings is not warranted: *Hoshor v. Kautz*, 19 Wash. 258, 53 Pac. 51.

A defect in the complaint in failing to state a cause of action does not justify a final judgment for defendant on the merits after plaintiff's opening statement to the jury, and the sufficiency of the complaint will not be considered upon appeal from such a judgment: *Redding v. Puget Sound Iron etc. Works*, 36 Wash. 642, 79 Pac. 308.

Admissions by plaintiff of affirmative defenses pleaded by defendant warrants a judgment in his favor on the pleadings: *Rockford Shoe Co. v. Jacob*, 6 Wash. 421, 33 Pac. 1057.

While the sufficiency of pleadings should not generally be tested by motion for judgment thereon, the practice is proper where it is apparent that no technical objection is made and that the pleadings are incapable of amendment, and the parties elect to stand thereon for that reason: *Hubenthal v. Spokane etc. R. Co.*, 43 Wash. 677, 86 Pac. 955.

Immaterial variance between the proof and pleadings does not warrant a judgment in favor of defendant where the pleadings can be amended without prejudice to him: See *Ernst v. Fox*, 26 Wash. 526, 67 Pac. 258.

On motion for judgment on the pleadings, the allegations of complaint and reply are admitted notwithstanding denials of the answer: *Fishburne v. Merchants' Bank*, 42 Wash. 473, 85 Pac. 38, 7 Ann. Cas. 848. A claim in the reply of a rescission of a lease set up in the answer is within the issues: *Snyder v. Harding*, 34 Wash. 286, 75 Pac. 812.

Objections to the sufficiency of denials in the answer will be deemed waived unless seasonably made: *Howard v. Hibbs*, 22 Wash. 513, 61 Pac. 159.

§ 279. Demurrer or Motion to Reply.

The defendant may demur to any new matter contained in the reply, when it appears upon the face thereof that such new matter is not a sufficient reply to the facts stated in the answer. Sham, frivolous, and irrelevant replies may be stricken out in like manner and on the same terms as like answers and defenses. [Cf. L. '54, p. 140, § 50; L. '69, p. 22, § 87; Cd. '81, § 89; 2 H. C., § 201.]

When one portion of a reply to an affirmative defense set up in the answer, which alleges a contract between the parties authorizing the acts complained of, admits such contract, another portion of the reply denying the contract, on the ground that plaintiff had no power to make it, should be stricken out on motion

of the defendant therefor: *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

It is proper to sustain a demurrer to a reply which does not traverse the affirmative matters of an answer: *Hughes v. New York Life Ins. Co.*, 32 Wash. 1, 72 Pac. 452.

§ 280. Court Rules Fixing Time for Pleading.

The court shall establish the rules prescribing the time in which pleadings subsequent to the complaint shall be filed. [L. '57, p. 10, § 10; Cd. '81, § 90; 2 H. C., § 202; see Const., Art. IV, § 24.]

Cited in 4 Wash. 325.

The appellate court will not take judicial notice of the rules of the superior

courts adopted in pursuance of this section: *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81.

CHAPTER VIII.

VERIFICATION OF PLEADINGS.

§ 281. Subscription and Verification of Pleadings.

Every pleading shall be subscribed by the party or his attorney, and except a demurrer, shall also be verified by the party, his agent or attorney, to the effect that he believes it to be true. The verification must be made by the affidavit of the party, or if there be several parties united in interest and pleading together, by one at least of such parties, if such party be within the county and capable of making the affidavit; otherwise the affidavit may be made by the agent or attorney of the party. The affidavit may also be made by the agent or attorney if the action or defense be founded on a written instrument for the payment of money only, and such instrument be in the possession of the agent or attorney, or if all the material allegations of the pleading be within the personal knowledge of the agent or attorney. When the affidavit is made by the agent or attorney, it must set forth the reason of his making it. When a corporation is a party, the verification may be made by any officer thereof, upon whom service of a notice [summons] might be made; and when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person to whom all the material allegations of the pleading are known. When the party is absent from or a non-resident of the county in which suit is brought, the verification may be made by the agent or attorney of said party. [Cf. L. '54, p. 141, §§ 53, 54; L. '67, p. 92, § 1; L. '69, p. 23, § 89; Cd. '81, § 91; L. '88, p. 29, § 1; 2 H. C., § 203.]

Cited in 11 Wash. 126; 40 Wash. 212.

VERIFICATION—Sufficiency and Requirements: See *Remington's Digest*, Plead., §§ 129—131; *Burdick v. Burdick*, 7 Wash. 533, 35 Pac. 415; *Cady v. Case*, 11 Wash. 124, 39 Pac. 375; *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369.

Sufficiency of verification to pleading by person other than party to action. 7 A. L. R. 4.

Necessity of showing authority or qualification of affiant in affidavit made in behalf of corporation. 3 A. L. R. 132.

Waiver of verification of pleading. *Ann. Cas.* 1918D, 440.

Manner and sufficiency of verification of pleading by corporation. *Ann. Cas.* 1913A, 212.

§ 282. Verification may be Omitted.

When, in the judgment of the court, an answer to an allegation in any pleading might subject the party answering to a criminal prosecution, the verification of the answer to such allegation may be omitted. No pleading shall be used in a criminal prosecution against the party as evidence of a fact alleged in such pleading. [Cf. L. '54, p. 141, § 54; L. '69, p. 23, § 90; Cd. '81, § 92; 2 H. C., § 204.]

Cited in 13 Wash. 8.

§ 283. Pleadings are not Proof on Trial.

Pleadings sworn to by either party in any case shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party. [L. '54, p. 219, § 484; Cd. '81, § 741; 2 H. C., § 792.]

Cited in 3 Wash. 237; 54 Wash. 132; 55 Wash. 309.

The pleadings of a party may be introduced in evidence against him and its admissions therein are conclusive unless shown to have been made under a mistake: Oregon R. & N. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415.

While an original complaint does not cease to be a part of the record by reason of the filing of an amended complaint, nevertheless the plaintiff cannot avail himself of any allegations contained in the original complaint, although his adversary may: Sengfelder v. Hill, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep. 36.

It is not error to exclude evidence of facts which are admitted: Charlton v. Markland, 36 Wash. 40, 78 Pac. 132.

As to the admissibility of verified pleadings in evidence and their effect, see Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. 133, 23 Pac. 928; Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098; Goldwater v. Burnside, 22 Wash. 215, 60

Pac. 409; Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596. As to admissibility of bill of particulars, see American Copper etc. Works v. Galland-Burke B. & M. Co., 30 Wash. 178, 70 Pac. 236.

Where an allegation of an amended complaint is not denied by the answer, it is error to permit the introduction in evidence of the first complaint in the action, which contains an allegation contrary to the allegation of the amended complaint admitted as true by the answer: Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409.

The rule as to the amount of testimony necessary to overcome a sworn answer in chancery is abrogated by this section: Lee v. Lee, 3 Wash. 236, 28 Pac. 355.

Pleading superseded by amended pleading as admissible in evidence against pleader. *Ann. Cas.* 1913A, 1132.

Admissibility of abandoned pleading in evidence against pleader. 18 *Ann. Cas.* 83.

CHAPTER IX.**GENERAL RULES OF PLEADING.****§ 284. Pleading Written Instruments and Accounts—Bill of Particulars.**

It shall not be necessary for a party to set forth in a pleading a copy of the instrument of writing, or the items of an account therein alleged; but unless he file a verified copy thereof with such pleadings, and serve the same on the adverse party, he shall, within ten days after a demand thereof in writing, deliver to the adverse party a copy of such instrument of writing, or the items of an account, verified by his own oath, or that of his agent or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof. The court, or judge thereof, may order a further account, when the one delivered is defective, and the court may, in all cases, order a bill of particulars of the claim of either party to be furnished. [L. '54, p. 142, § 55; Cd. '81, § 93; 2 H. C., § 205.]

Cited in 2 Wash. 342; 3 Wash. 769; 15 Wash. 217; 25 Wash. 665; 35 Wash. 195; 43 Wash. 221; 72 Wash. 207; 96 Wash. 55; 97 Wash. 151; 108 Wash. 95.

Pleading Written Instruments: See Remington's Digest, Plead., § 14; Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103.

Production and Inspection of Written Instrument Referred to in Pleading: This section has no application to a copy of the notice of the time, place, and injury required by the factory act to be given to an employer upon an injury to a servant on unguarded machinery, which is merely a condition precedent to action, and not the basis of the liability: Mathis v. Western Furniture Mfg. Co., 72 Wash. 206, 130 Pac. 94.

A motion for an order requiring defendants to furnish a copy of a written contract pleaded by them is a sufficient "demand in writing" within this section and is "upon notice," within section 1262 *infra*: Gates v. Herr, 102 Wash. 131, 172 Pac. 912.

Damages for breach of a land contract, claimed upon a cross-complaint, are not "items of account" within this section: Kelly v. Hinkhouse, 108 Wash. 93, 183 Pac. 86.

BILL OF PARTICULARS—Nature and Office: See Remington's Digest, Plead., § 133; Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Eckhart v. Peterson, 94 Wash. 379, 162 Pac. 551.

The object of a bill of particulars or the items of an account is to apprise the defendant of the nature and extent of the cause of action in order that he may, with greater certainty, plead thereto: Ferry v. King County, 2 Wash. 337, 26 Pac. 537.

Right to Particulars in General: See Remington's Digest, Plead., § 134; Turner v. Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883; Blackburn v. Washington Gold Min. Co., 19

Wash. 361, 53 Pac. 369; Ingram v. Wishkah Boom Co., 35 Wash. 191, 77 Pac. 34; Thorp v. Ramsey, 51 Wash. 530, 99 Pac. 584; Bellingham v. Linck, 53 Wash. 208, 101 Pac. 843; Switzer v. Sherwood, 80 Wash. 19, 141 Pac. 181, Ann. Cas. 1917A, 216; Neal v. Phoenix Lumber Co., 64 Wash. 523, 117 Pac. 267.

Knowledge of Parties as to Subject Matter: See Remington's Digest, Plead., § 135; Ferry v. King County, 2 Wash. 337, 26 Pac. 537; Messick v. National Council of Knights & Ladies of Security, 103 Wash. 143, 173 Pac. 940.

Ability to Furnish Particulars: See Remington's Digest, Plead., § 136; Isham v. Parker, 3 Wash. 755, 29 Pac. 835; Plummer v. Weil, 15 Wash. 427, 46 Pac. 648; Sanborn v. Dentler, 97 Wash. 149, 166 Pac. 62.

Application for Bill, and Proceedings Thereon: See Remington's Digest, Plead., § 137; Howells v. North American T. & T. Co., 24 Wash. 689, 64 Pac. 786; American Copper etc. Works v. Galland-Burke etc. Co., 30 Wash. 178, 70 Pac. 236; Goupille v. Chaput, 43 Wash. 702, 86 Pac. 1058.

Form and Requisites of Bill: See Remington's Digest, Plead., § 137-1; Moore v. Scharnikow, 48 Wash. 564, 94 Pac. 117; Carstens v. Nut House, 96 Wash. 50, 164 Pac. 770.

Amendment of Bill: See Remington's Digest, Plead., § 138; Plummer v. Weil, 15 Wash. 427, 46 Pac. 648.

Right under statute to an order for the examination of an adverse party to enable one to frame a bill of particulars. **L. B. A.** 1918C, 599.

Bills of particulars in negligence actions. 3 **Ann. Cas.** 161; **Ann. Cas.** 1916B, 105.

Right to bill of particulars in libel or slander action. **Ann. Cas.** 1915C, 1266.

§ 285. Pleadings Liberally Construed.

In the construction of a pleading, for the purpose of determining its effect, its allegation [s] shall be liberally construed, with a view to substantial justice between the parties. [L. '54, p. 142, § 56; Cd. '81, § 94; 2 H. C., § 206.]

Cited in 4 Wash. 59; 11 Wash. 363; 27 Wash. 104; 35 Wash. 684; 65 Wash. 67; 79 Wash. 494; 81 Wash. 36; 89 Wash. 439; 90 Wash. 434; 99 Wash. 365; 107 Wash. 277.

Liberal Construction of Complaints Under This Section: See Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599; Rochfort v. Quikstad, 90 Wash. 432, 156 Pac. 522; and cases *infra*.

Construction—In General: See Remington's Digest, Plead., § 16; Renton v. St.

Louis, 1 W. T. 215; Chambers v. Hoover, 3 W. T. 107, 13 Pac. 466; Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Grout v. Tacoma Eastern R. Co., 33 Wash. 524, 74 Pac. 665; Sackman v. Campbell, 15 Wash. 57, 45 Pac. 895; First Nat. Bank of Pullman v. Young, 20 Wash. 337, 55 Pac. 215; Malloy v. Benway, 34 Wash. 315, 75 Pac. 869; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849.

— **General and Specific Allegations:** See Remington's Digest, Plead., § 17; Mal-

lov v. Benway, 34 Wash. 315, 75 Pac. 869; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849.

— **Particular Words and Phrases:** See Remington's Digest, Plead., § 18; Boyle v. Great Northern R. Co., 13 Wash. 383, 43 Pac. 344.

— **Objections Raised at Trial:** See Remington's Digest, Plead., § 19; Townsend v. Price, 19 Wash. 415, 53 Pac. 668; Walsh v. Meyer, 40 Wash. 650, 82 Pac. 938.

— **Objections Raised After Verdict or Judgment:** See Remington's Digest, Plead., § 20; King v. Ilwaco R. & Nav. Co., 1 Wash. 127, 23 Pac. 924; Montesano v. Blair, 12 Wash. 188, 40 Pac. 731; Bishop v. Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024; Mosher v. Bruhn, 15 Wash. 332, 46 Pac. 397; Hall v. Woolery, 20 Wash. 440, 55 Pac. 562; Carey v. Hays, 41 Wash. 580, 84 Pac. 581.

— **Objections Raised on Appeal:** See Remington's Digest, Plead., § 21; Lyon v. Bond, 3 W. T. 407, 19 Pac. 35; Island County v. Babcock, 17 Wash. 438, 50 Pac.

54; State ex rel. Sander v. Jones, 20 Wash. 576, 56 Pac. 369; Turner v. Turner, 33 Wash. 118, 74 Pac. 55.

Conclusiveness of Allegations on Party Pleading: See Remington's Digest, Plead., § 22; Tingley v. Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409.

In an action to recover prospective profits from a contract to furnish hotel garbage for fattening hogs, the defendant cannot claim that the consequences were not within the contemplation of the parties, where his answer admits facts showing notice of the purpose for which the garbage was to be used: Nelson v. Davenport, 108 Wash. 259, 183 Pac. 132.

Construction of complaint framed on theory of cause ex delicto as permitting trial as action ex contractu. 8 Ann. Cas. 529.

Rule that alternative allegations in pleading neutralize each other. Ann. Cas. 1914A, 1239.

§ 286. Irrelevant, Redundant and Indefinite Matter, How Objected to.

If irrelevant or redundant matter be inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby; and when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment, or may dismiss the same. [L. '54, p. 142, § 57; Cd. '81, § 95; 2 H. C., § 207.]

Cited in '10 Wash. 540; 43 Wash. 221; 98 Wash. 568; 108 Wash. 38.

This section is applicable to petitions necessary in probate practice: Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145.

Matters of Presumption or Implication: See Remington's Digest, Plead., § 4; Chambers v. Hoover, 3 W. T. 107, 13 Pac. 466; Distler v. Dabney, 3 Wash. 200, 28 Pac. 335; Duryee v. Friars, 18 Wash. 55, 50 Pac. 583; Johnson v. Cook, 24 Wash. 474, 64 Pac. 729; Gehres v. Orlowski, 36 Wash. 156, 78 Pac. 792.

Matters of Fact or Conclusions: See Remington's Digest, Plead., § 5; Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372; Ritchie v. Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877; Baker-Boyer Nat. Bank v. Hughson, 5 Wash. 100, 31 Pac. 423; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767; State ex rel. Whitney v. Friars, 10 Wash. 348, 39 Pac. 104; Bay View Brewing Co. v. Grubb, 24 Wash. 163, 63 Pac. 1091; Mason v. McGee, 15 Wash. 272, 46 Pac. 237; Livingston v. Lovgren, 27 Wash. 102, 67 Pac. 599; Brummett v. Campbell, 32 Wash. 358, 73 Pac. 403; Macmartin v. Stevens, 37 Wash. 616, 79 Pac. 1099; Hotchkin v. Bussell, 46 Wash. 7, 89 Pac. 183; Martin v. Olympia, 69 Wash.

28, 124 Pac. 214; State ex rel. Craig v. Newport, 70 Wash. 286, 126 Pac. 637; Simpson Logging Co. v. Chehalis County, 80 Wash. 245, 141 Pac. 344.

Conclusions of Law from Facts Alleged: See Remington's Digest, Plead., § 6; Andrews v. Kings County, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136; Spokane St. R. Co. v. Spokane, 5 Wash. 634, 32 Pac. 456; Murdoch v. Leonard, 15 Wash. 142, 45 Pac. 751; Carlson v. County Commrs., 38 Wash. 616, 80 Pac. 795. See, also, Hart v. King County, 104 Wash. 485, 177 Pac. 344; Miller v. Kemper, 107 Wash. 274, 181 Pac. 859; Pearson v. Gottstein Inv. Co., 112 Wash. 60, 191 Pac. 796.

Matters of Evidence: See Remington's Digest, Plead., § 7; Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145; Stephens v. Spokane, 11 Wash. 41, 39 Pac. 266.

Certainty and Positiveness and Ambiguity: See Remington's Digest, Plead., §§ 8, 9; Roeder v. Brown, 1 W. T. 112; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Goore v. Goore, 24 Wash. 139, 63 Pac. 1092; Hastings v. Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776; Woodcock v. Guy, 33 Wash. 234, 74 Pac. 358.

Consistency or Repugnancy: See Remington's Digest, Plead., § 10; Tingley v. Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098; Arrowsmith v. Nelson, 73 Wash. 658, 132 Pac. 743.

Irrelevancy: See Remington's Digest, Plead., § 11; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886.

Falsity: See Remington's Digest, Plead., § 12; Brown v. Porter, 7 Wash. 327, 34 Pac. 1105; Distler v. Dabney, 7 Wash. 431, 35 Pac. 138, 1119.

Striking Out Irrelevant or Redundant Matter: See Remington's Digest, Plead., § 157; Hays v. Parker, 2 W. T. 198, 3 Pac. 901; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886; Lee v. Lee, 3 Wash. 236, 28 Pac. 355; Allen v. Olympia Light & P. Co., 13 Wash. 307, 43 Pac. 55; Hatch v. Tacoma, Olympia, etc. R. Co., 6 Wash. 1, 32 Pac. 1063; Guarantee Loan & T. Co. v. Galliher, 12 Wash. 507, 41 Pac. 887; State v. Lorenz, 22 Wash. 289, 60 Pac. 644; Williams v. Nine-mire, 23 Wash. 393, 63 Pac. 534; Jordan v. Coulter, 30 Wash. 116, 70 Pac. 257; Rand-McNally & Co. v. Royal, 36 Wash. 420, 78 Pac. 1103; Tait v. Pigott, 38 Wash. 59, 80 Pac. 172. See, also, Linville v. Wiedrich, 108 Wash. 1, 182 Pac. 578.

Making More Definite and Certain—In general: See Remington's Digest, Plead., § 158; Renton v. St. Louis, 1 W. T. 215; Puget Sound Iron Co. v. Worthington, 2 W. T. 472, 7 Pac. 882, 886; Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; McClure v. Review Pub. Co., 38 Wash. 160, 80 Pac. 303; O'Brien v. Seattle Ice Co., 43 Wash. 217, 86 Pac. 399. See, also, Connecticut Investment Co. v. Yokom, 106 Wash. 693, 180 Pac. 926.

Insufficiency and Indefiniteness of Complaint, in General: See Remington's Digest, Plead., § 159; Boyer v. Robison, 43 Wash. 97, 86 Pac. 385; Columbia & Puget Sound R. Co. v. Hawthorne, 3 W. T. 353, 19 Pac. 25; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Fares v. Gleason, 14 Wash. 657, 45 Pac. 314; Waldo v. Milroy, 19 Wash. 156, 52 Pac. 1012; Croft v. Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42; Hall v. Law Guarantee & T. Soc., 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Isaacs v. Holland, 4 Wash. 54, 29 Pac. 976; Weiser v. Holzman, 33 Wash. 87, 73 Pac. 797, 99 Am. St. Rep. 932; Helbig v. Grays Harbor Elec. Co., 37 Wash. 130, 79 Pac. 612; Berg v. Humptulips Boom etc. Co., 38 Wash. 342, 80 Pac. 528; Ekstrand v. Barth, 41 Wash. 321, 83 Pac. 305; Goupille v. Chaput, 43 Wash. 702, 86 Pac. 1058; Washington Dredging & Imp. Co. v. Cannel Coal Co., 45 Wash. 462, 88 Pac. 836; Thorp v. Ramsey, 51 Wash. 530, 99 Pac. 584; Bernot v. Morrison, 81 Wash. 538, 143 Pac. 104, Ann. Cas. 1916D, 290; Just v. Littlefield, 87 Wash. 299, 151 Pac. 780, Ann. Cas. 1917D, 705; Evans v. Goist, 90 Wash. 100, 155 Pac. 780.

Application and Proceedings Thereon: See Remington's Digest, Plead., § 161; Isham v. Parker, 3 Wash. 755, 29 Pac. 835; Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145; Griffith v. Wright, 21 Wash. 494, 58 Pac. 582; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Dick v. Northern Pac. R. Co., 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638; Rightor v. Ward, 87 Wash. 621, 152 Pac. 332; Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59.

§ 287. Judgments of Inferior Courts, How Pleased.

In pleading a judgment or other determination of a court or office[r] of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction. [L. '54, p. 142, § 58; Cd. '81, § 96; 2 H. C., § 208.]

Cited in 18 Wash. 99; 45 Wash. 422; 104 Wash. 462.

A complaint alleging that a city, "through its duly constituted officers, determined" that plaintiff's place of business constituted a nuisance, will not by inference be considered as alleging that any court of the city, or that the city

council by ordinance, had determined the fact; in view of this section as to the manner of pleading such a determination, and section 291, providing for the pleading of an ordinance by title and date of passage: Hotel Cecil Co. v. Seattle, 104 Wash. 460, 177 Pac. 347.

§ 288. Conditions Precedent, How Pleased.

In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance,

but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance. [L. '54, p. 142, § 59; Cd. '81, § 97; 2 H. C., § 209.]

Cited in 42 Wash. 307; 50 Wash. 662, 663.

This section has reference only to conditions precedent or necessary to the creation of the contract or to the perfecting

of the right of action, and not to conditions subsequent: *Port Blakely Mill Co. v. Hartford Fire Ins. Co.*, 50 Wash. 657, 97 Pac. 781.

§ 289. Private Statutes, How Pleased.

In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof. [L. '54, p. 142, § 60; Cd. '81, § 98; 2 H. C., § 210.]

Cited in 21 Wash. 350.

Pleading Foreign Statutes: See *Remington's Digest*, Statut., § 93; *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209; *Gunderson v. Gunderson*, 25 Wash. 459, 65 Pac. 791; *Stewart's Estate*, In re, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884; *Lowry v. Moore*, 16 Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49; *Cunningham v.*

Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113; *Mantle v. Dabney*, 44 Wash. 193, 87 Pac. 122; *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916; *State v. Collins*, 69 Wash. 268, 124 Pac. 903; *Lagomarsino v. Pacific Alaska Navigation Co.*, 100 Wash. 105, 170 Pac. 368; *Lipsett v. Dettering*, 94 Wash. 629, 162 Pac. 1007; *Matson v. Kennecott Mines Co.*, 101 Wash. 12, 171 Pac. 1040.

§ 290. Existence of City or Town, How Pleased.

In pleading the existence of any city or town in this state, it shall be sufficient to state in such pleading that the same is an existing city or town, incorporated or organized under the laws of the state of Washington. [Cd. '81, § 2063; 1 H. C., § 767.]

§ 291. Ordinances, How Pleased.

In pleading any ordinance of a city or town in this state, it shall be sufficient to state the title of such ordinance and the date of its passage, whereupon the court shall take judicial knowledge of the existence of such ordinance, and the tenor and effect thereof. [Cd. '81, § 2064; 1 H. C., § 768.]

Cited in 9 Wash. 241; 103 Wash. 181; 104 Wash. 462.

See note to § 287, supra.

Pleading Ordinances: See *Remington's Digest*, Mun. Corp., § 53; *Seattle v. Doran*, 5 Wash. 482, 32 Pac. 105, 1002; *Seattle v. Pearson*, 15 Wash. 575, 46 Pac. 1053; *New Whatcom v. Bellingham Bay Imp. Co.*, 16 Wash. 131, 47 Pac. 236; *Seattle v. Turner*, 29 Wash. 515, 69 Pac. 1083; *Hillman v. Seattle*, 33 Wash. 14, 73 Pac. 791; *Gove v. Tacoma*, 34 Wash. 434, 76

Pac. 73; *Davison v. Walla Walla*, 52 Wash. 453, 100 Pac. 981, 132 Am. St. Rep. 983, 21 L. R. A. (N. S.) 454.

In an action for personal injuries sustained in a collision with an automobile, a complaint, alleging that defendant was driving at an unlawful speed and pleading an ordinance fixing the speed limit at twenty miles an hour, is good as against a motion to strike or make more definite and certain under this section: *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021.

§ 292. Libel or Slander, How Pleased.

In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be

controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken. [L. '54, p. 142, § 61; Cd. '81, § 99; 2 H. C., § 211.]

Cited in 55 Wash. 612, 613; 64 Wash. 694; 88 Wash. 697.

Complaint—Requisites: See Remington's Digest, Libel, §§ 24, 25; Stewart v. Major, 17 Wash. 238, 49 Pac. 503; Dunlap v. Sundberg, 55 Wash. 609, 104 Pac. 830, 133 Am. St. Rep. 1050.

— **Inducement and Extrinsic Matter:** See Remington's Digest, Libel, § 26; Whitehouse v. Cowles, 48 Wash. 546, 93 Pac. 1086; Dunlap v. Sundberg, 55 Wash. 609, 104 Pac. 830, 133 Am. St. Rep. 1050; Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442.

— **Setting Out Defamatory Matter:** See Remington's Digest, Libel, § 27; McClure v. Review Pub. Co., 38 Wash. 160, 80 Pac. 303.

— **Special Damage:** See Remington's Digest, Libel, § 28; Denney v. Northwestern Credit Assn., 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021; Velikanje v. Millichamp, 67 Wash. 138, 120 Pac. 876; Dick v. Northern Pac. R. Co., 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638; Wells v. Times Printing Co., 77 Wash. 171, 137 Pac. 457; Dick v. Northern Pac. R. Co., 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638; Olympia Water Works v. Mottman, 88 Wash. 694, 153 Pac. 1074; Wood v. Star Publishing Co., 90 Wash. 85, 155 Pac. 400; Viss v. Calligan, 91 Wash. 673, 158 Pac. 1012, Ann. Cas. 1918A, 819; General Market Co. v. Post-Intelligencer Co., 96 Wash. 575, 165 Pac. 482.

EVIDENCE—Presumptions and Burden of Proof—Privilege, Justification and Mitigation:

gation: See Remington's Digest, Libel, § 31; Hall v. Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049; Stewart v. Major, 17 Wash. 238, 49 Pac. 503; Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270; Reynolds v. Holland, 46 Wash. 537, 90 Pac. 648; Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636; Olympia Water Works v. Mottman, 88 Wash. 694, 153 Pac. 1074.

Weight and Sufficiency—In General: See Remington's Digest, Libel, § 35; Quinn v. Review Pub. Co., 55 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077; Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442; Cyclohome Amusement Co. v. Hayward-Larkin Co., 93 Wash. 367, 160 Pac. 1051; Eeuyer v. New York Life Ins. Co., 101 Wash. 247, 172 Pac. 359.

Issues, Proof and Variance: See Remington's Digest, Libel, § 30; Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485; Bleitz v. Carton, 49 Wash. 545, 95 Pac. 1099; Lathrop v. Sundberg, 62 Wash. 136, 113 Pac. 574, Ann. Cas. 1912C, 891, 33 L. R. A. (N. S.) 90. See, also, Enright v. Bringgold, 106 Wash. 233, 179 Pac. 844.

Sufficiency of allegations of complaint in libel or slander connecting plaintiff with defamatory matter. 13 Ann. Cas. 380.

Sufficiency in complaint for slander of averments with respect to time and place of publication Ann. Cas. 1918B, 504.

§ 293. Answers in Justification and Mitigation.

In an action mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not; he may give in evidence the mitigating circumstances. [L. '54, p. 143, § 62; Cd. '81, § 100; 2 H. C., § 212.]

Cited in 11 Wash. 509; 40 Wash. 312, 313; 85 Wash. 512.

Plea or Answer—Justification: See Remington's Digest, Libel, § 29; Bleitz v. Carton, 49 Wash. 545, 95 Pac. 1099; Lambert v. Cowles, 76 Wash. 200, 135 Pac. 1008.

Under this section, the truth of the statement of acts and facts may be shown to defeat recovery in an action for libel, although it is pleaded merely in mitigation of damages and not by way of justification: Haynes v. Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

If matter published is libelous per se, it is not incumbent upon plaintiffs to allege its untruth, but, under this section, that is a matter of defense which must be alleged and proven, in order to be available as such: Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442.

Admissibility of Evidence, Justification: See Remington's Digest, Libel, § 32; Hall v. Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049; Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485; Ott v. Press Pub. Co., 40 Wash. 308, 82 Pac. 403; Reynolds v. Holland, 46 Wash. 537, 90 Pac. 648.

Evidence in Mitigation: See Remington's Digest, Libel, § 33; Ott v. Press Pub. Co., 40 Wash. 308, 82 Pac. 403; Reynolds v. Holland, 46 Wash. 537, 90 Pac. 648; Quinn v. Review Pub. Co., 55 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077.

Necessity of pleading specially mitigation of damages and justification in actions of libel or slander. 10 Ann. Cas. 219; Ann. Cas. 1913E, 704. Pleading truth as a defense to a civil action for libel or slander. 21 L. R. A. 511; 31 L. R. A. (N. S.) 138; 50 L. R. A. (N. S.) 1042.

§ 294. Falsely Charging Certain Crime, Actionable.

Every charge of incest, fornication, adultery, or whoredom falsely made by any person against a female, also words falsely spoken of any person charging such person with incest or the infamous crime against nature, either with mankind or the brute creation, shall be [actionable] in the same manner as in the case of slanderous words charging a crime the commission of which would subject the offender to death or other degrading penalties. [L. '54, p. 219, § 487; Cd. '81, § 747; 2 H. C., § 798.]

"Actionable" substituted for "accountable."

Cited in 17 Wash. 239; 71 Wash. 140.

Allegations in a complaint and affidavit in a divorce case charging adultery with a certain person are absolutely privileged if pertinent and relevant to the issue; and the rule of privilege is not changed by this section; hence a complaint by the correspondent for libel is demurrable, though the words are alleged to be false and malicious, where it is not charged that they were not pertinent and relevant to the issue: Miller v. Gust, 71 Wash. 139, 127 Pac. 845.

Under this section, such communications to third parties as: "She is nothing but an old whore," "This woman acknowledges that you sleep with her every night and I have reason to know that you are not the only one," and "She is an objectionable character; that man Adams is keeping her," if false, entitle the woman injured thereby to a right of action for defamation of character: Stewart v. Major, 17 Wash. 238, 49 Pac. 503.

§ 295. Answers in Actions to Recover Property Distrained.

In an action to recover the possession of property distrained doing damage, an answer that the defendant or person by whose command he acted was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title to such real property. [L. '54, p. 143, § 63; Cd. '81, § 101; 2 H. C., § 213.]

§ 296. Joinder of Causes of Action.

The plaintiff may unite several causes of action in the same complaint, when they all arise out of,—

1. Contract, express or implied; or,
2. Injuries, with or without force, to the person; or
3. Injuries, with or without force, to property; or
4. Injuries, to character; or
5. Claims to recover real property, with or without damages for the withholding thereof; or
6. Claims to recover personal property, with or without damages for the withholding thereof; or
7. Claims against a trustee, by virtue of a contract or by operation of law.
8. The same transaction.

But the causes of action so united must affect all the parties to the action, and not require different places of trial, and must be separately

stated. [L. '07, p. 172, § 1. Cf. L. '54, p. 143, § 64; L. '61, p. 51, § 5; L. '69, p. 25, § 100; Cd. '81, § 102; 2 H. C., § 214.]

Cited in 14 Wash. 479; 29 Wash. 533; 30 Wash. 634; 31 Wash. 662; 34 Wash. 76; 42 Wash. 88, 254; 46 Wash. 401; 47 Wash. 41; 49 Wash. 343; 51 Wash. 258; 64 Wash. 231; 71 Wash. 13, 246; 90 Wash. 288; 94 Wash. 62; 96 Wash. 501; 99 Wash. 428, 429; 100 Wash. 135; 106 Wash. 376; 108 Wash. 41; 110 Wash. 676.

Separate Causes of Action: See Remington's Digest, Plead., § 28; Northern Pac. R. Co. v. Hess, 2 Wash. 383, 26 Pac. 866; Seattle Trust Co. v. Kerry, 19 Wash. 389, 53 Pac. 665; Page v. Page, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L. R. A. (N. S.) 914; Peterson v. Pantheon Lumber Co., 62 Wash. 189, 113 Pac. 562; Boyce v. Chicago, Milwaukee & Puget Sound R. Co., 82 Wash. 204, 144 Pac. 27; Stewart v. Pacific Finance Co., 87 Wash. 484, 151 Pac. 1092; Bradbury v. Nethercutt, 95 Wash. 670, 164 Pac. 194.

Separate Counts on Same Cause of Action: See Remington's Digest, Plead., § 28-1; Gabrielson v. Hague Box & Lumber Co., 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032; Holm v. Chicago, M. & P. S. R. Co., 59 Wash. 293, 109 Pac. 799. See, also, Coleman v. St. Paul & Tacoma Lbr. Co., 110 Wash. 259, 188 Pac. 532.

Reference from One Count or Paragraph to Another: See Remington's Digest, Plead., § 29; Sly v. Palo Alto Gold Min. Co., 28 Wash. 485, 68 Pac. 871.

Duplicity: See Remington's Digest, Plead., § 30; Barto v. Nix, 15 Wash. 563, 46 Pac. 1033; Loveday v. Anderson, 18 Wash. 322, 51 Pac. 463; Saunders v. United States Marble Co., 25 Wash. 475, 65 Pac. 782. See, also, Hurley-Mason Co. v. Pacific Commissary Co., 111 Wash. 439, 191 Pac. 642.

Separating Causes of Action or Defenses: See Remington's Digest, Plead., § 162; Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113; Richardson v. Carbon Hill Coal Co., 10 Wash. 648, 39 Pac. 95; Hockersmith v. Ferguson, 51 Wash. 256, 98 Pac. 670; Harding v. Ostrander R. & Timber Co., 64 Wash. 224, 116 Pac. 635. See, also, Connecticut Investment Co. v. Yokom, 106 Wash. 693, 180 Pac. 926.

Election Between Causes of Action, Counts or Defenses: See Remington's Digest, Plead., § 163; Van Hook v. Burns, 10 Wash. 22, 38 Pac. 763; Norris Safe & Lock Co. v. Clark, 28 Wash. 268, 68 Pac. 718, 70 Pac. 129; Brown v. Calloway, 34 Wash. 175, 75 Pac. 630; Galbraith v. Carmode, 43 Wash. 456, 86 Pac. 624; Hutchinson v. Mt. Vernon Water & Power Co., 49 Wash. 469, 95 Pac. 1023; Davies v. Rose-Marshall Coal Co., 71 Wash. 560, 129 Pac. 98; O'Donnell v. McCool, 89 Wash. 537, 154 Pac. 1090; Starwich v. Ernst, 100 Wash. 198, 170 Pac. 584. See, also, Con-

nelly v. Malloy, 106 Wash. 464, 180 Pac. 469; Linville v. Wiedrich, 108 Wash. 1, 182 Pac. 578; Buckley v. Massachusetts Bonding & Ins. Co., 113 Wash. 13, 192 Pac. 924.

Causes Arising Out of Contract: See Remington's Digest, Action, § 21 Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186; Moylan v. Moylan, 49 Wash. 341, 95 Pac. 271; Evans v. Goist, 90 Wash. 100, 155 Pac. 780.

Under this section, causes of action on contract may be joined, they arising out of different transactions: McNall v. Sandygren, 100 Wash. 133, 170 Pac. 561.

Contract and Tort: See Remington's Digest, Action, § 22; Phelps v. S. S. City of Panama, 1 W. T. 518; Williams v. Miller, 1 W. T. 88; Clark v. Great Northern R. R. Co., 31 Wash. 658, 72 Pac. 477; Willey v. Nichols, 18 Wash. 528, 52 Pac. 237; Sanders v. Stimson Mill Co., 34 Wash. 357, 75 Pac. 974; Lambert v. La Conner Trad. etc. Co., 37 Wash. 113, 79 Pac. 608; Voss v. Bender, 32 Wash. 566, 73 Pac. 697; Maughlin Mill Co. v. Hamilton, 61 Wash. 66, 111 Pac. 1067; Harding v. Ostrander R. & Timber Co., 64 Wash. 224, 116 Pac. 635; McNall v. Sandygren, 100 Wash. 133, 170 Pac. 561.

Claims Arising Out of Same Transaction or Transactions Connected With Same Subject of Action: See Remington's Digest, Action, § 23; McClure v. Campbell, 42 Wash. 252, 84 Pac. 825; Bank of California v. Union Packing Co., 60 Wash. 456, 111 Pac. 573; Gustin v. Crockett, 44 Wash. 536, 87 Pac. 839; Lindley v. McGlauffin, 57 Wash. 581, 107 Pac. 355; Mullerleile v. Brandt, 64 Wash. 280, 116 Pac. 868; James v. Brainard-Jackson & Co., 64 Wash. 175, 116 Pac. 633; Bell v. Jovita Heights Co., 71 Wash. 7, 127 Pac. 289; Littlefield v. Bowen, 90 Wash. 286, 155 Pac. 1053, Ann. Cas. 1918B, 177; Stilwell Brothers v. Union Machinery & Supply Co., 94 Wash. 61, 161 Pac. 1048; Murphy v. Prosser, 96 Wash. 499, 165 Pac. 390; McNall v. Sandygren, 100 Wash. 133, 170 Pac. 561; Welch v. Northern Bank & Trust Co., 100 Wash. 349, 170 Pac. 1029. See, also, Manahan v. Aumiller, 110 Wash. 673, 188 Pac. 789.

A cause of action for an assault and battery upon a grocer while entering the defendant's apartment house to deliver goods does not arise out of the "same transaction," within this section, and therefore cannot be united with a cause of action to enjoin interference with plaintiff's right of entry: Konick v. Champneys, 108 Wash. 35, 183 Pac. 75, 6 A. L. R. 459.

SPLITTING CAUSES OF ACTION: See Remington's Digest, Action, § 25.

What is not a Splitting of Causes: Achey v. Creech, 21 Wash. 319, 58 Pac. 208; Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co., 58 Wash. 332, 108 Pac. 770; Harstad v. Olson, 57 Wash. 264, 106 Pac. 741; Davis v. Hibbs, 73 Wash. 315, 131 Pac. 1035.

Waiver of Objection: Brice v. Starr, 93 Wash. 501, 161 Pac. 347.

See, also, Portion asserted by setoff against assignee—Effect as to right of action for balance of claim: State ex rel. Alaska Pacific Navigation Co. v. Superior Court, 113 Wash. 439, 194 Pac. 412.

Severance of Actions, and Waiver: See Remington's Digest, Action, §§ 27, 27-1; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709; Dobrentai v. Piehl, 92 Wash. 433, 159 Pac. 371.

Stay of Proceedings: See Remington's Digest, Action, § 35; Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643; O'Brien v. Allen, 42 Wash. 393, 85 Pac. 8.

Actions Which may be Consolidated: See Remington's Digest, Action, § 26; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Kane v. Kane, 35 Wash. 517, 77 Pac. 842; Hayward v. Mason, 54 Wash. 653, 104 Pac. 141; Heal v. Evans Creek Coal & Coke Co., 71 Wash. 225, 128 Pac. 211.

Where, in an action to quiet title, the question as to the superior title, and whether plaintiff's warranty deed was intended as a mortgage, all arose out of

the same transaction, they may be joined in one action: Manahan v. Aumiller, 110 Wash. 673, 188 Pac. 789.

Under this section, there is a misjoinder of two causes of action relating to five lots, where two of the lots are owned by one of the plaintiffs and three by the other, each of whom has its own grievance and is not interested in that of the other and different relief is sought: McAllister v. Harper & Son, 106 Wash. 373, 180 Pac. 412.

Necessity under code practice that all causes joined affect all parties defendant. 3 Ann. Cas. 685.

Joinder of causes of action accruing to plaintiff individually and in representative capacity. Ann. Cas. 1912B, 1258.

Joinder and splitting of claims for injuries to person and property arising out of single tort. Ann. Cas. 1912D, 256; 36 L. R. A. (N. S.) 240.

Joinder of cause of action against party causing injury with cause of action against latter's insurer or indemnitor. 7 A. L. R. 1003.

Joinder of cause of action for breach of a contract with cause of action for fraud inducing the contract. 10 A. L. R. 756.

Joinder of statutory action against master with common-law action by servant for negligence. 12 L. R. A. (N. S.) 675.

§ 297. Material Allegations not Controverted Admitted, Except in Reply.

Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purpose of action, be taken as true; but the allegation of new matter in a reply is to be deemed controverted by the adverse party, as upon a direct denial or avoidance, as the case may require. [L. '69, p. 26, § 101; L. '77, p. 22, § 103; Cd. '81, § 103; 2 H. C., § 215.]

Cited in 2 Wash. 482; 5 Wash. 662; 11 Wash. 617; 42 Wash. 307; 85 Wash. 102.

Admissions in General: See Remington's Digest, Plead., § 56; Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195, 24 Pac. 415; Breemer v. Burgess, 2 W. T. 290, 5 Pac. 733, 840; Parker v. Denny, 3 W. T. 598, 21 Pac. 386; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767; Turner v. Turner, 33 Wash. 118, 74 Pac. 55; Denver v. Spokane Falls, 7 Wash. 226, 34 Pac. 926; American Copper etc. Works v. Galland-Burke etc. Co., 30 Wash. 178, 70 Pac. 236; Browder v. Phinney, 37 Wash. 70, 79 Pac. 598; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Stamaty v. Pappadimitriu, 51 Wash. 221, 98 Pac. 613; Sumpter v. Burnham, 51 Wash. 599, 99 Pac. 752;

Mead v. Kalberg, 70 Wash. 517, 127 Pac. 185; Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 Pac. 21; Clough v. Monro, 86 Wash. 507, 150 Pac. 1190. See, also, Johnson v. Western Express Co., 107 Wash. 339, 181 Pac. 693.

Admissions by Failure to Traverse or Deny: See Remington's Digest, Plead., § 57; Frost v. Ainslie Lum. Co., 3 Wash. 241, 28 Pac. 354, 915; Sengfelder v. Mutual Life Ins. Co., 5 Wash. 121, 31 Pac. 428; Roberts v. Center, 26 Wash. 435, 67 Pac. 151; Sherman v. Sweeny, 29 Wash. 321, 69 Pac. 1117; Hendelman v. Kahan, 50 Wash. 247, 97 Pac. 109; Bell v. Seranton Coal Mines Co., 59 Wash. 659, 110 Pac. 628; Clough v. Monro, 86 Wash. 507, 150 Pac. 1190.

§ 298. Material Allegations Defined.

A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient. [L. '54, p. 143, § 65; Cd. '81, § 104; 2 H. C., § 216.]

CHAPTER X.

MISTAKES AND AMENDMENTS.

§ 299. Variance, When Material.

No variance between the allegation in a pleading and the proof shall be deemed material, unless it shall have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the court, and in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just. [L. '54, p. 143, § 66; Cd. '81, § 105; 2 H. C., § 217.]

Cited in 1 Wash. 545; 2 Wash. 520; 3 Wash. 487, 534; 5 Wash. 57; 16 Wash. 48; 21 Wash. 640; 22 Wash. 142; 24 Wash. 155; 26 Wash. 527, 553; 29 Wash. 534; 30 Wash. 169; 38 Wash. 543; 39 Wash. 54; 43 Wash. 222; 50 Wash. 688; 54 Wash. 15, 621; 57 Wash. 21; 59 Wash. 296; 60 Wash. 524; 61 Wash. 184; 70 Wash. 618; 73 Wash. 52; 74 Wash. 307; 81 Wash. 36; 84 Wash. 464; 86 Wash. 331; 87 Wash. 297, 400; 92 Wash. 421; 99 Wash. 75; 108 Wash. 228.

ISSUES. PROOF AND VARIANCE—Scope of Issues of Fact: See Remington's Digest, Plead., § 164; Tullis v. Shannon, 3 Wash. 716, 29 Pac. 449; Davis v. Hinchcliffe, 7 Wash. 199, 34 Pac. 915; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Hughes v. New York Life Ins. Co., 32 Wash. 1, 72 Pac. 452; Snyder v. Harding, 34 Wash. 286, 75 Pac. 812; Bartlett v. Oregon R. & Nav. Co., 57 Wash. 16, 106 Pac. 487, 135 Am. St. Rep. 959; Boyer v. Pain, 60 Wash. 56, 110 Pac. 682.

Matters to be Proved—Surplusage and Unnecessary Allegations: See Remington's Digest, Plead., § 165; Freeman v. Gloyd, 43 Wash. 607, 86 Pac. 1051; Lobb v. Seattle, Renton etc. R. Co., 48 Wash. 238, 93 Pac. 420; Fransioli v. Tacoma, 60 Wash. 463, 111 Pac. 564.

Express Admissions: See Remington's Digest, Plead., § 166; Charlton v. Markland, 36 Wash. 40, 78 Pac. 132; Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42; Lownsdale v. Grays Harbor Boom Co., 54 Wash. 542, 103 Pac. 833; German-Am. Bank of Seattle v. Wright, 85 Wash. 460, 148 Pac. 769.

Admissions by Failure to Deny: See Remington's Digest, Plead., § 167; Lake v. Steinbach, 5 Wash. 659, 32 Pac.

767; Johanson v. Seattle, 80 Wash. 527, 141 Pac. 1032.

EVIDENCE ADMISSIBLE UNDER PLEADING—Complaint or Petition in General: See Remington's Digest, Plead., § 169; Northern Pac. R. Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32; Kennedy v. Currie, 3 Wash. 442, 28 Pac. 1028; Seal v. Puget Sound Loan etc. Co., 5 Wash. 422, 32 Pac. 214; Tilzie v. Haye, 8 Wash. 187, 35 Pac. 583; Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837; Kaufman v. Tacoma etc. R. Co., 11 Wash. 632, 40 Pac. 137; State ex rel. Olson v. Allen, 14 Wash. 684, 45 Pac. 644; Dickey v. Northern Pac. R. Co., 19 Wash. 350, 53 Pac. 347; Goldwater v. Burnside, 22 Wash. 215, 60 Pac. 409; Allend v. Spokane Falls & N. R. Co., 21 Wash. 324, 58 Pac. 244; Mercier v. Travelers' Ins. Co., 24 Wash. 147, 64 Pac. 158; Uren v. Golden Tunnel Min. Co., 24 Wash. 261, 64 Pac. 174; Clukey v. Seattle Elec. Co., 27 Wash. 70, 67 Pac. 379; Bringgold v. Spokane, 27 Wash. 202, 67 Pac. 612; Rattelmiller v. Stone, 28 Wash. 104, 68 Pac. 168; Crooker v. Pac. Lounge & Mattress Co., 34 Wash. 191, 75 Pac. 632; Stowe v. La Conner Trad. & Transp. Co., 30 Wash. 28, 80 Pac. 856, 81 Pac. 97; Imhoof v. Northwestern Lumber Co., 43 Wash. 387, 86 Pac. 650; Thomson v. Issaquah Shingle Co., 43 Wash. 253, 86 Pac. 588.

Contracts, Agreements and Written Instruments: See Remington's Digest, Plead., § 170; Washington Bridge Co. v. Land & R. Imp. Co., 12 Wash. 272, 40 Pac. 982; Skagit R. & Lum. Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; Stephens v. Spokane, 11 Wash. 41, 39 Pac. 266; Everett Land Co. v. Maney, 16 Wash. 552, 48 Pac. 243; Interstate Sav. & Loan Assn. v. Knapp, 20 Wash. 225, 55 Pac. 48, 931; Carroll v.

Caine, 27 Wash. 402, 67 Pac. 993; Lang v. Crescent Coal Co., 44 Wash. 267, 87 Pac. 261; Wees v. Page, 47 Wash. 213, 91 Pac. 766; Wright v. Lake, 48 Wash. 469, 93 Pac. 1072.

— **Fraud:** See Remington's Digest, Plead., § 171; Rathbone, Sard & Co. v. Frost, 9 Wash. 162, 37 Pac. 298; Cade v. Head Camp, W. O. W., 27 Wash. 218, 67 Pac. 603; McMullen v. Rousseau, 40 Wash. 497, 82 Pac. 883; Wheeler v. Aberdeen, 45 Wash. 63, 87 Pac. 1061. See, also, Peterson v. Mohammed, 113 Wash. 117, 193 Pac. 215.

— **Title and Ownership:** See Remington's Digest, Plead., § 172; Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Miller v. Lake Irr. Co., 27 Wash. 447, 67 Pac. 996; Kemp v. Folsom, 14 Wash. 16, 43 Pac. 1100.

Plea or Answer in General: See Remington's Digest, Plead., § 173; Corliss v. Dunning, 8 Wash. 332, 35 Pac. 1074; Murray v. Okanogan Livestock etc. Co., 12 Wash. 259, 40 Pac. 942; Brown v. Seattle City R. Co., 16 Wash. 465, 47 Pac. 890; Kennedy v. School Dist. No. 1, 20 Wash. 399, 55 Pac. 567; Clark v. Northern Pac. R. Co., 29 Wash. 139, 69 Pac. 636, 59 L. R. A. 508; Wasmund v. Harm, 36 Wash. 170, 78 Pac. 777; United States, Use etc. v. Aetna Indemnity Co., 40 Wash. 87, 82 Pac. 171.

— **General Issue or General Denial:** See Remington's Digest, Plead., § 174; Penter v. Staight, 1 Wash. 365, 25 Pac. 469; Dillon v. Folsom, 5 Wash. 439, 32 Pac. 216; Fairhaven v. Cowgill, 8 Wash. 686, 36 Pac. 1093; Nichols v. Opperman, 6 Wash. 618, 34 Pac. 162; Trumbull v. Jackman, 9 Wash. 524, 37 Pac. 680; Kellogg v. Scheuerman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237; Peterson v. Seattle Traction Co., 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; Bay View Brewing Co. v. Grubb, 24 Wash. 163, 63 Pac. 1091; Lund v. St. Paul, M. & M. R. Co., 31 Wash. 286, 71 Pac. 1032, 96 Am. St. Rep. 906, 61 L. R. A. 506; Armstrong v. Musser Lumber & Mfg. Co., 43 Wash. 584, 86 Pac. 944; Boothe v. Bassett, 82 Wash. 95, 143 Pac. 449. See, also, Empson Packing Co. v. Lamb-Davis Lbr. Co., 112 Wash. 75, 191 Pac. 833.

Waiver by plaintiff of a contract for services may be shown in an action for the services under a general denial, where the evidence tended to show that the services had not been performed; Buttz v. Cook, 62 Wash. 90, 113 Pac. 282.

— **Affirmative Matter:** See Remington's Digest, Plead., § 175; Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43; McKay v. Elwood, 12 Wash. 579, 41 Pac. 919; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Carter v. Seattle, 19 Wash. 597, 53 Pac. 1102; Ryan v. Lambert, 49 Wash. 649, 96

Pac. 232; Anderson v. Mitchell, 51 Wash. 265, 98 Pac. 751; Kumblad v. Allen, 51 Wash. 425, 99 Pac. 19.

— **Consideration:** See Remington's Digest, Plead., § 176; Griffith v. Wright, 21 Wash. 494, 58 Pac. 582; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124.

— **Title and Ownership:** See Remington's Digest, Plead., § 177; Parker v. Dacres, 1 Wash. 190, 24 Pac. 192; Kerron v. North Pacific etc. Mfg. Co., 1 Wash. 241, 24 Pac. 445; Chamberlin v. Winn, 1 Wash. 501, 20 Pac. 780; Allen v. Higgins, 9 Wash. 446, 37 Pac. 671, 43 Am. St. Rep. 847; Carkeek v. Boston Nat. Bank, 16 Wash. 399, 47 Pac. 884; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; Coey v. Low, 36 Wash. 10, 77 Pac. 1077; Shine v. Culver, 42 Wash. 484, 85 Pac. 271; Chrast v. O'Connor, 41 Wash. 360, 83 Pac. 238. See, also, Peterson v. Mohammed, 113 Wash. 117, 193 Pac. 215.

— **Defenses to be Specially Pleaded:** See Remington's Digest, Plead., § 178; Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117; Walker v. Baxter, 6 Wash. 244, 33 Pac. 426; Huggins v. Milwaukee Brew. Co., 10 Wash. 579, 39 Pac. 152; Jacobs v. First Nat. Bank, 15 Wash. 358, 46 Pac. 396; Interstate Sav. & L. Assn. v. Knapp, 20 Wash. 255, 55 Pac. 48, 931; Gay v. Havermale, 27 Wash. 390, 67 Pac. 804; Olson v. Springer, 60 Wash. 77, 110 Pac. 807; Spokane etc. Lumber Co. v. McChesney, 1 Wash. 609, 21 Pac. 198; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Richards v. Jefferson, 20 Wash. 166, 54 Pac. 1123; Pickle v. Anderson, 62 Wash. 552, 114 Pac. 177; Palmer v. Parker, 91 Wash. 683, 158 Pac. 1017; Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867, 7 Ann. Cas. 607.

Variance from Bill of Particulars: See Remington's Digest, Plead., § 179; Isham v. Parker, 3 Wash. 755, 29 Pac. 835; Seattle v. Parker, 13 Wash. 450, 43 Pac. 369; Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; Howells v. North Amer. Trans. & Trad. Co., 24 Wash. 689, 64 Pac. 786; American Copper etc. Works v. Galland-Burke etc. Co., 30 Wash. 178, 70 Pac. 236; Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Powers v. Washington Portland Cement Co., 79 Wash. 1, 139 Pac. 615.

VARIANCE BETWEEN ALLEGATIONS AND PROOF—A party cannot allege one state of facts in his complaint and recover judgment by proof of an entirely different state of facts at the trial: Distler v. Dabney, 3 Wash. 200, 28 Pac. 335; Clark v. Sherman, 5 Wash. 681, 32 Pac. 771; Comegys v. American Lumber Co., 8 Wash. 661, 36 Pac. 1087.

Materiality to Issue: See Remington's Digest, Plead., § 181; State ex rel. Olson v. Allen, 14 Wash. 684, 45 Pac. 645; Mercier v. Travelers' Ins. Co., 24 Wash. 147,

64 Pac. 158; *Irby v. Phillips*, 40 Wash. 618, 82 Pac. 931; *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900; *Hansen v. Rounds*, 70 Wash. 350, 126 Pac. 927; *Britz v. Houlehan*, 77 Wash. 506, 137 Pac. 1035; *Gilbert v. Morgan Lumber Co.*, 87 Wash. 293, 151 Pac. 785; *Henry v. Navy Yard Route*, 94 Wash. 526, 162 Pac. 584. See, also, *Bullock v. Yakima Valley Transportation Co.*, 108 Wash. 413, 184 Pac. 641, 187 Pac. 410.

Extent of Variance in General: See *Remington's Digest*, Plead., § 182; *Wolf v. Hemrich Bros. Brew. Co.*, 28 Wash. 187, 68 Pac. 440; *Koyukuk Min. Co. v. Van de Vanter*, 30 Wash. 385, 70 Pac. 966; *Leghorn v. Review Pub. Co.*, 31 Wash. 627, 72 Pac. 485; *McClammy v. Spokane*, 36 Wash. 339, 78 Pac. 912.

— **Arising from Action on Contracts:** See *Remington's Digest*, Plead., § 183; *Bigelow v. Scott*, 2 W. T. 378, 8 Pac. 494; *Olson v. Snake River Val. R. Co.*, 22 Wash. 139, 60 Pac. 156; *Childs Lum. & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373; *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68; *Griffith v. Ridpath*, 38 Wash. 540, 80 Pac. 820; *Meals v. De Soto Placer Min. Co.*, 33 Wash. 302, 74 Pac. 470; *Butterworth & Sons v. Teale*, 54 Wash. 14, 102 Pac. 768, 18 Ann. Cas. 854; *Bartelt v. Oregon R. & Nav. Co.*, 57 Wash. 16, 106 Pac. 487, 135 Am. St. Rep. 959; *Eaton v. General Compressed Air etc. Mach. Co.*, 62 Wash. 373, 113 Pac. 1091; *Cholokovitch v. Porcupine Gold Mining Co.*, 73 Wash. 48, 131 Pac. 459; *Hubenthal v. Creighton*, 81 Wash. 688, 143 Pac. 98; *Liliopoulos v. Oregon-Washington R. & Nav. Co.*, 87 Wash. 396, 151 Pac. 818; *Var Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124. See, also, *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

This section is applicable to contracts in lien cases: *Stetson & Post Lumber Co. v. Sloane Co.*, 61 Wash. 180, 112 Pac. 248.

— **Place:** See *Remington's Digest*, Plead., § 184; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830; *Breeden v. Seattle, Renton & S. R. Co.*, 60 Wash. 522, 111 Pac. 771.

— **Parties or Other Persons:** See *Remington's Digest*, Plead., § 185; *Pilling v. Morse*, 5 Wash. 797, 32 Pac. 748; *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119; *Post-Intelligencer Pub. Co. v. Harris*, 11 Wash. 500, 39 Pac. 965; *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Dennis v. First Nat. Bank*, 33 Wash. 161, 73 Pac. 1125; *Grisson v. Hofius*, 39 Wash. 51, 80 Pac. 1002, 4 Ann. Cas. 125; *Vulcan Iron Works v. Burrell Constr. Co.*, 39 Wash. 319, 81 Pac. 836.

— **Property or Other Subject Matter:** See *Remington's Digest*, Plead., § 186; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac.

380, 26 Am. St. Rep. 877; *Roe v. Cutter*, 4 Wash. 611, 30 Pac. 663. See, also, *National Milling & Min. Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128.

— **Written Instruments:** See *Remington's Digest*, Plead., § 187; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867; *Jacobs v. First Nat. Bank*, 15 Wash. 358, 46 Pac. 396; *Anderson v. New York Life Ins. Co.*, 34 Wash. 616, 76 Pac. 109.

— **Nature or Extent of Relief:** See *Remington's Digest*, Plead., § 188; *Washburn v. Case*, 1 W. T. 253; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Sterrett v. Northport Min. & Smelt. Co.*, 30 Wash. 164, 70 Pac. 266; *Budlong v. Budlong*, 48 Wash. 645, 94 Pac. 478.

— **Effect of Variance to Mislead or Surprise:** See *Remington's Digest*, Plead., § 189; *Denny v. Saywood*, 10 Wash. 422, 39 Pac. 115; *Mercier v. Travelers' Ins. Co.*, 24 Wash. 147, 64 Pac. 158; *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68; *Olson v. Snake River Valley R. Co.*, 22 Wash. 139, 60 Pac. 156; *Grisson v. Hofius*, 39 Wash. 51, 80 Pac. 1002, 4 Ann. Cas. 125; *German American Bank of Seattle v. Wright*, 85 Wash. 460, 148 Pac. 769, Ann. Cas. 1917D, 381; *Lee Hong v. Schoenwald*, 86 Wash. 326, 150 Pac. 436. See, also, *Umpqua Valley Fruit Union v. North Pac. Fruit Distributors*, 108 Wash. 265, 183 Pac. 101.

Variance between proof and theory of the case set forth in pleading. 50 L. R. A. (N. S.) 14.

Reversal of judgment for technical violation of rule that allegations and proof must agree. Ann. Cas. 1913D, 68.

Which governs in case of variance between exhibit and pleading in civil actions. 16 Ann. Cas. 490.

Right to show partial failure under plea of total failure of consideration. Ann. Cas. 1914B, 758; 39 L. R. A. (N. S.) 951.

What constitutes variance between pleading and proof of defamatory words. 2 A. L. R. 367.

Proof of other defamatory statements in civil action for libel or slander. 12 A. L. R. 1026.

Allegata and probata in action against carrier for willful tort of servant to passenger. 40 L. R. A. (N. S.) 1085.

Admissibility of proof that money or property was obtained by fraud, under the common-law count for money had and received. L. R. A. 1918F, 439.

Right to recover upon negligent acts not pleaded. Ann. Cas. 1912A, 641.

Necessity of agreement between allegation and proof as to master's liability to injured servant. 41 **L. R. A.** 149.

Variance between allegation and proof as to time in action against railroad company for setting out fires. 41 **L. R. A. (N. S.)** 635.

§ 300. Immaterial Variance, Effect of.

When the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. [L. '54, p. 144. § 67; Cd. '81, § 106; 2 H. C., § 218.]

Cited in 22 Wash. 142; 26 Wash. 528; 38 Wash. 544; 40 Wash. 621; 57 Wash. 22; 87 Wash. 400; 99 Wash. 75.

AMENDMENT TO CONFORM TO PROOFS.—Upon an immaterial variance, amendments should be considered as made if they could or ought to have been made: Ward v. Moorey, 1 W. T. 104; Murray v. Meade, 5 Wash. 693, 32 Pac. 780; Seward v. Derrickson, 12 Wash. 225, 40 Pac. 939; Olson v. Snake River etc. R. Co., 22 Wash. 139, 60 Pac. 156; Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143; Richardson v. Moore, 30 Wash. 406, 71 Pac. 18; Gay v. Havermale, 30 Wash. 622, 71 Pac. 190.

After allowance of a trial amendment to the complaint to conform to proof, plaintiff is entitled to the benefits of the proofs which supported the complaint as amended: Hershey v. Hanauer, 108 Wash. 498, 185 Pac. 627.

Where a trial on the merits was entered into and proceeded without objection to the form of a reply containing an admission, upon oral objection at the trial, the court could consider it amended to conform to proofs, and did so in effect by overruling a motion for judgment and determining the case on the merits: Strang v. Person, 108 Wash. 503, 185 Pac. 944.

It is not error to refuse to allow an answer to be amended at the trial, where it is not plain in what respect the answer would have been amended to state a valid defense: Western Farquhar Machinery Co. v. Pierce, 108 Wash. 621, 185 Pac. 570.

Amendments Which were Proper to Conform to the Proof: See Remington's Digest, Plead., § 104; Lemon v. Waterman, 2 W. T. 485, 7 Pac. 899; Carson v. Railsback, 3 W. T. 168, 13 Pac. 618; Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338; Davis

v. Hinchcliffe, 7 Wash. 199, 34 Pac. 915; State v. Lorenz, 22 Wash. 289, 60 Pac. 644; Whitney v. Priest, 26 Wash. 48, 66 Pac. 108; Westland Pub. Co. v. Royal, 36 Wash. 399, 78 Pac. 1096; Lobb v. Seattle, Renton etc. R. Co., 48 Wash. 238, 93 Pac. 420; Clark v. Cross, 51 Wash. 231, 98 Pac. 607, 16 Ann. Cas. 489; Wilson v. Seattle, Renton etc. R. Co., 55 Wash. 656, 104 Pac. 1114; Carlisle Packing Co. v. Deming, 62 Wash. 455, 114 Pac. 172; Thayer v. Harbican, 70 Wash. 278, 126 Pac. 625; Stocking v. Boyer, 70 Wash. 615, 127 Pac. 194; Oldfield v. Angeles Brewing & Malting Co., 72 Wash. 168, 129 Pac. 1098; Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 146 Pac. 861; Cremidas v. Dallas, 91 Wash. 441, 157 Pac. 1084; Morrill v. Title Guaranty & Surety Co., 94 Wash. 258, 162 Pac. 360, 163 Pac. 733; Gould v. Gould, 99 Wash. 204, 169 Pac. 324; Cascade Lumber & Shingle Co. v. Wright, 99 Wash. 421, 169 Pac. 833; Kies v. Wilkinson, 101 Wash. 340, 172 Pac. 351. See, also, Hershey v. Hanauer, 108 Wash. 498, 185 Pac. 627; Strang v. Person, 108 Wash. 503, 185 Pac. 944; Williams v. Snow, 109 Wash. 329, 186 Pac. 861; Pearson v. Arlington Dock Co., 111 Wash. 14, 189 Pac. 559; Hurley-Mason Co. v. Pacific Commissary Co., 111 Wash. 439, 191 Pac. 642.

Amendments to Conform Which were not Proper or Could not be Made: See Remington's Digest, Plead., § 104; State v. Pittenger, 37 Wash. 384, 79 Pac. 942; International Dev. Co. v. Clemans, 59 Wash. 398, 109 Pac. 1034; Oldfield v. Angeles Brewing & Malting Co., 72 Wash. 168, 129 Pac. 1098.

Amendment of pleadings in appellate court to conform to proof. **Ann. Cas.** 1913E, 1315; **L. R. A.** 1916D, 841.

§ 301. Failure of Proof.

When, however, the allegation of the cause of action or defense to which the proof is directed is not proved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance within the last two sections, but a failure of proof. [L. '54, p. 144, § 68; Cd. '81, § 107; 2 H. C., § 219.]

Cited in 1 Wash. 543, 545; 22 Wash. 143; 26 Wash. 553; 28 Wash. 190; 29 Wash. 543; 38 Wash. 661; 57 Wash. 22; 59 Wash. 296; 81 Wash. 688; 86 Wash. 285; 99 Wash. 75; 108 Wash. 228.

Fatal Variances: See Remington's Digest, Plead., § 190; Butler v. Carvin, 33 Wash. 621, 74 Pac. 813; Hartman v. Belden, 38 Wash. 655, 80 Pac. 806; Albin v. Seattle Elec. Co., 40 Wash. 51, 82 Pac. 145; Stamaty v. Papadamitriu, 51 Wash. 221, 98 Pac. 613; Spokane Grain Co. v. Great Northern Express Co., 55 Wash. 545, 104 Pac. 794; Oldfield v. Angeles Brewing & Malting Co., 72 Wash. 168, 129 Pac. 1098; Wiser v. Northwestern Improvement Co., 86 Wash. 433, 150 Pac. 619; Eckhart

v. Peterson, 94 Wash. 379, 162 Pac. 551. See, also, Anderson v. Rucker Bros., 107 Wash. 595, 183 Pac. 70, 186 Pac. 293, 8 A. L. R. 544.

Failure of Proof: See Remington's Digest, Plead., § 191; Carson v. Railsback, 3 W. T. 168, 13 Pac. 618; Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836; Marsh v. Wade, 1 Wash. 538, 20 Pac. 578; Dudley v. Duval, 29 Wash. 528, 70 Pac. 68; Malloy v. Benway, 34 Wash. 315, 75 Pac. 869; Weber v. Snohomish Shingle Co., 37 Wash. 576, 79 Pac. 1126; McLachlan v. Gordan, 86 Wash. 282, 150 Pac. 441; Mullins v. Alveolar Dental Co., 97 Wash. 170, 166 Pac. 65; Henneberg v. Cook, 103 Wash. 685, 175 Pac. 313.

§ 302. Variance in Action to Recover Personal Property.

Where the plaintiff in an action to recover the possession of personal property, on a claim of being the owner thereof, shall fail to establish on trial such ownership, but shall prove that he is entitled to the possession thereof by virtue of a special property therein, he shall not thereby be defeated of his action, but shall be permitted to amend, on reasonable terms, his complaint, and be entitled to judgment according to the proof in the case. [L. '57, p. 10, § 11; L. '69, p. 27, § 106; Cd. '81, § 108; 2 H. C., § 220.]

Cited in 1 Wash. 119; 16 Wash. 4.

§ 303. Amendments, Allowance of.

The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may upon like terms, enlarge the time for answer or demurrer. The court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars, and may upon like terms, allow an answer to be made after the time limited by this code, and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. [L. '54, p. 144, § 69; L. '75, p. 11, § 20; Cd. '81, § 109; L. '91, p. 106, § 3; 2 H. C., § 221.]

Cited in 3 Wash. 709; 4 Wash. 505, 763; 8 Wash. 594; 10 Wash. 310; 11 Wash. 73; 12 Wash. 664; 17 Wash. 357, 566, 601; 18 Wash. 211, 390, 842; 21 Wash. 640; 23 Wash. 251; 25 Wash. 656, 669; 28 Wash. 165; 31 Wash. 185, 254; 32 Wash. 174, 376, 497; 35 Wash. 358, 361, 687; 37 Wash. 226; 48 Wash. 430; 50 Wash. 374; 51 Wash. 465, 677; 58 Wash. 582; 59 Wash. 200; 62 Wash. 152; 79 Wash. 490; 84 Wash. 400; 86 Wash. 284; 87 Wash. 550; 91 Wash. 92, 96; 92 Wash. 421; 93 Wash. 15; 94 Wash. 579; 95 Wash. 207; 97 Wash. 428, 430; 98 Wash. 99, 278; 101

Wash. 138, 139, 140, 141, 145, 146; 103 Wash. 466; 104 Wash. 109; 112 Wash. 251.

AMENDED AND SUPPLEMENTAL PLEADINGS—Right to Amend Pleadings in General: See Remington's Digest, Plead., § 99; Newberg v. Farmer, 1 W. T. 182; Thomas v. Price, 33 Wash. 459, 74 Pac. 563, 99 Am. St. Rep. 961; Walsh Lumber Co. v. Chaney, 67 Wash. 583, 122 Pac. 10; Robbins v. Wyman, Partridge & Co., 75 Wash. 617, 135 Pac. 656.

See, also, Where answer is confession of judgment: Johnson v. Rose, 113 Wash. 272, 193 Pac. 700.

Application for Leave, and Determination Thereon in General: See Remington's Digest, Plead., § 102; Cooke v. Cain, 35 Wash. 353, 77 Pac. 682; Burnett v. Ewing, 39 Wash. 45, 80 Pac. 855; Post v. Tamm, 91 Wash. 504, 158 Pac. 91.

Conditions on Granting Leave: See Remington's Digest, Plead., § 103; Williams v. Miller, 1 W. T. 88; Silsby v. Frost, 3 W. T. 388, 17 Pac. 887; Gould v. Gleason, 10 Wash. 476, 39 Pac. 123; Wright v. Northern Pac. R. Co., 38 Wash. 64, 80 Pac. 197; Eldridge v. Young America etc. Min. Co., 27 Wash. 297, 67 Pac. 703; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Neilsen v. Hovander, 56 Wash. 93, 105 Pac. 172, 21 Ann. Cas. 113; Roberts v. Tacoma R. & Power Co., 59 Wash. 226, 109 Pac. 605.

Surprise or Prejudice: See Remington's Digest, Plead., § 105; McDonough v. Great Northern R. Co., 15 Wash. 244, 46 Pac. 334; Price Baking Powder Co. v. Rinear, 17 Wash. 95, 49 Pac. 223; Scholey v. De Mattos, 18 Wash. 504, 52 Pac. 242; Allend v. Spokane Falls & N. R. Co., 21 Wash. 324, 58 Pac. 244; Morrissey v. Faucett, 28 Wash. 52, 68 Pac. 352; Helbig v. Grays Harbor Elec. Co., 37 Wash. 130, 79 Pac. 612; Stern v. Sill, 39 Wash. 557, 81 Pac. 1007; Gritman v. U. S. Fidelity etc. Co., 41 Wash. 77, 83 Pac. 6; Smith v. Michigan Lum. Co., 43 Wash. 402, 86 Pac. 652; Ryder-Gougar Co. v. Garretson, 53 Wash. 71, 101 Pac. 498, 132 Am. St. Rep. 1053; Lindquist v. Seattle, 67 Wash. 230, 121 Pac. 449; Fifer v. Lynden Lumber Co., 90 Wash. 373, 156 Pac. 1; Northwest Land & Colonization Co. v. Addington, 98 Wash. 576, 168 Pac. 164; Armstrong v. Spokane International R. Co., 101 Wash. 525, 172 Pac. 578.

Amendment of Complaint—Defects Amendable in General: See Remington's Digest, Plead., § 107; Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813; Goupille v. Chaput, 43 Wash. 702, 86 Pac. 1058; Loveday v. Parker, 50 Wash. 260, 97 Pac. 62; Freeborn v. Chewelah Copper King Mining Co., 89 Wash. 519, 154 Pac. 1095; Bradbury v. Nethercutt, 95 Wash. 670, 164 Pac. 194.

Number of Amendments Granted: See Remington's Digest, Plead., § 108; Balch v. Smith, 4 Wash. 497, 30 Pac. 648; Ross v. Howard, 25 Wash. 1, 64 Pac. 794; Harris v. Cowles, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847; Perlus v. Market Investment Co., 95 Wash. 484, 164 Pac. 65.

Condition of Cause, and Time for Amendment: See Remington's Digest, Plead., § 109; Skagit R. & Lum. Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; Davis v. Erickson, 3 Wash. 654, 29 Pac. 86; Hulbert v. Brackett, 8 Wash. 438, 36 Pac. 264; Sargent v. Tacoma, 10 Wash. 212, 38 Pac. 1048; Maney v. Hart, 11 Wash.

67, 39 Pac. 268; Norris Safe & Lock Co. v. Clark, 28 Wash. 268, 68 Pac. 718, 70 Pac. 129; McCleary v. Willis, 35 Wash. 676, 77 Pac. 1073; Carstens & Earles v. Hine, 39 Wash. 498, 81 Pac. 1004; Schoening v. Maple Valley Lumber Co., 61 Wash. 332, 112 Pac. 381.

Subject Matter and Grounds in General: See Remington's Digest, Plead., § 110; Lee v. Lee, 3 Wash. 236, 28 Pac. 355; Liebman v. McGraw, 3 Wash. 520, 28 Pac. 1107; Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; Zeimantz v. Blake, 39 Wash. 6, 80 Pac. 822. See, also, Johnson v. Rose, 113 Wash. 272, 193 Pac. 700.

New or Different Cause of Action: See Remington's Digest, Plead., § 112; Richardson v. Carbon Hill Coal Co., 18 Wash. 368, 51 Pac. 402, 1046; Anderson v. Harper, 30 Wash. 378, 70 Pac. 965; Van Behren v. Rettkowski, 37 Wash. 247, 79 Pac. 787; State ex rel. Matson v. Superior Court, 42 Wash. 491, 85 Pac. 254; Hadevis v. Nutting, 43 Wash. 40, 86 Pac. 197; Smith Sand & Gravel Co. v. Corbin, 89 Wash. 43, 154 Pac. 150; Fifer v. Lynden Lumber Co., 90 Wash. 373, 156 Pac. 1; Hansen v. Lemley, 100 Wash. 444, 171 Pac. 255.

See, also, Maze v. Feuchtwanger, 106 Wash. 327, 179 Pac. 850; Heitmiller v. Prall, 108 Wash. 382, 184 Pac. 334; Martin v. Bateman, 111 Wash. 634, 191 Pac. 759; Johnson v. Rose, 113 Wash. 272, 193 Pac. 700.

Jurisdiction—Change in form of action—Divorce: Schwarzmiller v. Schwarzmiller, 111 Wash. 672, 191 Pac. 808.

Amendments as to parties: Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; Dean v. Oregon R. & Nav. Co., 38 Wash. 565, 80 Pac. 842; Mottet v. Stafford, 94 Wash. 572, 162 Pac. 1001.

Change of Form of Action: See Remington's Digest, Plead., §§ 113, 113-1; Cummings v. Weir, 37 Wash. 42, 79 Pac. 487; Gerber v. Gerber, 52 Wash. 253, 100 Pac. 735; Robbins v. Wyman, Partridge & Co., 75 Wash. 617, 135 Pac. 656.

In a tenant's action for damages for breach of the landlord's contract to install a pump, it is not error, at the conclusion of the evidence, to refuse an amendment of the complaint to show fraud and false representations inducing plaintiff to enter into the lease, as it would change the form of action and require a retrial: Heitmiller v. Prall, 108 Wash. 382, 184 Pac. 334.

Operation and Effect in General: See Remington's Digest, Plead., § 114; Ward v. Ward, 14 Wash. 640, 45 Pac. 312; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Sengfelder v. Hill, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep.

36. See, also, *Hershey v. Hanauer*, 108 Wash. 498, 185 Pac. 627.

— **Demurrer to Amended Pleading:** See *Remington's Digest*, Plead., § 115; *Renton's Estate, In re*, 10 Wash. 533, 39 Pac. 145.

Amendment of Answer—Necessity for Amendment: See *Remington's Digest*, Plead., § 116; *Vulcan Iron Works v. Burrell Const. Co.*, 39 Wash. 319, 81 Pac. 836.

— **Condition of Cause, and Time for Amendment:** See *Remington's Digest*, Plead., § 117; *State ex rel. McLeod v. Superior Court*, 9 Wash. 366, 37 Pac. 454; *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857; *Price v. Scott*, 13 Wash. 574, 43 Pac. 634; *Van Lehn v. Morse*, 16 Wash. 672, 48 Pac. 404; *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014; *Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 Pac. 359; *United States, Use etc. v. Aetna Indem. Co.*, 40 Wash. 87, 82 Pac. 171; *Shine v. Culver*, 42 Wash. 484, 85 Pac. 271; *Veysey v. Thompson*, 49 Wash. 571, 95 Pac. 1096; *Anderson v. Hall*, 91 Wash. 376, 157 Pac. 996; *Maltbie v. Gadd*, 101 Wash. 483, 172 Pac. 557; *Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 172 Pac. 16.

— **Subject Matter and Grounds in General:** See *Remington's Digest*, Plead., § 118; *Vulcan Iron Works v. Burrell Const. Co.*, 39 Wash. 319, 81 Pac. 836; *Tebbetts v. Northern Commercial Co.*, 36 Wash. 599, 79 Pac. 203; *Pearson v. Gullans*, 81 Wash. 57, 142 Pac. 456; *Johnson v. Alexander*, 87 Wash. 570, 151 Pac. 1121; *Jensen v. Kohler*, 93 Wash. 8, 159 Pac. 978. See, also, *Western Farquhar Mach. Co. v. Pierce*, 108 Wash. 621, 185 Pac. 570; *Western Farquhar Mach. Co. v. Pierce*, 113 Wash. 141, 193 Pac. 708.

— **New or Different Defense:** See *Remington's Digest*, Plead., § 119; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Gould v. Gleason*, 10 Wash. 476, 39 Pac. 123; *Bishop v. Averill*, 19 Wash. 490, 53 Pac. 726; *Brown v. Baruch*, 24 Wash. 572, 64 Pac. 789; *Smith Sand & Gravel Co. v. Corbin*, 102 Wash. 306, 173 Pac. 16.

See, also, *O'Reilly v. Tillman*, 111 Wash. 594, 191 Pac. 866.

Amendment to Plead Statute of Limitations: See *Remington's Digest*, Lim. of Act., § 89; *Kinthead v. Holmes & Bull Furn. Co.*, 24 Wash. 216, 64 Pac. 157; *Thomas v. Price*, 33 Wash. 459, 74 Pac. 563, 99 Am. St. Rep. 961; *Peterson v. Philadelphia Mtg. etc. Co.*, 33 Wash. 464, 74 Pac. 585.

Amendment of Cross-complaint: See *Remington's Digest*, Plead., § 120; *Biddle Pub. Co. v. Pt. Townsend Steel etc. Co.*, 16 Wash. 681, 48 Pac. 407; *Klock Produce Co. v. Diamond Ice & Storage Co.*, 90 Wash. 67, 155 Pac. 414.

Amendment of Replication or Reply: See *Remington's Digest*, Plead., § 121; *Ankeny v. Clark*, 1 Wash. 549, 20 Pac. 583; *Bergman v. London etc. Fire Ins. Co.*, 34 Wash. 398, 75 Pac. 989; *Kline v. Stein*, 38 Wash. 124, 80 Pac. 278; *Hoffman v. Schnatterly*, 103 Wash. 465, 175 Pac. 30. See, also, *Strang v. Person*, 108 Wash. 503, 185 Pac. 944.

Amendment of Demurrer: See *Remington's Digest*, Plead., § 122; *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59; *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517.

Leave of Court: See *Remington's Digest*, Plead., § 124; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Long v. Eisenbeis*, 23 Wash. 556, 63 Pac. 249; *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12; *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855; *Harsin v. Oman*, 59 Wash. 693, 110 Pac. 621.

Necessity in General: See *Remington's Digest*, Plead., § 125; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

VACATING JUDGMENTS.—A motion to vacate a judgment is directed to the discretion of the trial court, and its action in passing thereon will not be reversed, unless showing made therefor leaves no room for the exercise of discretion by it: *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134.

As to vacation of judgments, when taken through mistake, surprise, or inadvertence, see *Remington's Digest*, Judgment, §§ 110—112, and cases cited.

A court will not open a judgment regularly entered, although it may be through mistake, unless it appears that the judgment was wrongful or oppressive; *Northern Pac. & Puget S. Ry. Co. v. Black*, 3 Wash. 327, 28 Pac. 538.

Where judgment has been taken against defendant by default for failure to answer, it should be vacated when it appears that he has a meritorious defense and was misled by a statement of plaintiff's attorney, that the cause would be tried several months later than the time at which default was taken: *Bast v. Hyson*, 6 Wash. 170, 32 Pac. 997.

It is not an abuse of discretion for a trial court to deny a motion to vacate a judgment by default, when the only ground claimed for relief is that defendant's counsel was prevented from answering, on account of absence from the city: *Sanborn v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466; nor to deny a motion to vacate a judgment, when the affidavits in support of the motion show only a want of attention to the case by counsel and client: *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33.

Mistake of an attorney in noting the day in which answer must be filed, when a summons is handed him by a client.

owing to which mistake judgment by default is taken against his client for want of answer, will warrant the court in setting aside the default: *Reitmeir v. Seigmund*, 13 Wash. 624, 43 Pac. 878.

This section authorizes a trial court to vacate its own order denying a new trial, taken against a party through mistake, inadvertence, surprise or excusable neglect: *Little Bill v. Dyslin*, 51 Wash. 675, 99 Pac. 1026.

An order vacating a judgment will not be reversed on the technical ground that it was granted after denial of a former motion for such order, when on the same grounds, when the first motion should have been granted: *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272.

Under section 109 of the Code of 1881, of which this section is an amendment, it was held that an order vacating a judgment, whether at the same term or within five months thereafter, is not appealable: *Lilienthal v. Wright*, 1 Wash. 1, 23 Pac. 801; *Gower v. Gower*, 1 Wash. 16, 24 Pac. 29; see contra, *Northern Pac. & Puget S. Ry. Co. v. Black*, 3 Wash. 327, 28 Pac. 538.

In *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381, it is held that an order setting aside a default is not appealable. See, also, *Halter v. Spokane Soap Works Co.*, 12 Wash. 662, 42 Pac. 126.

This section, authorizing relief from judgments has no application to new trials for newly discovered evidence, in view of other statutes expressly covering that subject: *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088.

In proceedings under the statute to set aside a voidable judgment for mistake or surprise under this section, or for irregularity or fraud in obtaining it under section 464, it is necessary to meet in addition the provisions of section 469, requiring an adjudication that there is a valid defense: *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 Pac. 1158.

An application under this section is properly made by motion, since the procedure by petition for the vacation of judgments is applicable only to the particular cases set forth in section 467, which specially prescribes the procedure to be followed in those cases alone: *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92.

But such fact would not preclude the applicant from presenting by way of petition his demand for relief, based upon a joinder of the causes of action provided for under those two sections of the code: *Williams v. Breen*, 25 Wash. 666, 66 Pac. 103.

This section authorizes a trial court to review and vacate its own order deny-

ing a new trial, taken against a party through mistake, inadvertence, surprise or excusable neglect: *Little Bill v. Dyslin*, 51 Wash. 675, 99 Pac. 1026.

The court may allow withdrawal of a motion for voluntary nonsuit made upon suggestion of the court, formal judgment of nonsuit not having been signed: *Allbin v. Seattle*, 98 Wash. 275, 167 Pac. 922.

An order vacating a judgment on the ground of accident and surprise, under this section, after first refusing to vacate the same, on a previous similar motion, will not be reversed if the first motion for the same relief should have been granted: *Clein v. Wandschneider*, 14 Wash. 257, 44 Pac. 272.

Under this section it is the duty of the court to correct a mistake made by counsel in entering an order confirming a receiver's sale, so that the same will conform to the order and notice of sale: *National Bank of Commerce v. Kilsheimer & Co.*, 59 Wash. 460, 110 Pac. 15.

It is not an abuse of discretion to set aside a default judgment for mistake, under this section, where the defendant had consulted with, and believed in good faith that he had employed a lawyer to defend the action, although the attorney denied the employment: *Kain v. Sylvester*, 62 Wash. 151, 113 Pac. 573.

Limitations as to Relief from Judgments: Proceedings to vacate a judgment by motion or by petition, under sections 303, 464—466, are limited to one year after entry of the judgment, unless the judgment is void on its face for want of jurisdiction: *Denton v. Merchants' Nat. Bank*, 18 Wash. 387, 51 Pac. 473; *Keith v. Rose*, 59 Wash. 197, 109 Pac. 810; *State ex rel. Pacific Loan & Investment Co. v. Superior Court*, 84 Wash. 392, 146 Pac. 834.

The general statutes on the subject of vacation of judgments, which makes no restriction in the case of divorce decrees, are superseded, in so far as they conflict, by the later enactment of section 235, supra, which forbids the opening up of decrees of divorce: *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535.

Amendment of pleadings on trial. 5 Ann. Cas. 674.

Right to amend pleading so as to set up statute of limitations. Ann. Cas. 1914A, 24.

Right to amend complaint by adding new parties plaintiff. Ann. Cas. 1916C, 591.

Amendment of pleading where plaintiff in action is nonexistent. Ann. Cas. 1917D, 1196.

Amendment of complaint in suit for divorce so as to show residence or domicile. 48 L. R. A. (N. S.) 779.

Amendment of pleading with respect to description of land in controversy. 14 *Ann. Cas.* 455.

Amendment of complaint as to plaintiff in statutory action for death. *L. R. A.* 1916E, 172.

Amendment of pleadings in proceeding to perpetuate testimony. 25 *L. R. A. (N. S.)* 680.

Amendment of pleading in suit by or against partnership in firm name. 29 *L. R. A. (N. S.)* 284.

Amendment of pleadings before arbitrator. 20 *Ann. Cas.* 603.

Amendment of complaint so as to change capacity in which suit is brought from representative to individual one, or vice versa. *Ann. Cas.* 1916C, 401.

Amendment of complaint in civil action for assault and battery to set up defense of justification. 21 *Ann. Cas.* 116.

Amendment of plea in abatement. 12 *Ann. Cas.* 324.

Amendment of ad damnum clause after verdict. *Ann. Cas.* 1913B, 709.

Right to amend pleading after default judgment. *Ann. Cas.* 1913B, 481.

Amendment of complaint by setting forth additional ground of negligence as stating new cause of action. *Ann. Cas.* 1913D, 742; *Ann. Cas.* 1916B, 511; *Ann. Cas.* 1916E, 1237.

Amendment relying on same cause of action but curing demurrable defects in original complaint as stating new cause of action. *Ann. Cas.* 1914C, 1025.

Amendment of complaint for damages for personal injuries by changing description of place of injury as introducing new cause of action. *Ann. Cas.* 1915B, 219.

General rules as to amendment of equity pleading. 1 *Ann. Cas.* 976.

§ 304. Amendments, How Made.

When any pleading or proceeding is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended complaint, or otherwise, as the case may be. Such amended pleading shall be complete in itself, without reference to the original, or any preceding amended one. [L. '69, p. 27, § 108; Cd. '81, § 110; 2 H. C., § 222.]

Cited in 15 Wash. 612; 16 Wash. 357; 103 Wash. 51.

Mode of Making Amendment: See Remington's Digest, Plead., § 106; Williams v. Miller, 1 W. T. 88; Newberg v. Farmer, 1 W. T. 182; Newman v. Buzard, 24 Wash. 225, 64 Pac. 139.

Under this section requiring an amended pleading to be complete in itself, allegations in an original answer are waived by amended answers: Seattle v. Puget S. Tr. L. & P. Co., 103 Wash. 41, 174 Pac. 464.

§ 305. Informal Pleadings, Stricken Out—Amendment of.

Any pleading not duly verified and subscribed may, on motion of the adverse party, be stricken out of the case. When any pleading contains more than one cause of action or defense, if the same be not pleaded separately, such pleading may, on motion of the adverse party, be stricken out of the case. When a motion to strike out is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading; or if the motion be disallowed, and it appear to have been made in good faith, the court may, upon like terms, allow the party to plead over. [L. '69, p. 27, § 109; Cd. '81, § 111; 2 H. C., § 223.]

Cited in 40 Wash. 212; 98 Wash. 568.

Striking Out Pleading or Defense—In General: See Remington's Digest, Plead., § 151; Mann v. Young, 1 W. T. 454; Kratz v. Dawson, 3 W. T. 100, 13 Pac. 663; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81;

Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; Smith Sand & Gravel Co. v. Corbin, 89 Wash. 43, 154 Pac. 150; Jensen v. Kohler, 93 Wash. 8, 159 Pac. 978. See, also, Loewe v. Osner & Mehlhorn, 109 Wash. 124, 186 Pac. 643.

— **Insufficient Allegations or Denials:** See Remington's Digest, Plead., § 152; Hatch v. Tacoma etc. R. Co., 6 Wash. 1, 7, 32 Pac. 1063; Silsby v. Tacoma etc. R. Co., 6 Wash. 295, 32 Pac. 1067; Keef v. Tibbals, 18 Wash. 656, 52 Pac. 227; Stone v. Insurance Co. of North America, 56 Wash. 427, 105 Pac. 856.

A complaint may be struck out where it pleads as one cause of action, a wrongful eviction from a leasehold, damages by reason of a leaky roof, and injury from change of a street grade: Hocker-smith v. Sullivan, 71 Wash. 244, 128 Pac. 222.

— **Amended or Supplemental Pleading:** See Remington's Digest, Plead., § 153; Noyes v. Loughhead, 9 Wash. 325, 37 Pac. 452; Hays v. Peavey, 43 Wash. 163, 86 Pac. 170.

A general denial of the material allegations of a complaint cannot be stricken out on the ground that it is a sham or frivolous pleading: Larson v. Winder, 14 Wash. 647, 45 Pac. 315.

— **Application and Proceedings Thereon:** See Remington's Digest, Plead., § 155; Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103; Vaktaren Pub. Co. v. Pacific etc. Pub. Co., 41 Wash. 355, 83 Pac. 426; Maltbie v. Gadd, 101 Wash. 483, 172 Pac. 557.

Striking Out Matter from Pleadings—In General: See Remington's Digest, Plead., § 156; Penter v. Staight, 1 Wash. 365, 25 Pac. 469; Waldron v. Canadian Pac. R. Co., 22 Wash. 253, 60 Pac. 653; Tyler v. North American T. & T. Co., 24 Wash. 253, 64 Pac. 162; Rochford v. Doty, 37 Wash. 232, 79 Pac. 782.

Motions—Scope and Purposes of Remedy by Motion in General: See Remington's Digest, Plead., § 144; Renton v. St. Louis, 1 W. T. 215; Chambers v. Hoover, 3 W. T. 107, 13 Pac. 466; Bethel v. Robinson, 4 Wash. 446, 30 Pac. 734; Seal v. Cameron, 24 Wash. 62, 63 Pac. 1103.

Conditions on Granting Application.—An order of the court granting a motion to vacate a default judgment, when not an abuse of discretion under this section: Halter v. Spokane Soap Works Co., 12 Wash. 662, 42 Pac. 126.

Striking out pleading to cure defect for which motion in arrest of judgment has been made. 67 L. R. A. 182.

Power to punish disobedience to orders in case by striking pleadings. 4 L. R. A. (N. S.) 1185; 27 L. R. A. (N. S.) 1060.

§ 306. Defendant Designated by Fictitious Name.

When the plaintiff shall be ignorant of the name of the defendant, it shall be so stated in his pleading, and such defendant may be designated in any pleading or proceeding by any name, and when his true name shall be discovered, the pleading or proceeding may be amended accordingly. [L. '54, p. 144, § 70; L. '69, p. 28, § 110; Cd. '81, § 112; 2 H. C., § 224.]

§ 307. Harmless Errors Disregarded.

The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. [L. '54, p. 144, § 71; Cd. '81, § 113; 2 H. C., § 225.]

Cited in 24 Wash. 221; 26 Wash. 342; 50 Wash. 363; 53 Wash. 634; 68 Wash. 62; 70 Wash. 77, 288; 71 Wash. 11; 83 Wash. 32, 58, 381, 475; 87 Wash. 303; 88 Wash. 611; 89 Wash. 121, 439; 92 Wash. 515; 102 Wash. 47.

Harmless Error Disregarded on Appeal: See Remington's Digest, App. & E., §§ 422—470; Criminal Law, §§ 444—453.

The supreme court will not review error arising upon defective pleadings, when it appears that they could have been amended without prejudicing appellant's rights, and the amendments will be considered as made under this section: Pencil v. Home Ins. Co., 3 Wash. 485, 28 Pac.

1031; Helphrey v. Strobach, 13 Wash. 128, 42 Pac. 537; Allend v. Spokane Falls & N. R. Co., 21 Wash. 324, 58 Pac. 244; State v. Lorenz, 22 Wash. 289, 60 Pac. 644; Kinkead v. Holmes & Bull Fur. Co., 24 Wash. 216, 64 Pac. 157; Green v. Tidball, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879.

Discretion of Court.—The granting or refusing to grant leave to amend a pleading rests in the discretion of the trial court, and will not be reversed except for abuse of discretion which has resulted in surprise or prejudice to appellant: See Remington's Digest, Plead., § 101; Silsby v. Frost, 3 W. T. 388, 17 Pac. 887; Hul-

bert v. Brackett, 8 Wash. 438, 36 Pac. 264; Morgan v. Morgan, 10 Wash. 99, 38 Pac. 1054; Belles v. Miller, 10 Wash. 259, 38 Pac. 1050; Seward v. Derrickson, 12 Wash. 225, 40 Pac. 939; McDough v. Great Northern R. Co., 15 Wash. 244, 46 Pac. 334; Ogle v. Jones, 16 Wash. 319, 47 Pac. 747; West Seattle Land & Imp. Co. v. Herren, 16 Wash. 665, 48 Pac. 341; Interstate Sav. & L. Assn. v. Knapp, 20 Wash. 225, 55 Pac. 48, 931; Seattle v. Baxter, 20 Wash. 714, 55 Pac. 320; Hart Lum. Co. v. Rucker, 20 Wash. 383, 55 Pac. 320; Long v. Eisenbeis, 23 Wash. 556, 63 Pac. 249; Daly v. Everett Pulp & P. Co., 31 Wash. 252, 71 Pac. 1015; Thomas v. Price, 33 Wash. 459, 74 Pac. 563, 99 Am. St. Rep. 961; Cummings v. Weir, 37 Wash. 42, 79 Pac. 487; Helbig v. Grays Harbor Elec. Co., 37 Wash. 130, 79 Pac. 612; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784; Van Behren v. Rettkowski, 37 Wash. 247, 79 Pac. 787. See, also, Connelly v. Malloy, 106 Wash. 464, 188 Pac. 469; Osner & Mehlhorn v. Loewe, 111 Wash. 550, 191 Pac. 746.

And for a proper exercise of such discretion in allowing or refusing such amendments: See Remington's Digest, Plead., § 101; Balch v. Smith, 4 Wash. 497, 30 Pac. 648; Maney v. Hart, 11 Wash. 67, 39 Pac. 268; Price v. Scott, 13 Wash. 574, 43 Pac. 634; Van Lehn v. Morse, 16 Wash. 672, 48 Pac. 404; Price Baking Powder Co. v. Rinear, 17 Wash. 95, 49 Pac. 223; Hudson v. Ellsworth, 56 Wash. 243, 105 Pac. 463; Stone v. Insurance Co. of North America, 56 Wash. 427, 105 Pac. 856; Eaton v. General Compressed Air etc. Mach. Co., 62 Wash. 373, 113 Pac. 1091; Behne v. Stapish, 68 Wash. 204, 122 Pac. 1002; Gust v. Gust, 70 Wash. 695, 127 Pac. 292; State ex rel. Murphy v. Coleman, 71 Wash. 15, 127 Pac. 568; McDougall v. McDonald, 86 Wash. 334, 150 Pac. 628; Stoner v. Fryett, 91 Wash. 89, 157 Pac. 213; Barton v. Van Gesen, 91 Wash. 94, 157 Pac. 215; Lipsett v. Dettering, 94 Wash. 629, 162 Pac. 1007; Shultz v. Crewdson, 95 Wash. 266, 163 Pac. 734; Farnandis v. Seattle, 95 Wash. 587, 164 Pac. 225; Garrison v. Newton, 96 Wash. 284, 165 Pac. 90. See, also, Kinkhead v. Holmes & Bull Furn. Co., 24 Wash. 216, 64 Pac. 157; Zindorf v. Tillotson, 83 Wash. 472, 145 Pac. 587.

For Abuse of Such Discretion: See Remington's Digest, Plead., § 101; Leaman v. Thompson, 43 Wash. 579, 86 Pac. 926; Maitland v. Purdy, 49 Wash. 575, 96 Pac. 154.

Where the essential facts were not established and did not appear from the findings, which were mere conclusions, there is no room for the application of the statute relating to amendments: Crandall v. Lee, 89 Wash. 115, 154 Pac. 190.

Technical Defects and Objections: See Remington's Digest, Plead., § 198; King v. Ilwaco R. & Nav. Co., 1 Wash. 127, 23 Pac. 924; Titlow v. Cascade Oatmeal Co., 15 Wash. 652, 47 Pac. 19; Bonne v. Security Sav. Soc., 35 Wash. 696, 78 Pac. 38; Carstens v. Milo, 40 Wash. 335, 82 Pac. 410. See, also, Whitaker v. Ellis, 102 Wash. 43, 172 Pac. 881.

Under this section the supreme court, on reversing a cause for failure of the trial judge to make findings of fact and conclusions of law, will remand the case to the court below with instructions to make such findings and enter judgment thereon: Colvin v. Clark, 83 Wash. 376, 145 Pac. 419.

Objections to Rulings on Demurrer in General: See Remington's Digest, Plead., § 203; Moore v. Walla Walla, 2 W. T. 184, 2 Pac. 187; Penter v. Staight, 1 Wash. 365, 25 Pac. 469; Lowman v. West, 7 Wash. 407, 35 Pac. 130; Washington Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321, 64 Pac. 546; Marvin v. Yates, 26 Wash. 50, 66 Pac. 131; Crane Co. v. Aetna Indemnity Co., 43 Wash. 516, 86 Pac. 849.

— **Waiver by Amendment:** See Remington's Digest, Plead., § 204; Wood v. Mastick, 2 W. T. 64, 3 Pac. 612; Bell v. Waudby, 4 Wash. 743, 31 Pac. 18; Prescott v. Puget Sound etc. Dredg. Co., 31 Wash. 177, 71 Pac. 772; Reed v. Parker, 33 Wash. 107, 74 Pac. 61; Hays v. Peavey, 43 Wash. 163, 86 Pac. 170.

— **Waiver by Pleading Over:** See Remington's Digest, Plead., § 205; Tolmie v. Dean, 1 W. T. 46; Ward v. Moorey, 1 W. T. 104; Renton v. St. Louis, 1 W. T. 215; Wood v. Mastick, 2 W. T. 64, 3 Pac. 612; Jones v. St. Paul etc. R. Co., 16 Wash. 25, 47 Pac. 226; Scott v. Hallock, 16 Wash. 439, 47 Pac. 968; Maris v. Clevenger, 29 Wash. 395, 69 Pac. 1089; Budlong v. Budlong, 48 Wash. 645, 94 Pac. 478; Clemens v. Stanton Co., 61 Wash. 419, 112 Pac. 494; Johnson v. Johnson, 66 Wash. 113, 119 Pac. 22; Benjamin v. Ernst, 83 Wash. 59, 145 Pac. 79; Rea v. Eslick, 87 Wash. 125, 151 Pac. 256.

Objections to Rulings on Motions: See Remington's Digest, Plead., § 208; Kratz v. Dawson, 3 W. T. 100, 13 Pac. 663; Pettygrove v. Rothschild, 2 Wash. 6, 25 Pac. 907; Davis v. Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393; Du Clos v. Batcheller, 17 Wash. 389, 49 Pac. 483; Boardman v. Hager, 24 Wash. 487, 64 Pac. 724; Rattlemiller v. Stone, 28 Wash. 104, 68 Pac. 168; Anderson v. Harper, 30 Wash. 378, 70 Pac. 965; Curtis v. Tenino Stone Quarries, 37 Wash. 355, 79 Pac. 955; Pike Street, In re, 42 Wash. 551, 85 Pac. 45; Federal Iron & Brass Bed Co. v. Hock, 42 Wash. 668, 85 Pac. 418; Johnson v. Seattle Elec. Co., 39 Wash. 211, 81 Pac.

705. See, also, *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

Objections to Evidence as not Within Issues: See *Remington's Digest*, Plead., § 209; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

Objections to Evidence on Ground of Insufficiency of Pleading: See *Remington's Digest*, Plead., § 210; *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123; *Prescott v. Puget Sound Bridge etc. Co.*, 31 Wash. 177, 71 Pac. 772; *O'Day v. Ambaum*, 47 Wash. 684, 92 Pac. 421, 15 L. R. A. (N. S.) 484.

Objections to Evidence on Ground of Variance: See *Remington's Digest*, Plead., § 211; *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780; *Megrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032; *Bruce v. Foley*, 18 Wash. 96, 50 Pac. 935; *Blair v. Wilkeson Coal & Coke Co.*, 54 Wash. 334, 103 Pac. 18; *Kelly v. Spokane*, 83 Wash. 55, 145 Pac. 57. See, also, *Umpqua Valley Fruit Union v. North Pac. Fruit Distributors*, 108 Wash. 265, 183 Pac. 101.

Aider by Verdict or Judgment—In General: See *Remington's Digest*, Plead., § 212; *Johnson v. Leonhard*, 1 Wash. 564, 20 Pac. 591; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101; *Moynahan v. Interstate Min. etc. Co.*, 31 Wash. 417, 72 Pac. 81; *Johnson*

v. Pacific Bank & Store Fixture Co., 59 Wash. 58, 109 Pac. 205.

Aider of Defects in Complaint in General: See *Remington's Digest*, Plead., § 213; *Price Baking Powder Co. v. Rinear*, 17 Wash. 95, 49 Pac. 223; *Pain v. Isaacs*, 10 Wash. 173, 38 Pac. 1038; *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879; *Brown v. Gillett*, 33 Wash. 264, 74 Pac. 386; *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160; *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114.

— **Nature of Omission in General:** See *Remington's Digest*, Plead., § 214; *Livesley v. O'Brien*, 3 Wash. 546, 28 Pac. 920; *Burdick v. Burdick*, 7 Wash. 533, 35 Pac. 415; *Waldron v. Home Mut. Ins. Co.*, 9 Wash. 534, 38 Pac. 136; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

Instructions to Jury—Instructions Cured by Verdict: See *Remington's Digest*, Trial, § 162; *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76; *Oregon Ry. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Pac. 973, 26 Am. St. Rep. 860; *Davis v. Gilliam*, 14 Wash. 206, 44 Pac. 119; *Secor v. Oregon Imp. Co.*, 15 Wash. 35, 45 Pac. 654; *Bay View Brewing Co. v. Techlenberg*, 19 Wash. 469, 53 Pac. 724; *Ott v. Press Pub. Co.*, 40 Wash. 308, 82 Pac. 403; *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220.

§ 308. Supplemental Pleadings, When Allowed.

The court may, on motion, allow supplemental pleadings showing facts which occurred after the former pleadings were filed. [L. '54, p. 144, § 72; Cd. '81, § 114; 2 H. C., § 226.]

Cited in 1 Wash. 375; 3 Wash. 657; 27 Wash. 335; 72 Wash. 259; 106 Wash. 665.

Matters Arising or Discovered After Original Pleading: See *Remington's Digest*, Plead., § 111; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794; *International Dev. Co. v. Clemans*, 59 Wash. 398, 109 Pac. 1034.

A supplemental bill should be permitted to show subsequent facts: *Meacham Arms Co. v. Swarts*, 2 W. T. 412, 7 Pac. 859.

In an action to quiet the title of a divorced wife in a community property not disposed of by the decree, which was prematurely commenced before the final decree of divorce was entered, it is not allowable by supplemental complaint to plead the subsequent entry of the decree of divorce; since a premature action cannot be sustained by a supplemental complaint showing a later cause of action under a new class of facts which is the antithesis of the first cause pleaded: *Keeler v. Parks*, 72 Wash. 255, 130 Pac. 111.

Where, pending an action, defendants procured a settlement and agreement to

dismiss by fraud, the plaintiff, before entry of a dismissal, is properly given leave to file a supplemental complaint setting up the fraud and asking that the agreement to dismiss the action be set aside: *Daniel v. Daniel*, 106 Wash. 659, 181 Pac. 215.

Supplemental Complaint: See *Remington's Digest*, Plead., § 126; *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86; *Scoland v. Scoland*, 4 Wash. 118, 29 Pac. 930; *Kleeb v. Bard*, 7 Wash. 41, 34 Pac. 138; *Lawrence v. Pederson*, 33 Wash. 1, 74 Pac. 1011; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209; *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202; *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*, 33 Wash. 47, 73 Pac. 772; *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232; *Edwards v. Seattle, Renton etc. R. Co.*, 62 Wash. 77, 113 Pac. 563.

New Cause of Action: See *Remington's Digest*, Plead., § 127; *Andrews v. Andrews*, 3 W. T. 286, 14 Pac. 68; *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *Lawrence v. Pederson*, 34 Wash. 1, 74 Pac. 1011; *Keeler v. Parks*, 72 Wash. 255,

130 Pac. 111. See, also, *Daniel v. Daniel*, 106 Wash. 659, 181 Pac. 215.

Supplemental Answer: See *Remington's Digest*, Plead., § 128; *Schulte v. Littlejohn*, 2 Wash. 129, 26 Pac. 79; *Tilden v. Gordon & Co.*, 34 Wash. 92, 74 Pac. 1016; *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855; *McRea v. Warehime*, 49 Wash. 194, 94 Pac. 824.

Under this section, it is proper to allow defendant to withdraw an answer and demur on the ground that the complaint was not filed within time to toll the statute of limitations, where the objection was not available at the time the issue was made up: *Petree v. Washington Water Power Co.*, 64 Wash. 636, 117 Pac. 475.

ISSUES, TRIAL AND JUDGMENT.

TITLE III.

ISSUES, TRIAL AND JUDGMENT.

CHAPTER I.—ISSUES IN CIVIL ACTIONS.

- | | |
|---------------------------------|---|
| 309. Issues defined, kinds of. | 316. Jury fee—Advance deposit—Waiver of jury. |
| 310. Issue of law. | 317. Fee deposited to be part of costs. |
| 311. Issue of fact, how raised. | 318. Agreement to refer. |
| 312. Trial defined. | 319. Notice of trial—Note of issue—Motion docket. |
| 313. Issue of law, how tried. | 320. Hearing—Trial of issue. |
| 314. Issue of fact, how tried. | 321. Pleadings—Time for filing. |
| 315. Trial of other issues. | |

CHAPTER II.—TRIAL OF CIVIL ACTIONS.

- | | |
|--|---|
| 322. Motion for continuance—Allowance—Terms. | 341. Special findings. |
| 323. Impaneling jury. | 342. Questions of law—Duty of court. |
| 324. Challenges—Kind and number. | 343. Questions of fact—Duty of jury. |
| 325. Peremptory challenges, defined. | 344. View by jury of premises. |
| 326. Challenge for cause, defined. | 345. Admonitions to jury. |
| 327. General causes of challenge. | 347. Proceeding in case juror becomes ill. |
| 328. Previous service within one year. | 348. Juror as witness. |
| 329. Particular cause of challenge. | 349. Care of jury while deliberating. |
| 330. Implied bias, defined. | 350. Expenses of keeping jury. |
| 331. Challenge for actual bias. | 351. Taking papers to jury-room. |
| 332. Exemption not cause of challenge. | 352. Further instructions to jury. |
| 333. Peremptory challenges, how taken. | 353. Discharge of jury without verdict. |
| 334. Order of taking challenges. | 354. If jury discharged, cause continued for trial. |
| 335. Trial and exceptions to challenges. | 355. Recess of court while jury are deliberating. |
| 336. Trial of challenge—Rules governing. | 356. Proceedings when jury have agreed. |
| 337. Challenge, exception and denial may be oral. | 357. Manner of giving verdict. |
| 338. Oath of jurors. | 358. Ten jurors may render verdict in civil cases. |
| 339. Manner of conducting trials—Statements of counsel—Charging jury—Written instructions. | 359. Jury may be polled. |
| 340. Directing judgment and discharging jury. | 360. Correction of informal verdict. |
| | 361. Receiving verdict and discharging jury. |

CHAPTER III.—THE VERDICT.

- | | |
|---|---|
| 362. General and special verdict, defined. | 364. Rendition of general or special verdict, when. |
| 363. Verdict in actions for specific personal property. | 365. Special verdict controls. |
| | 366. Jury to assess amount of recovery. |

CHAPTER IV.—TRIAL BY THE COURT.

- | | |
|--|--|
| 367. Findings and conclusions, how made. | 368. Order of proceedings—Findings deemed verdict. |
|--|--|

CHAPTER V.—TRIAL BY REFEREES.

- | | |
|--|--|
| 369. Reference by consent. | 375. Referee's report—Contents—Filing evidence—Cost of frivolous evidence. |
| 370. Reference without consent, when. | |
| 371. To whom reference may be ordered. | 376. Filing report and proceedings thereon. |
| 372. Qualifications of referees. | 377. Judgment on referee's report. |
| 373. Challenges to referees. | |
| 374. Trial by referees. | |

ISSUES, TRIAL AND JUDGMENT.

CHAPTER VI.—AGREED CASES.

- | | |
|--|--|
| 378. Submission of controversies without action. | 379. Judgment as in other cases. |
| | 380. Judgments enforced as in other cases. |

CHAPTER VII.—EXCEPTIONS.

- | | |
|--|---|
| 381. Definition. | 391. Certificate, what to contain — How signed. |
| 382. When to be taken. | |
| 383. Manner of taking in cases tried by court. | 392. How certified upon change or death of judge. |
| 384. Manner of taking in jury cases. | 393. When to be filed—Effect of irregularity. |
| 385. How entered in minutes. | 394. Return of bill—Extension of time for brief. |
| 386. Manner of taking and entry. | 395. What shall be part of record. |
| 387. Review on appeal. | 396. How certified when cases consolidated. |
| 388. Bill of exceptions, what constitutes. | 397. Construction of chapter. |
| 389. Bill of exceptions—Amendments—Notice to settle. | |
| 390. How written evidence certified. | |

CHAPTER VIII.—NEW TRIALS.

- | | |
|---|--------------------------------------|
| 398. New trial, defined. | 401. Affidavits may be used. |
| 399. New trial may be granted—Grounds for granting. | 402. Notice and motion, practice. |
| 400. Specification of grounds for new trial. | 403. Affidavits for motion—Contents. |

CHAPTER IX.—JUDGMENTS IN GENERAL.

- | | |
|---------------------------------|--|
| 404. Judgment, defined. | 406. Judgment for or against any of the parties. |
| 405. Order and motion, defined. | 407. Judgments against several defendants. |

CHAPTER X.—JUDGMENT OF NONSUIT.

- | | |
|--|---|
| 408. Judgment of dismissal or nonsuit—Grounds. | 409. All other judgments are on the merits. |
| | 410. Effect of judgment of nonsuit. |

CHAPTER XI.—JUDGMENT BY DEFAULT.

- | | |
|--------------------------------------|-----------------------------|
| 411. Judgment for failure to answer. | 412. Setting aside default. |
|--------------------------------------|-----------------------------|

CHAPTER XII.—JUDGMENT BY CONFESSION.

- | | |
|--|---|
| 413. When judgment may be given on confession. | 417. Judgment by confession without action. |
| 414. By corporations and minors. | 418. Requisites of statement. |
| 415. Against persons jointly liable. | 419. Proceedings in court on presentation of statement. |
| 416. Confession, how made. | |

CHAPTER XIII.—ARBITRATION AND JUDGMENT THEREON.

- | | |
|--|---|
| 420. Disputes may be submitted to arbitration. | 426. Powers of arbitrators. |
| 421. Agreement to be in writing. | 427. Rules of evidence. |
| 422. How arbitration conducted. | 428. Arbitrators may punish contempts. |
| 423. Compensation of arbitrators—Penalty. | 429. Costs taxed against losing party. |
| 424. Exceptions to award. | 430. Award, when affirmed, has force of a judgment. |
| 425. Proceedings of court on such exceptions. | |

CHAPTER XIV.—MANNER OF TAKING AND ENTERING JUDGMENTS.

- | | |
|---|--|
| 431. Time of entering judgment—Signing and filing—Motions attacking—Service and filing. | 433. Judgment in case of setoff. |
| 431-1. Entry of verdict in execution docket—Effect—Lien. | 434. Judgment in actions to recover personal property. |
| 431-2. Abstract of verdict—Transmission to other county—Cessation of lien—Certificate. | 435. Entry of judgment. |
| | 436. Summons, after judgment, to joint debtor not originally served. |
| | 437. Contents of such summons. |
| | 438. Affidavit to support summons. |

- 439. Defenses in such case.
- 440. Pleadings in such case.
- 441. Trial and entry in such cases.

- 432. Judgment-roll—What constitutes.
- 443. Judgment-roll—Indorsement and preservation.

CHAPTER XV.—JUDGMENT LIENS.

- 444. Execution docket.
- 445. Judgment lien.
- 446. Clerk's record index.
- 447. Assignment or satisfaction, filing — Notice.
- 448. Entries in execution docket.
- 449. Book of levies.
- 450. Transcripts from justices' courts.
- 451. Abstract of judgment, contents of.

- 452. Transcript of justice's docket.
- 453. Entry of abstract or transcript of judgment.
- 454. Satisfaction of judgments.
- 455. Satisfaction of judgments of federal court—Penalty for failure.
- 456. Existing liens continued.
- 457. Interest on judgments.
- 458. Appeal does not suspend lien.

CHAPTER XVI.—REVIVAL OF JUDGMENTS.

- 459. Judgment lien expires when.
- 460. Proceedings for extension denied.
- 461. Exceptions.

- 462. Revival—Procedure.
- 463. Proof for revival—No revival after six years.

CHAPTER XVII.—VACATION AND MODIFICATION OF JUDGMENTS.

- 464. Causes for vacation or modification of judgments.
- 465. Petition for new trial.
- 466. Petition to vacate, etc., to be by motion, when.
- 467. Petition to be verified, when.

- 468. Proceedings.
- 469. Valid defense.
- 470. Grounds to vacate must first be tried.
- 471. Injunction to suspend proceedings.
- 472. Construction of act.
- 473. Judgment upon denial of application.

CHAPTER XVIII.—COSTS AND DISBURSEMENTS.

- 474. Compensation of attorneys—Costs.
- 475. Amount, how fixed.
- 476. Prevailing party entitled to costs and disbursements.
- 477. Limitations.
- 478. Limited to one of several actions.
- 479. Costs to defendant.
- 480. Costs to defendants defending separately.
- 481. Costs as attorney fee—Amount taxable.
- 482. Disbursements, etc.—Cost bill.
- 483. Fees of referees.
- 484. Costs on postponement of trial.
- 485. Costs where tender is made.
- 486. Deposit with clerk by defendant of tender, effect of.
- 487. Costs in appeals from justice's court.
- 488. Costs against guardian of infant plaintiff.
- 489. Costs in cases of executors, etc.
- 490. Assignee liable for costs, when.
- 491. Costs against state or county.

- 492. Costs in revisory proceedings.
- 493. Costs in discretion of court.
- 494. Retaxation of costs.
- 495. Security for costs—Demand—Bond—Deposit.
- 496. Judgment against surety on cost bond.
- 497. Schedule of fees of officers, witnesses, etc.
- 498. Witnesses and jurors in criminal cases.
- 499. Salaried officers not to receive fees.
- 500. "Folio" defined, and matter concerning.
- 501. Mileage in certain cases.
- 502. Witness fee not allowed to attorney.
- 504. Costs of publication to be paid in advance.
- 505. Fees payable in advance.
- 506. Officers not to serve until fees are paid—Liability afterward.
- 507. Fees of witness are to be paid in advance—Waiver.
- 508. County to pay certain costs.
- 509. Expenses in lieu of mileage.

CHAPTER I.

ISSUES IN CIVIL ACTIONS.

§ 309. Issues Defined, Kinds of.

Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds—First, of law; and second, of fact. [Cf. L. '54, p. 163, § 179; Cd. '81, § 200; 2 H. C., § 333; L. '93, p. 415, § 28.]

Cited in 24 Wash. 96.

§ 310. Issue of Law.

An issue of law arises upon a demurrer to the complaint, answer or reply. [Cf. L. '54, p. 163, § 180; Cd. '81, § 201; 2 H. C., § 334; L. '93, p. 415, § 29.]

Cited in 17 Wash. 602.

§ 311. Issue of Fact, How Raised.

An issue of fact arises,—

First: Upon a material allegation in the complaint controverted by the answer; or

Second: Upon new matter in the answer, controverted by the reply; or

Third: Upon new matter in the reply, except when an issue of law is joined thereon.

Issues both of law and of fact may arise upon different and distinct parts of the pleadings in the same action. [Cf. L. '54, p. 163, § 181; Cd. '81, § 202; 2 H. C., § 335; L. '93, p. 415, § 30.]

§ 312. Trial Defined.

A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact. [L. '93, p. 416, § 31.]

Cited in 17 Wash. 602.

§ 313. Issue of Law, How Tried.

An issue of law shall be tried by the court, unless it is referred as provided by the statutes relating to referees. [Cf. L. '54, p. 164, § 183; Cd. '81, § 204; 2 H. C., § 337; L. '93, p. 416, § 32.]

Cited in 16 Wash. 384; 56 Wash. 75.

§ 314. Issue of Fact, How Tried.

An issue of fact, in an action for the recovery of money only, or of specific real or personal property shall be tried by a jury, unless a jury is waived, as provided by law, or a reference ordered, as provided by statute relating to referees. [Cf. L. '54, p. 164, § 183; L. '69, p. 50, § 208; L. '73, p. 52, § 206; Cd. '81, § 204; 2 H. C., § 337; L. '93, p. 416, § 33.]

Cited in 28 Wash. 71; 30 Wash. 6; 56 Wash. 75; 79 Wash. 585; 86 Wash. 681; 93 Wash. 513.

RIGHT TO TRIAL BY JURY—Constitutional Provisions: See Remington's Digest, Jury, § 1; State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 Pac. 859; State v. Strasburg, 60 Wash. 106, 110 Pac. 1020, Ann. Cas. 1912B, 917, 32 L. R. A. (N. S.) 1216; State v. McDowell, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414; Donaldson v. Great Northern R. Co., 89 Wash. 161, 154 Pac. 133; Garey v. Pasco, 89 Wash. 382, 154 Pac. 433.

Nature of Cause of Action or Issue in General: See Remington's Digest, Jury, § 2; Winston v. Crowe, 28 Wash. 65, 68 Pac. 174; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107.

Legal or Equitable Actions or Issues: See Remington's Digest, Jury, § 4; Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327; Hamar v. Peterson, 9 Wash. 152, 37 Pac. 309; Murray v. Okanogan Live Stock etc. Co., 12 Wash. 259, 40 Pac. 942; Clayson's Estate, In re, 26 Wash. 253, 66 Pac. 410; Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593; Winston v. Crowe, 28 Wash. 65, 68 Pac. 174; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107; Spokane Co-operative Min. Co. v. Pearson, 28 Wash. 118, 68 Pac. 165; Bluett v. Wilce, 43 Wash. 492, 86 Pac. 853; Palmer v. Peterson, 56 Wash. 74, 105 Pac. 179; Hart-Parr Co. v. Keeth, 62 Wash. 464, 114 Pac. 169, Ann. Cas. 1912D, 243; Enos v. Hamblem, 79 Wash. 583, 140 Pac. 675; Fitzpatrick v. Newland, 81 Wash. 401, 142 Pac. 867; Veysey v. Veysey, 86

Wash. 553, 151 Pac. 39; State ex rel. Upper v. Hanna, 87 Wash. 29, 151 Pac. 83, 1087; Watson v. Watson, 93 Wash. 512, 161 Pac. 375; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; Bank of Ed-wall v. Bateman, 98 Wash. 447, 167 Pac. 1102. See, also, Harrild v. Spokane School District, 112 Wash. 266, 192 Pac. 1.

Foreclosure of Liens: See Remington's Digest, Jury, § 5; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

— **Quieting Title and Determination of Adverse Claims:** See Remington's Digest, Jury, § 6; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748; Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188.

— **Injunction to Abate Nuisance:** See Remington's Digest, Jury, § 7; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 958.

Legal and Equitable Issues in Same Action: See Remington's Digest, Jury, § 8; Installment Bldg. & Loan Co. v. Wentworth, 1 Wash. 467, 25 Pac. 298; Eisenbach v. Wakeman, 3 Wash. 534, 28 Pac. 923; Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049; Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490; McCoy v. Spithill, 13 Wash. 158, 42 Pac. 546; Peterson v. Philadelphia Mortgage etc. Co., 33 Wash. 464, 74 Pac. 585; Carlisle Packing Co. v. Deming, 62 Wash. 455, 114 Pac. 172; Nolan v. Pacific Warehouse Co., 67 Wash. 173, 121 Pac. 451, Ann. Cas. 1913D, 167; Enos v. Hamblen, 79 Wash. 583, 140 Pac. 675; Maher & Co. v. Farnandis, 70 Wash. 250, 126 Pac. 542; Dunlap v. Seattle Nat. Bank, 93 Wash. 568, 161 Pac. 364; Weidlich v.

Independent Asphalt Paving Co., 94 Wash. 395, 162 Pac. 541; Reser v. La Bude, 103 Wash. 228, 173 Pac. 1093. See, also, Oroville International Salts Co. v. Rayburn, 104 Wash. 137, 176 Pac. 14.

— **Supplemental Proceedings in Aid of Execution:** See Remington's Digest, Jury, § 10; Murne v. Schwabacher, 2 W. T. 130, 3 Pac. 899.

— **Proceedings in Attachment or Garnishment:** See Remington's Digest, Jury, § 11; Windt v. Banniza, 2 Wash. 147, 26 Pac. 189; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520.

Civil Proceedings Other Than Actions: See Remington's Digest, Jury, 13; Dacres v. Oregon R. & Nav. Co., 1 Wash. 525, 20 Pac. 601; Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415; State Board of Medical Examiners v. Macy, 92 Wash. 614, 159 Pac. 801.

— **Quo Warranto:** See Remington's Digest, Jury, § 14; State ex rel. Mullen v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; State ex rel. Orr v. Fawcett, 17 Wash. 188, 49 Pac. 346.

— **Eminent Domain:** See Remington's Digest, Jury, § 15; Smith's Petition, In re, 9 Wash. 85, 37 Pac. 311, 494; Seanor v. County Commissioners, etc., 13 Wash. 48, 42 Pac. 552.

Criminal Prosecutions—Violations of Municipal Ordinances: See Remington's Digest, Jury, § 16; State ex rel. Belt v. Kennan, 25 Wash. 621, 66 Pac. 62.

Abolition of Rights of Action by Industrial Insurance Law: See Remington's Digest, Jury, § 22-1; State v. Mountain Timber Co., 75 Wash. 581, 135 Pac. 645, L. R. A. 1917D, 10, 4 N. C. C. A. 811.

§ 315. Trial of Other Issues.

Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or any specific question of fact involved therein, be tried by a jury, or referred. [L. '93, p. 416, § 34.]

Cited in 16 Wash. 384; 79 Wash. 586, 588; 93 Wash. 514.

Power and Duty of Court in General: See Remington's Digest, Trial, § 144; Johnson v. Goodtime, 1 W. T. 484; Wilson v. Aberdeen, 25 Wash. 614, 60 Pac. 95; Goupille v. Chaput, 43 Wash. 702, 88 Pac. 1058.

Trial of Special Issues by Jury.—In general: See Remington's Digest, Trial, § 145;

Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490; Land Mortgage Bank of Northwestern Amer. v. Nicholson, 24 Wash. 258, 64 Pac. 156; Dalton v. Union Gap Irrigation Co., 69 Wash. 303, 124 Pac. 1128; Lindblom v. Johnston, 92 Wash. 171, 158 Pac. 972.

— **Advisory Verdict:** See Remington's Digest, Trial, § 146; Roberts v. Sabin, 14 Wash. 35, 44 Pac. 108; Lauman v. Hooper, 37 Wash. 382, 79 Pac. 953.

§ 316. Jury Fee—Advance Deposit—Waiver of Jury.

In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court a statement of himself, or attorney, that he elects

to have such case tried by jury. At the time of filing such statement such party shall also deposit with the clerk of the court twelve dollars, which deposit, in the event that the case is settled out of court prior to the time that such case is called to be heard upon trial, shall be returned to such party by such clerk. Unless such statement is filed and such deposit made, the parties shall be deemed to have waived trial by jury, and consented to a trial by the court: Provided, that, in the superior courts of counties of the first class such parties shall serve and file such statement, in manner herein provided, at any time not later than two days before the time the case is called to be set for trial. [L. '03, p. 50, § 1; L. '09, p. 715, § 1.]

Cited in 33 Wash. 536, 537, 539; 36 Wash. 603; 38 Wash. 687; 39 Wash. 106; 40 Wash. 355; 59 Wash. 264; 79 Wash. 688.

Demand for Jury, Necessity: See Remington's Digest, Jury, § 17; Meeker v. Gilbert, 3 W. T. 369, 19 Pac. 18; Baker v. Prewitt, 3 W. T. 595, 19 Pac. 149; Washington Iron Works v. Jenson, 3 Wash. 584, 28 Pac. 1019; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; Fleming v. Wilson, 39 Wash. 106, 80 Pac. 1104; Hart v. Cascade Timber Co., 39 Wash. 279, 81 Pac. 738; Forrester v. Reliable Transfer Co., 65 Wash. 602, 118 Pac. 753. See, also, Dolan v. Cain, 59 Wash. 259, 109 Pac. 1009.

Payment or Deposit of Jury Fees: See Remington's Digest, Jury, § 19; State ex rel. Clark v. Neterer, 33 Wash. 535, 74 Pac. 668; Chelan County v. Navarre, 38 Wash. 684, 80 Pac. 845.

Waiver of Right—In civil cases: See Remington's Digest, Jury, § 20; Moore v. Walla Walla, 2 W. T. 184, 2 Pac. 187; Meeker v. Gilbert, 3 W. T. 369, 19 Pac. 18; Park v. Mighell, 7 Wash. 304, 35 Pac. 63; Askham v. King County, 9 Wash.

1, 36 Pac. 1097 (overruled in Seanor v. County Commrs., 13 Wash. 48, 42 Pac. 552); Frye v. Hill, 14 Wash. 83, 43 Pac. 1079; Zilke v. Woodley, 36 Wash. 84, 78 Pac. 299; Oregon R. & Nav. Co. v. McCormick, 46 Wash. 45, 89 Pac. 186; Fruitland Irr. Co. v. Smith, 54 Wash. 185, 102 Pac. 1031; Sholin v. Skamania Boom Co., 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053; Alexander v. Mentzer, 91 Wash. 552, 158 Pac. 75; Gray v. Hickey, 94 Wash. 370, 162 Pac. 564.

The amendment of the act of 1903, providing that the parties "will" be deemed to have waived a jury by this section, to read that they "shall," be deemed to have made such waiver in such event, cannot be construed as intended to make the demand and prepayment of fees mandatory, where the real purpose of the amendment was to insert a provision allowing return of the fee in case of settlement of the suit. Peterson v. Arland, 79 Wash. 679, 141 Pac. 63.

— **In Criminal Cases:** See Remington's Digest, Jury, § 21; State v. Ellis, 22 Wash. 129, 60 Pac. 136; State v. Packenham, 40 Wash. 403, 82 Pac. 597.

§ 317. Fee Deposited to be Part of Costs.

The amount deposited by the party demanding a trial by jury shall be a part of the taxable costs in such action. The amounts received by the clerk on account of jury fees shall be accounted for as such other fees received. [L. '03, p. 50, § 2.]

Cited in 56 Wash. 305.

§ 318. Agreement to Refer.

The [waiver of a jury or] agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records: Provided, that nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand made by the pleadings in the action. [Cf.

L. '54, p. 164, § 183; L. '69, p. 50, § 208; L. '73, p. 52, § 206; Cd. '81, § 204; 2 H. C., § 337.]

Superseded as to waiver of jury by § 316, *supra*.

Cited in 3 Wash. 591; 33 Wash. 469, 539; 79 Wash. 689.

§ 319. Notice of Trial—Note of Issue—Motion Docket.

At any time after the issues of fact are completed in any case by the service of complaint and answer or reply when necessary, as provided in title three, either party may cause the issues of fact to be brought on for trial, by serving upon the opposite party a notice of trial at least three days before any day provided by rules of court for setting causes for trial, which notice shall give the title of the cause as in the pleadings, and notify the opposite party that the issues in such action will be brought on for trial at the time set by the court; and the party giving such notice of trial shall, at least three days before the day of setting such causes for trial file with the clerk of the court a note of issue containing the title of the action, the names of the attorneys and the date when the last pleading was served; and the clerk shall thereupon enter the cause upon the trial docket according to the date of the issue. In case an issue of law raised upon the pleading is desired to be brought on for argument, either party shall, at least three days before the day set apart by the court under its rules for hearing issues of law, serve upon the opposite party a like notice of trial and furnish the clerk of the court with a note of issue as above provided, which note of issue shall specify that the issue to be tried is an issue of law; and the clerk of the court shall thereupon enter such action upon the motion docket of the court. When a cause has once been placed upon either docket of the court, if not tried or argued at the time for which notice was given, it need not be noticed for a subsequent session or day, but shall remain upon the docket from session to session or from law day to law day until final disposition or stricken off by the court. The party upon whom notice of trial is served may file the note of issue and cause the action to be placed upon the calendar without further notice on his part. [L. '93, p. 416, § 35.]

Cited in 17 Wash. 408; 18 Wash. 209; 30 Wash. 629; 57 Wash. 291; 64 Wash. 338.

Notice of Trial, Necessity: See Remington's Digest, Trial, § 6; Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061; Spokane etc. Copper Co. v. Colfelt, 30

Wash. 628, 71 Pac. 196; Western Avenue, In re, 57 Wash. 290, 106 Pac. 901.

When not an abuse of discretion to refuse to dismiss upon plaintiff's failure to notice for trial for nearly two years after issues joined: Loving v. Maltbie, 64 Wash. 336, 116 Pac. 1086.

§ 320. Hearing—Trial of Issue.

Either party, after the notice of trial, whether given by himself or the adverse party, may bring the issue to trial, and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require. [L. '93, p. 417, § 36.]

§ 321. Pleadings—Time for Filing.

All pleadings in any civil action shall be filed with the clerk of the court, on or before the day when the case is called for trial, or the day

when any application is made to the court for an order therein, and in case the moving party shall fail, or neglect to cause the pleadings to be filed with the clerk of the court as above required, the adverse party may apply to the court, without notice, for an order on such moving party to file such pleadings forthwith, and for a failure to comply with such order the court may order the cause dismissed unless good cause is shown for granting an extension of time within which to file such pleadings. [L. '93, p. 417, § 37.]

Cited in 15 Wash. 641; 22 Wash. 442; 38 Wash. 171; 110 Wash. 256.

FILING AND SERVICE: See Remington's Digest, Plead., §§ 140—143; Baldwin v. Baer, 10 Wash. 414, 39 Pac. 117; Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740; Snohomish Land Co. v. Blood, 40 Wash. 626, 82 Pac. 933; Sullivan's Estate, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895.

Failure to serve a summons within 90 days after filing the complaint, as provided by this section, does not lose the cause of action; and service of a summons thereafter is the commencement of a new action dating from the day of service: State ex rel. Teeter v. Superior Court, 110 Wash. 255, 188 Pac. 391.

CHAPTER II.

TRIAL OF CIVIL ACTIONS.

§ 322. Motion for Continuance—Allowance—Terms.

A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party. [Cf. L. '54, p. 164, § 184; L. '69, p. 50, § 209; Cd. '81, § 205; 2 H. C., § 338.]

Cited in 8 Wash. 726; 14 Wash. 581; 29 Wash. 380; 34 Wash. 204; 49 Wash. 13; 81 Wash. 29.

Right to Continuance in General: See Remington's Digest, Contin., § 2; Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415; Catlin v. Harris, 7 Wash. 542, 35 Pac. 385; Juch v. Hanna, 11 Wash. 676, 40 Pac. 341; Thompson v. Territory, 1 W. T. 547; State v. Brooks, 4 Wash. 328, 30 Pac. 147; State v. Murphy, 9 Wash. 204, 37 Pac. 420; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Champoux, 33 Wash. 339, 74 Pac. 557; Robertson v. Woolley, 6 Wash. 156, 32 Pac. 1060; Wright v. Northern Pac. R. Co., 38 Wash. 64, 80 Pac. 197; State v. Harras, 22 Wash. 57, 60 Pac. 58; Spokane v. Costello, 42 Wash. 182, 84 Pac. 652; Bank of Montreal v. Howard, 44 Wash. 10, 86 Pac. 1115.

Disability of Party or Counsel: See Remington's Digest, Contin., § 5; McClellan v. Gaston, 18 Wash. 472, 51 Pac.

1062; State v. Vance, 29 Wash. 435, 70 Pac. 34.

Amendment of Pleadings: See Remington's Digest, Contin., §§ 6, 7; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Wilson v. Sun Publishing Co., 85 Wash. 503, Ann. Cas. 1917B, 442, 148 Pac. 774; National Bank of Commerce v. Galland, 14 Wash. 502, 45 Pac. 35.

Proceedings to Take Depositions: See Remington's Digest, Contin., § 8; Hill v. Hill, 42 Wash. 250, 84 Pac. 829; Strom v. Toklas, 78 Wash. 223, 138 Pac. 880.

Pendency of Proceedings for Discovery: See Remington's Digest, Contin., § 9; Steenstrup v. Toledo Foundry & Machine Co., 66 Wash. 101, 119 Pac. 16, Ann. Cas. 1913C, 427.

Absence of Party: See Remington's Digest, Contin., § 10; Puget Sound Mach. Depot v. Brown Alaska Co., 42 Wash. 681, 85 Pac. 671; Traynor v. White, 44 Wash. 560, 87 Pac. 823; Portland & Seattle R.

Co. v. Ladd, 47 Wash. 88, 91 Pac. 573; Nye v. Manley, 69 Wash. 631, 125 Pac. 1009; Furman v. Bon Marche, 71 Wash. 238, 128 Pac. 210; Humphrey v. Mutual Life Ins. Co., 86 Wash. 672, 151 Pac. 100.

Absence or Withdrawal of Counsel: See Remington's Digest, Contin., §§ 11, 12; Skagit Railway & Lumber Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; Catlin v. Harris, 7 Wash. 542, 35 Pac. 385; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28; McInnes v. Sutton, 35 Wash. 384, 77 Pac. 736; State v. Underwood, 35 Wash. 558, 79 Pac. 863; Steenstrup v. Toledo Foundry & Machine Co., 66 Wash. 101, 119 Pac. 16, Ann. Cas. 1913C, 427.

See, also, Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17.

Absence of Witness or Evidence—In General: See Remington's Digest, Contin., § 13; Robertson v. Woolley, 6 Wash. 156, 32 Pac. 1060; State v. Champoux, 33 Wash. 339, 74 Pac. 557; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; Leghorn v. Nydell, 39 Wash. 17, 80 Pac. 833; Sholin v. Skamania Boom Co., 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053; Sorenson v. Danaher Lumber Co., 71 Wash. 38, 127 Pac. 586; Jones v. Jones, 96 Wash. 172, 164 Pac. 757. See, also, Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17.

The fact that the court compelled the accused in a criminal case to go to trial in the absence of some of his witnesses was not error, where no motion for a continuance was made pursuant to the requirements of this section: State v. Newton, 29 Wash. 373, 70 Pac. 31.

It is not error to refuse a continuance to defendant asked for at 4:30 o'clock until the next day, in order to meet evidence of the plaintiff on reopening the case for the purpose of introducing evidence not proper in rebuttal, where the defendants failed to make any showing pursuant to this section, but merely stated that their witnesses had been excused and it would be necessary to hunt them up and consult with them: Gauthier v. Wood & Iverson, 49 Wash. 8, 94 Pac. 654.

Probability of Securing Testimony of Absent Witness: See Remington's Digest, Contin., § 14; State v. Wilson, 9 Wash. 218, 37 Pac. 424; Wright v. Northern Pac. R. Co., 38 Wash. 64, 80 Pac. 197.

Competency or Materiality: See Remington's Digest, Contin., § 15; Ward v. Moorey, 1 W. T. 104; State v. Craemer, 12 Wash. 217, 40 Pac. 944; Jackson v. Mercantile Mut. Fire Ins. Co., 45 Wash. 244, 88 Pac. 127.

Cumulative or Impeaching Evidence: See Remington's Digest, Contin.,

§ 16; State v. Brooks, 4 Wash. 328, 30 Pac. 147; State v. Boyce, 24 Wash. 514, 64 Pac. 719; Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188; Benson v. Hamilton, 34 Wash. 201, 75 Pac. 805; Creech v. Aberdeen, 44 Wash. 72, 87 Pac. 44, 12 Ann. Cas. 370; Maloney v. Stetson & Post Mill Co., 46 Wash. 645, 90 Pac. 1046; Hill v. Arthur, 103 Wash. 187, 173 Pac. 1092.

Diligence: See Remington's Digest, Contin., § 18; Roeder v. Brown, 1 W. T. 112; State v. Brooks, 4 Wash. 328, 30 Pac. 147; Maggs v. Morgan, 30 Wash. 604, 71 Pac. 188; Oregon R. & Nav. Co. v. Dacres, 1 Wash. 195, 23 Pac. 415; Juch v. Hanna, 11 Wash. 676, 40 Pac. 341; State v. Craemer, 12 Wash. 217, 40 Pac. 944; State v. Hutchinson, 14 Wash. 580, 45 Pac. 156; Fruitland Irr. Co. v. Smith, 54 Wash. 185, 102 Pac. 1031; La Bee v. Sulton Logging Co., 59 Wash. 341, 109 Pac. 1023; State v. O'Brien, 66 Wash. 219, 119 Pac. 609; State ex rel. Tanner v. Northwestern Investment Co., 70 Wash. 381, 126 Pac. 895; Reser v. La Bude, 103 Wash. 228, 173 Pac. 1093. See, also, Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17.

Surprise at Trial—In General: See Remington's Digest, Contin., § 19; Juch v. Hanna, 11 Wash. 676, 40 Pac. 341; Vulcan Iron Works v. Burrell Constr. Co., 39 Wash. 319, 81 Pac. 836; O'Neil v. Lindsey, 41 Wash. 649, 84 Pac. 603; Perolin Co. v. Young, 65 Wash. 300, 118 Pac. 1.

Grounds for Continuance—Indorsement of Names of Witnesses on indictment and addition of new names: See Remington's Digest, Crim. Law, § 192; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Kelly, 14 Wash. 702, 45 Pac. 38; State v. Everett, 14 Wash. 574, 45 Pac. 150; State v. Holedger, 15 Wash. 443, 46 Pac. 652; State v. Carpenter, 56 Wash. 670, 106 Pac. 206; State v. McCaskey, 97 Wash. 401, 166 Pac. 1163.

For text treatment of "Trial," see 26 B. C. L. 1008.

Imposition of terms on granting continuance. Ann. Cas. 1913A, 306.

Continuance to procure witness who is beyond the jurisdiction. L. R. A. 1918E, 527.

Presence of witnesses at trial as curing error in denying motion for continuance on ground of absent witnesses. 2 A. L. R. (N. S.) 721.

Application for continuance as waiver of right to dismissal because of plaintiff's failure to furnish security for costs. 8 A. L. R. 1528.

War conditions as ground for continuance. 3 A. L. R. 333.

§ 323. Impaneling Jury.

When the action is called for trial, the clerk shall prepare separate ballots containing the names of the jurors summoned who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders, citizens of the county, as many qualified persons as may be necessary to complete the jury. Whenever it shall be requisite for the sheriff to summon more than one person at a time from the bystanders or body of the county, the names of the talesmen shall be returned to the clerk, who shall thereupon write the names upon separate ballots and deposit the same in the trial-jury box, and draw such ballots separately therefrom, as in the case of the regular panel. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three, and such consent shall be entered by the clerk on the minutes of the trial. [Cf. L. '54, p. 164, § 185; L. '69, p. 51, § 210; Cd. '81, § 206; 2 H. C., § 339.]

Cited in 6 Wash. 187; 12 Wash. 180; 17 Wash. 550; 19 Wash. 59; 22 Wash. 133; 40 Wash. 584; 82 Wash. 289.

Under this section, when the jury list has become exhausted before the completion of a jury, jurors may be summoned from the bystanders, even if some of those drawn may have failed to appear: *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

This section does not confer the right to try a criminal case by a jury of less than twelve persons: *State v. Ellis*, 22 Wash. 129, 60 Pac. 136.

Designation, Identity and Residence: See *Remington's Digest*, Jury, §§ 27-1, 28; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *Clarke v. Territory*, 1 W. T. 68.

Where the court orders the United States marshal to summon a talesman from the bystanders to fill an exhausted

panel, the sheriff being present, and, so far as the record shows, not disqualified, and defendant objects, but fails to challenge the juror, and the juror is not shown to be unfit to try the cause, it is error without prejudice: *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837.

Under this section, when the jury list has become exhausted before the completion of a jury, jurors may be summoned from the bystanders, even if some of those drawn may have failed to appear, as the presumption is that they had been properly excused by the court: *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

For text treatment of "Jury," see 16 **B. C. L.** 176.

Bias or misconduct of officer summoning jurors as ground for challenge to panel. **Ann. Cas.** 1916A, 693.

§ 324. Challenges—Kind and Number.

Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges. [L. '54, p. 165, § 186; Cd. '81, § 207; 2 H. C., § 340.]

Cited in 50 Wash. 93; 52 Wash. 231; 77 Wash. 39.

Peremptory Challenges—Joinder of Several Parties: See *Remington's Digest*, Jury, § 59-1; *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823, 16 Ann. Cas. 264; *Crandall v. Puget Sound Tr. L. & P. Co.*, 77 Wash. 37, 137 Pac. 319.

An abutting owner having a separate trial in condemnation proceedings is not entitled to exercise separate challenges: *Manhattan Bldg. Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330.

Right and manner of exercise of peremptory challenges by joint parties in civil cases. 16 **Ann. Cas.** 265; **Ann. Cas.** 1917E, 461.

§ 325. Peremptory Challenges, Defined.

A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him. [L. '69, p. 51, § 212; Cd. '81, § 208; 2 H. C., § 341.]

§ 326. Challenge for Cause, Defined.

A challenge for cause is an objection to a juror, and may be either,—

1. General; that the juror is disqualified from serving in any action; or
 2. Particular; that he is disqualified from serving in the action on trial.
- [L. '69, p. 51, § 213; Cd. '81, § 209; 2 H. C., § 342.]

Cited in 14 Wash. 411.

§ 327. General Causes of Challenge.

General causes of challenge are:—

1. A conviction for a felony;
2. A want of any of the qualifications prescribed by law for a juror;
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror. [L. '69, p. 52, § 214; Cd. '81, § 210; 2 H. C., § 343.]

Challenges to the Polls for Cause—
Grounds: See Remington's Digest, Jury, § 56; Horst v. Silverman, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Miller, 78 Wash. 268, 138 Pac. 896.

— Making and Sufficiency: See Remington's Digest, Jury, § 57; McAllister v. Territory, 1 W. T. 360; State v. Biles, 6 Wash. 186, 33 Pac. 347.

§ 328. Previous Service Within One Year.

It shall be sufficient cause of challenge to any juror called to be sworn in any cause, that he has been summoned upon an open venire and attended said court as a juror at any session of said court held within one year prior to the time of such challenge; or that he has been summoned from the bystanders or body of the county, and has served as juror in any cause, upon such summons, within one year prior to the time of such challenge. [L. '91, p. 88, § 11; 2 H. C. § 66.]

For the first part of this section, see *supra*, § 111.

Prior Service as Juror: See Remington's Digest, Jury, §§ 43, 44; State v. Hall, 24 Wash. 255, 64 Pac. 153; State v. Van Waters, 36 Wash. 358, 78 Pac. 897; State v. Barnes, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932; State v. Austin, 83 Wash. 444, 145 Pac. 451.

Religious affiliations as affecting competency of juror. 17 *Ann. Cas.* 343; 25 *L. R. A. (N. S.)* 992.

Relationship of juror to witness as constituting disqualification of juror. *Ann. Cas.* 1912B, 1060.

Relationship to stockholder of corporate party as disqualifying juror. 21 *Ann. Cas.* 642.

Prejudice as to business of party to action as disqualifying juror. 20 *Ann. Cas.* 1312.

Prejudice against race or color of party to action as disqualifying juror. *Ann. Cas.* 1912B, 969; *Ann. Cas.* 1917C, 1167.

Interest or bias sufficient to disqualify juror in eminent domain proceeding. 5 *Ann. Cas.* 923.

Sympathy for laboring men generally as sufficient ground for challenge for cause. *Ann. Cas.* 1913A, 1279.

Sympathy for plaintiff in action for personal injuries as bias sufficient to constitute disqualification. *Ann. Cas.* 1912B, 1183.

§ 329. Particular Causes of Challenge.

Particular causes of challenge are of two kinds:—

1. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias;

2. For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias. [L. '69, p. 52, § 215; Cd. '81, § 211; 2 H. C., § 344.]

Cited in 3 Wash. 104; 30 Wash. 141; 46 Wash. 411.

§ 330. Implied Bias, Defined.

A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:—

1. Consanguinity or affinity within the fourth degree to either party;

2. Standing in the relation of guardian and ward, attorney and client, master and servant, or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of the adverse party; or being surety or bail in the action called for trial, or otherwise, for the adverse party.

3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the state against either party upon substantially the same facts or transaction;

4. Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always the interest of the juror as a member or citizen of the county or municipal corporation. [Cf. L. '54, p. 165, 187; L. '69, p. 52, § 216; Cd. '81, § 212; 2 H. C., § 345.]

Cited in 3 Wash. 103; 24 Wash. 524; 30 Wash. 637.

COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS—Witness in Cause: See Remington's Digest, Jury, § 40; State v. Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807.

Pecuniary Interest—Citizen or Taxpayer of Municipality: See Remington's Digest, Jury, § 41; Rathbun v. Thurston County, 8 Wash. 238, 35 Pac. 1102; State v. Krug, 12 Wash. 288, 41 Pac. 126.

Business Connection or Transactions With Party or Attorney: See Remington's Digest, Jury, § 42; State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Boyce, 24 Wash. 514, 64 Pac. 719; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186; State v. Lewis, 31 Wash. 75, 71 Pac. 778; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607.

Right to interrogate juror on voir dire as to prejudice for or against particular class of witnesses. 1 A. L. R. 1688.

§ 331. Challenge for Actual Bias.

A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section three hundred and twenty-nine. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially. [L. '69, p. 53, § 217; Cd. '81, § 213; 2 H. C., § 346.]

Cited in 3 Wash. 104; 8 Wash. 15; 14 Wash. 411.

Bias and Prejudice: See Remington's Digest, Jury, § 45; Stinson v. Sachs, 8 Wash. 391, 36 Pac. 287; State v. Boyce, 24 Wash. 514, 64 Pac. 719; Denham v. Washington Water P. Co., 38 Wash. 354, 80 Pac. 546; State v. Gohl, 46 Wash. 408, 90 Pac. 259; State v. Montgomery, 57 Wash. 192, 106 Pac. 771; Beach v. Seattle, 85 Wash. 379, 148 Pac. 39; State v. Sullivan, 97 Wash. 639, 166 Pac. 1123. See, also, State v. Lathrop, 112 Wash. 560, 192 Pac. 950.

Formation and Expression of Opinion as to Cause: See Remington's Digest, Jury, § 46; State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Krug, 12 Wash. 288, 41 Pac. 126; State v. Straub, 16 Wash. 111, 47 Pac. 227; State v. Moody, 18 Wash. 165, 51 Pac. 356; State v. Lattin, 19 Wash. 57, 52 Pac. 314; State v. Royse, 24 Wash. 440, 64 Pac. 742; Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769; State v. Swafford, 88 Wash. 659, 153 Pac. 1056.

— **From Rumor and Newspaper Reports:** See Remington's Digest, Jury, § 47; Rose v. State, 2 Wash. 310, 26 Pac. 264; State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Murphy, 9 Wash. 204, 37 Pac. 420; State v. Wilcox, 11 Wash. 215, 39 Pac. 368; State v. Carey, 15 Wash. 549, 46 Pac. 1050; State v. Royse, 24 Wash. 440, 64 Pac. 742; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Far-

ris, 26 Wash. 205, 66 Pac. 412; State v. Croney, 31 Wash. 122, 71 Pac. 783.

— **Influence of Opinion on Verdict:** See Remington's Digest, Jury, § 48; Rose v. State, 2 Wash. 310, 26 Pac. 264; State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Coella, 8 Wash. 512, 36 Pac. 474; State v. Rutten, 13 Wash. 203, 43 Pac. 30; State v. Harras, 22 Wash. 57, 60 Pac. 58; State v. Riley, 36 Wash. 441, 78 Pac. 1001; State v. Kinney, 45 Wash. 165, 87 Pac. 1123.

Personal Opinions and Conscientious Scruples: See Remington's Digest, Jury, § 49; State v. Croney, 31 Wash. 122, 71 Pac. 783; State v. Ware, 58 Wash. 526, 109 Pac. 359.

— **Particular Defenses:** See Remington's Digest, Jury, § 50; State v. Royse, 24 Wash. 440, 64 Pac. 742; State v. Croney, 31 Wash. 122, 71 Pac. 783.

— **Weight and Effect of Evidence:** See Remington's Digest, Jury, § 51; State v. Everett, 14 Wash. 574, 45 Pac. 150.

— **Punishment Prescribed for Offense:** See Remington's Digest, Jury, § 52; State v. Boyce, 24 Wash. 514, 64 Pac. 719.

Waiver of Right to Object or Challenge: See Remington's Digest, Jury, § 53; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006; Heasley v. Nichols, 38 Wash. 485, 80 Pac. 769; State v. Jahns, 61 Wash. 636, 112 Pac. 747.

§ 332. Exemption not Cause of Challenge.

An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted. [L. '69, p. 53, § 218; Cd. '81, § 214; 2 H. C., § 347.]

§ 333. Peremptory Challenges, How Taken.

The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to wit:—

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only. [L. '69, p. 53, § 219; Cd. '81, § 215; 2 H. C., § 348.]

Cited in 8 Wash. 305, 307; 15 Wash. 203; 29 Wash. 462.

Order and Exhaustion of Challenges:

See Remington's Digest, Jury, § 60; State v. Eddon, 8 Wash. 292, 36 Pac. 139; Poncin v. Furth, 15 Wash. 201, 46 Pac.

241; *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *Creech v. Aberdeen*, 44 Wash. 72, 87 Pac. 44, 12 Ann. Cas. 370.

Time of exercise of right of peremptory challenge. 19 Ann. Cas. 766.

§ 334. Order of Taking Challenges.

The challenges of either party shall be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class:—

1. For general disqualification;
2. For implied bias;
3. For actual bias;
4. Peremptory. [L. '69, p. 53, § 220; Cd. '81, § 216; 2 H. C., § 349.]

Cited in 30 Wash. 141.

§ 335. Trial and Exceptions to Challenges.

The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue, and determine the law and the facts. [L. '69, p. 53, § 221; Cd. '81, § 217; 2 H. C., § 350.]

Examination of Juror: See Remington's Digest, Jury, § 58; Northern Pac. R. R. Co. v. Holmes, 3 W. T. 202, 14 Pac. 688; *White v. Territory*, 1 Wash. 279, 24 Pac. 447; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97; *State v. Royse*, 24 Wash. 440, 64 Pac. 742; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Croney*, 31 Wash. 122, 71 Pac. 783; *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558; *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 15 Ann. Cas. 584, 14 L. R. A. (N. S.) 346; *Hoyt v. Independent Asphalt Paving Co.*, 52 Wash. 672, 101 Pac. 367; *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

Evidence: See Remington's Digest, Jury, § 58-1; *State v. Phillips*, 65 Wash.

324, 118 Pac. 43; *State v. Cohen*, 72 Wash. 109, 129 Pac. 891.

Trial and Determination: See Remington's Digest, Jury, § 59; *White v. Territory*, 3 W. T. 397, 19 Pac. 37; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

Objections and Exceptions: See Remington's Digest, Jury, § 62; *State v. Moody*, 7 Wash. 395, 35 Pac. 132; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30; *State v. Stentz*, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; *State v. Carey*, 15 Wash. 549, 46 Pac. 1050; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557.

Right to ask hypothetical question in examining juror on voir dire. Ann. Cas. 1913D, 680.

§ 336. Trial of Challenge—Rules Governing.

Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent, may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded; but if determined or found otherwise, it shall be disallowed. [L. '69, p. 54, § 222; Cd. '81, § 218; 2 H. C., § 351.]

§ 337. Challenge, Exception and Denial may be Oral.

The challenge, the exception and the denial may be made orally. The judge of the court shall note the same upon his minutes, and the

substance of the testimony on either side. [L. '69, p. 54, § 233; Cd. '81, § 219; 2 H. C., § 352.]

§ 338. Oath of Jurors.

As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial. [L. '69, p. 54, § 224; Cd. '81, § 220; 2 H. C., § 353.]

See *infra*, § 2143, oath to jury in criminal cases.

§ 339. Manner of Conducting Trials—Statements of Counsel—Charging Jury—Written Instructions.

When a jury has been sworn, the trial shall proceed in the following manner:—

(1) The plaintiff shall briefly state the cause of action and the evidence by which he expects to sustain it. The defendant may in like manner state the defense, and the evidence he expects to offer in support thereof, but nothing in the nature of comments or argument shall be allowed in opening a case. It shall be optional with the defendant whether he states his case before or after the close of the plaintiff's evidence.

(2) The plaintiff, or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence.

(3) The parties then will be confined to rebutting evidence, unless the court shall consider that justice requires that evidence in the original case may then be offered.

(4) The court must reduce the charge to be given the jury to writing, and at the conclusion of the evidence he shall read his written charge to the jury. Either party may request such instructions as he deems material to the case, and the court may hear them upon the propriety of the requested instructions before finally settling the charge that he will give. If a stenographer shall be in attendance upon the trial of the cause, the court shall have the right to dictate the charge he desires to give to such stenographer, and to have the stenographer reduce the same to writing for him and a copy for each of the parties plaintiff and defendant. And the cost thereof shall be taxed as other costs in the action. When the charge shall have been given by the court, the plaintiff, or party having the burden of proof, may, by himself, or one counsel, address the court and jury upon the law and facts in the case, after which the adverse party may address the court and jury in like manner, by himself and one counsel or by two counsel, and be followed by the party or counsel of the party first addressing the court. No more than two speeches on behalf of the plaintiff or defendant shall be allowed. After the argument shall have been concluded, the jury shall retire to consider their verdict, and shall take with them to the jury-room, among other matters proper to be taken to their jury-room for further consideration by them, the written charge given them by the court. Either party, at any time before the hearing of a motion for a new trial may

except to the instructions given by the court, or any part thereof. [L. '09, p. 184, § 1. Cf. L. '69, p. 54, § 225; Cd. '81, § 221; 2 H. C., § 354; L. '03, p. 119, § 1.]

Cited in 1 Wash. 148; 2 Wash. 366; 3 Wash. 114; 4 Wash. 214; 9 Wash. 544; 15 Wash. 535; 28 Wash. 176; 30 Wash. 253; 31 Wash. 19; 32 Wash. 571; 37 Wash. 115; 50 Wash. 313; 51 Wash. 125; 59 Wash. 687; 62 Wash. 638; 63 Wash. 400; 68 Wash. 600, 679; 70 Wash. 135, 137; 71 Wash. 203, 459; 74 Wash. 282; 75 Wash. 439; 82 Wash. 80, 622; 83 Wash. 646; 87 Wash. 307; 106 Wash. 682; 109 Wash. 93.

Trial of Causes Together: See Remington's Digest, Trial, § 2; Harrington v. Miller, 4 Wash. 808, 31 Pac. 325.

Separate Trials in Same Cause: See Remington's Digest, Trial, § 3; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; State v. Mason, 19 Wash. 94, 52 Pac. 525; Tacoma v. Bonnell, 58 Wash. 593, 109 Pac. 60.

Remarks and conduct of judge during progress of trial, as comment on facts, when prejudicial and when not: See Remington's Digest, Trial, § 14, and cases cited.

RECEPTION OF EVIDENCE—INTRODUCTION, OFFER AND ADMISSION OF EVIDENCE IN GENERAL—Necessity and Scope of Proof: See Remington's Digest, Trial, §§ 15, 16; Schlotfeldt v. Bull, 18 Wash. 64, 50 Pac. 590; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709; Northern Pacific Ry. Co. v. Miller, 20 Wash. 21, 54 Pac. 603. See, also, Woolworth Co. v. Seattle, 104 Wash. 629, 177 Pac. 664.

Introduction of Documentary Evidence: See Remington's Digest, Trial, § 18; Barnes v. Gerberg, 27 Wash. 126, 67 Pac. 568; Craver v. Mossbach, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016; Palmer v. Parker, 91 Wash. 683, 158 Pac. 1017. See, also, Proctor v. Appleby, 110 Wash. 403, 188 Pac. 481.

Withdrawal of exhibits: McLean v. York, 110 Wash. 566, 188 Pac. 799.

Separation and Exclusion of Witnesses: See Remington's Digest, Trial, § 19; Griffith v. Ridpath, 38 Wash. 540, 80 Pac. 820; Hendelman v. Kahan, 50 Wash. 247, 97 Pac. 109; Wiles v. Northern Pac. R. Co., 66 Wash. 337, 119 Pac. 810.

Separation of Witnesses in Criminal Cases: See Remington's Digest, Crim. Law, § 223; State v. Lee Doon, 7 Wash. 308, 34 Pac. 1103; State v. Armstrong, 37 Wash. 51, 79 Pac. 490; State v. Ilomaki, 40 Wash. 629, 82 Pac. 873; State v. Dalton, 43 Wash. 278, 86 Pac. 590.

Offer of Proof: See Remington's Digest, Trial, § 20; Kennedy v. Currie, 3 Wash. 442, 28 Pac. 1028; Nason v. Northwestern

Milling etc. Co., 17 Wash. 142, 49 Pac. 235; MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290; Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056, Ann. Cas. 1918E, 494; Mogelberg v. Calhoun, 94 Wash. 662, 163 Pac. 29; Deitchler v. Ball, 99 Wash. 483, 170 Pac. 123. See, also, Van Delinder v. Richmond, 112 Wash. 191, 191 Pac. 850.

Prejudicial Effect of Admission of Evidence: See Remington's Digest, Trial, § 22; Marsh v. Wade, 1 Wash. 538, 20 Pac. 578; Woo Dan v. Seattle E. R. & P. Co., 5 Wash. 466, 32 Pac. 103; Crane v. Dexter Horton & Co., 5 Wash. 479, 32 Pac. 223; Lewis v. McReavy, 7 Wash. 294, 34 Pac. 832; Fairhaven v. Cowgill, 8 Wash. 686, 36 Pac. 1093; Schwede v. Hemrich, 29 Wash. 124, 69 Pac. 643; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Earles v. Bigelow, 7 Wash. 581, 35 Pac. 390; Keating v. Pacific Steam Whaling Co., 21 Wash. 415, 58 Pac. 224.

Exclusion of Improper Evidence: See Remington's Digest, Trial, § 23; Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534; Davis v. Hinchcliffe, 7 Wash. 199, 34 Pac. 915.

Cumulative Evidence in General: See Remington's Digest, Trial, § 24; Cogswell v. West St. & N. E. El. R. Co., 5 Wash. 46, 31 Pac. 411; Ramage v. Littlejohn, 17 Wash. 386, 49 Pac. 486; Elster v. Seattle, 18 Wash. 304, 51 Pac. 394; Seattle v. Griffith Realty & Bk. Co., 28 Wash. 605, 68 Pac. 1036. See, also, Borg v. Bringhurst, 105 Wash. 521, 178 Pac. 450; West Marginal Way, Seattle, In re, 109 Wash. 116, 186 Pac. 644; Sound Timber Co. v. Danaher Lbr. Co., 112 Wash. 314, 192 Pac. 941.

Restricting Number of Witnesses: See Remington's Digest, Trial, § 25; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189, 1200; Mogelberg v. Calhoun, 94 Wash. 662, 163 Pac. 29.

Scope of Evidence in Chief: See Remington's Digest, Trial, § 28; Malstrom v. Northern Pac. R. Co., 20 Wash. 195, 55 Pac. 38; Sandquist v. Independent Tel. Co., 38 Wash. 313, 80 Pac. 539.

Scope of Evidence in Rebuttal: See Remington's Digest, Trial, § 29; White v. Territory, 1 Wash. 279, 24 Pac. 447; Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621; Rawson v. Ellsworth, 13 Wash. 667, 43 Pac. 934; State v. Klein, 19 Wash. 268, 53 Pac. 364; State v. Nelson, 13 Wash. 523, 43 Pac. 637; Croft v. Northwestern Steamship Co., 20 Wash. 175, 55 Pac. 42; Crooker v. Pacific Lounge etc.

Co., 34 Wash. 191, 75 Pac. 632; Williams v. Spokane Falls & N. R. Co., 42 Wash. 597, 84 Pac. 1129; Kimble v. Stackpole, 60 Wash. 35, 110 Pac. 677, 35 L. R. A. (N. S.) 148; Gardner v. Spalt, 86 Wash. 146, 149 Pac. 647. See, also, Haskell v. Carlisle Packing Co., 105 Wash. 368, 177 Pac. 780; Sound Timber Co. v. Danaher Lbr. Co., 112 Wash. 314, 192 Pac. 941.

Scope of Rebuttal in Criminal Cases: See Remington's Digest, Crim. Law, § 229; Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Ripley, 32 Wash. 182, 72 Pac. 1036; State v. Carpenter, 32 Wash. 254, 73 Pac. 357; State v. Fetterly, 33 Wash. 599, 74 Pac. 810; State v. Armstrong, 37 Wash. 51, 79 Pac. 490; State v. McPhail, 39 Wash. 199, 81 Pac. 683; State v. Belknap, 44 Wash. 605, 87 Pac. 934; State v. Constantine, 48 Wash. 218, 93 Pac. 317; State v. Mallahan, 66 Wash. 21, 118 Pac. 898; Seattle v. Smythe, 97 Wash. 351, 166 Pac. 1150, L. R. A. 1918A, 228. See, also, State v. Walker, 104 Wash. 472, 176 Pac. 315.

Withdrawal of Evidence: See Remington's Digest, Trial, § 26; Johnson v. San Juan Fish & Pack. Co., 31 Wash. 238, 71 Pac. 787; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. Rep. 823, 1 L. R. A. (N. S.) 1075.

ORDER OF PROOF, REBUTTAL AND REOPENING CASE—Order of Admission in General: See Remington's Digest, Trial, § 27; McKenzie v. Oregon Imp. Co., 5 Wash. 409, 31 Pac. 748; Van Horn v. New Western Shingle Co., 54 Wash. 117, 103 Pac. 42.

In Criminal Cases: See Remington's Digest, Crim. Law, § 227; Yelm Jim v. Territory, 1 W. T. 63; Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. McCauley, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; State v. Druxinman, 34 Wash. 257, 75 Pac. 814; State v. Gohl, 46 Wash. 408, 90 Pac. 259; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989; State v. Macleod, 78 Wash. 175, 138 Pac. 648.

Admission in Rebuttal of Evidence Proper in Chief: See Remington's Digest, Trial, § 30; Cogswell v. West St. etc. Ry. Co., 5 Wash. 46, 31 Pac. 411; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Gaudie v. Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; Bellingham v. Linck, 53 Wash. 208, 101 Pac. 843; Anderson v. Globe Nav. Co., 57 Wash. 502, 107 Pac. 376.

In Criminal Cases: See Remington's Digest, Crim. Law, § 230; State v. Nelson, 13 Wash. 523, 43 Pac. 637; State v. Drux-

inman, 34 Wash. 257, 75 Pac. 814; State v. Copeland, 66 Wash. 243, 119 Pac. 607; State v. Stone, 66 Wash. 625, 120 Pac. 76; State v. Overland, 68 Wash. 566, 123 Pac. 1011.

Reopening Case for Further Evidence—In General: See Remington's Digest, Trial, § 31; Brygger v. Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388; Thorne v. Joy, 15 Wash. 83, 45 Pac. 642; Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056, Ann. Cas. 1918E, 494; Norton v. Pacific Power & Light Co., 79 Wash. 625, 140 Pac. 905; Brown v. Jamison, 102 Wash. 124, 172 Pac. 853; Perkins v. Sidney, 103 Wash. 595, 175 Pac. 301. See, also, Clark Lloyd Lbr. Co. v. Puget Sound & Cascade R. Co., 111 Wash. 232, 190 Pac. 226; Howatt v. Clark, 112 Wash. 137, 192 Pac. 7.

After Close of Evidence: See Remington's Digest, Trial, § 32; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Bergman v. London etc. Fire Ins. Co., 34 Wash. 398, 75 Pac. 989; Lueders v. Tenino, 49 Wash. 521, 95 Pac. 1089; Spencer v. Alki Point Transp. Co., 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058; Ritter v. Seattle, 82 Wash. 325, 144 Pac. 61; Garey v. Pasco, 89 Wash. 382, 154 Pac. 433; Dunlap v. Seattle National Bank, 93 Wash. 568, 161 Pac. 364.

In an action for injuries sustained in driving under an elevated pipe where there was not sufficient clearance, it is not an abuse of discretion to refuse to open the case for further evidence and continue the hearing to show the height of the pipe: Simpson v. Brown, 107 Wash. 366, 182 Pac. 88.

It is discretionary for the trial court after announcement of a tentative decision, to reopen the case for further evidence, where no formal judgment had been entered: Simpson v. Sisters of Charity of the House of Providence, 108 Wash. 82, 182 Pac. 937.

After Motion for Nonsuit or Verdict: See Remington's Digest, Trial, § 33; Martin v. Union Mutual Ins. Co., 13 Wash. 275, 43 Pac. 53; Kane v. Kane, 35 Wash. 517, 77 Pac. 842; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209; Richardson v. Agnew, 46 Wash. 117, 89 Pac. 404; Reiff v. Coulter, 47 Wash. 678, 92 Pac. 436; Seattle & Puget Sound Packing Co. v. Seattle, 72 Wash. 359, 130 Pac. 493; Painter v. Kennedy, 89 Wash. 275, 154 Pac. 161.

It is not error to refuse to reopen a case for further testimony after granting a nonsuit, where the proposed testimony would not have changed the result: Vlastelica v. Baretich, 105 Wash. 638, 178 Pac. 825.

In Criminal Cases: See Remington's Digest, Crim. Law, § 231; State v. Sexton, 37 Wash. 110, 79 Pac. 634; State v.

Constatine, 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043; *State v. Pilegge*, 61 Wash. 264, 112 Pac. 263; *State v. Brown*, 62 Wash. 293, 113 Pac. 782; *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898; *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322; *State v. Jones*, 80 Wash. 588, 141 Pac. 700.

ARGUMENTS AND CONDUCT OF COUNSEL—Control by Court in General: See Remington's Digest, Trial, § 41; *Chezum v. Parker*, 19 Wash. 645, 54 Pac. 22; *State v. Costello*, 29 Wash. 366, 69 Pac. 1099; *Thomas v. Fos*, 51 Wash. 250, 98 Pac. 663. See, also, *Leschi v. Territory*, 1 W. T. 13.

Right to Address Jury—Waiver: See Remington's Digest, Trial, § 42; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *Voss v. Bender*, 32 Wash. 566, 73 Pac. 697.

Proceedings for Impaneling Jury: See Remington's Digest, Trial, § 42-1; *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233. See, also, *Schwalen v. Fuller & Co.*, 107 Wash. 476, 182 Pac. 592, 187 Pac. 366.

Presentation of Evidence—In General: See Remington's Digest, Trial, § 42-2; *Billings v. Snokomish*, 51 Wash. 135, 98 Pac. 107; *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149; *Cook v. Danaher Lumber Co.*, 61 Wash. 118, 112 Pac. 245; *Jensen v. Schlenz*, 89 Wash. 268, 154 Pac. 159; *Duval v. Inland Navigation Co.*, 90 Wash. 149, 155 Pac. 768; *Backman v. Holman*, 92 Wash. 227, 159 Pac. 125.

Presentation of Evidence for Prosecution in Criminal Cases: See Remington's Digest, Crim. Law, § 236-3; *State v. Montgomery*, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119, 21 Ann. Cas. 331; *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179; *State v. Pryor*, 67 Wash. 216, 121 Pac. 56.

— **Showing Indemnity Insurance:** See Remington's Digest, Trial, § 43; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Edwards v. Burke*, 36 Wash. 107, 78 Pac. 610; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. Rep. 881; *Westby v. Washington Brick etc. Co.*, 40 Wash. 289, 82 Pac. 271; *Passage v. Stimson Mill Co.*, 52 Wash. 661, 101 Pac. 239; *Madrona Grocery Store Co. v. Wallin*, 57 Wash. 136, 106 Pac. 617; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59; *Shay v. Horr*, 78 Wash. 667, 139 Pac. 604; *Jensen v. Schlenz*, 89 Wash. 268, 154 Pac. 159; *Gianini v. Cerini*, 100 Wash. 687, 171 Pac. 1007.

Upon the trial of cause for wrongful death, plaintiff's counsel should not be permitted, in examining the jurors on their voir dire, to persistently so inter-

rogate them as to suggest that an indemnity bonding company was interested in the defense of the action: *Schwalen v. Fuller & Co.*, 107 Wash. 476, 182 Pac. 592, 187 Pac. 366.

Limiting Scope or Time of Argument in Criminal Cases: See Remington's Digest, Crim. Law, § 237; *State v. Patchen*, 37 Wash. 24, 79 Pac. 479; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881; *Seattle v. Erickson*, 55 Wash. 675, 104 Pac. 1128, 25 L. R. A. (N. S.) 1027; *State v. Hewett*, 103 Wash. 52, 173 Pac. 726.

Scope and Effect of Summing Up: See Remington's Digest, Trial, § 44; *State v. Moody*, 7 Wash. 395, 35 Pac. 132; *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558.

Scope and Effect of Opening Statement in Criminal Cases: See Remington's Digest, Crim. Law, §§ 236-1, 236-2; *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449; *State v. Boone*, 65 Wash. 331, 118 Pac. 46; *State v. King*, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322.

See, also, *State v. Harris*, 74 Wash. 60, 132 Pac. 735; *State v. Grant*, 105 Wash. 189, 177 Pac. 784; *State v. Storrs*, 112 Wash. 675, 192 Pac. 984, 197 Pac. 17.

Statements as to Facts, Comments and Arguments: See Remington's Digest, Trial, § 45; *Taylor v. Spokane, Portland & Seattle R. Co.*, 67 Wash. 96, 120 Pac. 889; overruled in *Taylor v. Spokane, Portland & Seattle R. Co.*, 72 Wash. 378, 130 Pac. 506; *Smith v. Northern Pac. R. Co.*, 79 Wash. 448, 140 Pac. 685, 5 N. C. C. A. 497; *Hammock v. Tacoma*, 44 Wash. 623, 87 Pac. 924; *Sullivan v. Seattle Elec. Co.*, 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Chicago M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515.

In Criminal Cases: See Remington's Digest, Crim. Law, § 238; *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. Wong Tung Hee*, 41 Wash. 623, 84 Pac. 596; *State v. George*, 58 Wash. 681, 109 Pac. 114; *State v. Peeples*, 71 Wash. 451, 129 Pac. 108; *State v. Jakubowski*, 77 Wash. 78, 137 Pac. 448; *State v. Conroy*, 82 Wash. 417, 144 Pac. 538; *State v. Jackson*, 83 Wash. 514, 145 Pac. 470; *State v. Engstrom*, 86 Wash. 499, 150 Pac. 1173; *State v. Wright*, 97 Wash. 304, 166 Pac. 645.

— **Arguing or Reading Law to Jury:** See Remington's Digest, Trial, § 45-1; *Phelps v. Steamship City of Panama*, 1 W. T. 518; *State v. Coella*, 8 Wash. 512, 36 Pac. 474; *Gallagher v. Buckley*, 31 Wash. 380, 72 Pac. 79; *Williams v. Spokane Falls & N. R. Co.*, 39 Wash. 77, 80 Pac. 1100; *Brennan v. Seattle*, 46 Wash. 427, 90 Pac. 434; *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232; *Snider v.*

Washington Water Power Co., 66 Wash. 598, 120 Pac. 88.

See, also, Cowl v. West Coast Steel Co., 109 Wash. 426, 186 Pac. 866.

Counsel in addressing the jury have no right to read from law reports or authorities in view of this and sections 342 and 343: State v. Rholeder, 82 Wash. 618, 144 Pac. 914.

— **Matters not Within Issues:** See Remington's Digest, Trial, § 46; Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725; Hanstad v. Canadian Pac. R. Co., 44 Wash. 505, 87 Pac. 832; Moy Quon v. Furuya Co., 81 Wash. 526, 143 Pac. 99.

— **Matters not Sustained by Evidence:** See Remington's Digest, Trial, § 47; Cohen v. Drake, 13 Wash. 102, 42 Pac. 529; State v. Van Waters, 36 Wash. 358, 78 Pac. 897; Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 Pac. 867, 7 Ann. Cas. 607; Rogers v. Kangley Timber Co., 74 Wash. 48, 132 Pac. 731; Godley v. Gowen, 89 Wash. 124, 154 Pac. 141.

— **Comments on Evidence or Witnesses:** See Remington's Digest, Trial, § 48; Columbia & Puget Sound R. Co. v. Hawthorne, 3 W. T. 353, 19 Pac. 25; Skagit Railway & Lumber Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; Sears v. Seattle Consol. St. Ry. Co., 6 Wash. 227, 33 Pac. 389, 1081; State v. Bokien, 14 Wash. 403, 44 Pac. 889; Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143; Hammock v. Tacoma, 44 Wash. 623, 87 Pac. 924; Sullivan v. Seattle Elec. Co., 51 Wash. 71, 97 Pac. 1109, 130 Am. St. Rep. 1082; Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 Pac. 842; Kinnane v. Conroy, 52 Wash. 651, 101 Pac. 223; Kalberg v. Bon Marche, 64 Wash. 452, 117 Pac. 227; State v. Marion, 68 Wash. 675, 124 Pac. 125.

In Criminal Cases: See Remington's Digest, Crim. Law, § 240; Freidrich v. Territory, 2 Wash. 358, 26 Pac. 976; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Smails, 63 Wash. 172, 115 Pac. 82; State v. Cavelero, 89 Wash. 364, 154 Pac. 435.

— **Comments on Failure of Party to Testify:** See Remington's Digest, Trial, § 49; Mitchell v. Tacoma Ry. & Motor Co., 9 Wash. 120, 37 Pac. 341; Lane v. Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153.

Comments on Accused or on Failure of Accused to Testify: See Remington's Digest, Crim. Law, §§ 241—243; State v. Ulsemer, 24 Wash. 657, 64 Pac. 800; State v. Smokalem, 37 Wash. 91, 79 Pac. 603; State v. Raub, 103 Wash. 214, 173 Pac. 1094; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Regan, 8 Wash. 506, 36 Pac. 472.

Appeals to Sympathy or Prejudice: See Remington's Digest, Trial, § 49-1; Keough v. Seattle Elec. Co., 71 Wash. 466, 128 Pac. 1065; Winston v. Terrace, 78 Wash. 146, 138 Pac. 673; Johnson v. Seattle Taxicab & Transfer Co., 85 Wash. 551, 148 Pac. 900.

Retaliatory Statements and Remarks: See Remington's Digest, Trial, § 50; Columbia & P. S. R. Co. v. Hawthorne, 3 W. T. 353, 19 Pac. 25; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 Pac. 1119, 107 Am. St. Rep. 823, 1 L. R. A. (N. S.) 1075.

Objection and Exceptions: See Remington's Digest, Trial, § 51; Skagit Railway & Lumber Co. v. Cole, 2 Wash. 57, 25 Pac. 1077; State v. Regan, 8 Wash. 506, 36 Pac. 472; State v. Bailey, 31 Wash. 89, 71 Pac. 715; Chezum v. Parker, 19 Wash. 645, 54 Pac. 22; Shoemaker v. Bryant Lumber etc. Co., 27 Wash. 637, 68 Pac. 380; Taylor v. Modern Woodmen, 42 Wash. 304, 84 Pac. 867, 7 Ann. Cas. 607; Northern Pac. R. Co. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453; State v. Meyerkamp, 82 Wash. 607, 144 Pac. 942.

Withdrawal or Correction of Objectionable Matter: See Remington's Digest, Trial, § 52; Taylor v. Ballard, 24 Wash. 191, 64 Pac. 143; State v. Boyce, 24 Wash. 514, 64 Pac. 719; Graves v. Smith, 7 Wash. 14, 34 Pac. 213; Clukey v. Seattle Electric Co., 27 Wash. 70, 67 Pac. 379; Cady v. Seattle, 42 Wash. 402, 85 Pac. 19; Thomson v. Issaquah Shingle Co., 43 Wash. 253, 86 Pac. 588; Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18, 111 Am. St. Rep. 1027, 5 L. R. A. (N. S.) 1086; Barclay v. Puget Sound Lumber Co., 48 Wash. 241, 93 Pac. 430, 16 L. R. A. (N. S.) 140; Spencer v. Arlington, 49 Wash. 121, 94 Pac. 904; Alkire v. Meyers Lumber Co., 57 Wash. 300, 106 Pac. 915; Bunck v. McAulay, 84 Wash. 473, 147 Pac. 33.

In Criminal Cases: See Remington's Digest, Crim. Law, § 244; State v. Manville, 8 Wash. 523, 36 Pac. 470; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Hawkins, 27 Wash. 375, 67 Pac. 814; State v. Ackerman, 90 Wash. 198, 155 Pac. 743.

See, also, State v. Storrs, 112 Wash. 675, 192 Pac. 984, 197 Pac. 17.

INSTRUCTIONS TO JURY—Province of Court and Jury in General—Comments by judge on evidence are prohibited by Const., Art. IV, § 16: See Remington's Digest, Trial, § 66; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; State v. Surry, 23 Wash. 655, 63 Pac. 557; Jensen v. Shaw Show Case Co., 76 Wash. 419, 136 Pac. 698.

See, also, Spokane v. Dale, 112 Wash. 533, 192 Pac. 921.

Instructions not Amounting to Prejudicial Comment on the Facts: See Remington's Digest, Trial, § 66; Klepsch v. Donald, 4 Wash. 463, 30 Pac. 991; Frank v. Jenkins, 11 Wash. 611, 40 Pac. 220; Binnian v. Jennings, 14 Wash. 677, 45 Pac. 302; Steele v. Northern Pac. Ry. Co., 21 Wash. 287, 57 Pac. 820; State v. Surry, 23 Wash. 655, 63 Pac. 557; Drumheller v. Amer. Sur. Co., 30 Wash. 530, 71 Pac. 25; French v. Seattle Traction Co., 26 Wash. 264, 66 Pac. 404; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124; Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788; Lownsdale v. Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904; Crowley v. Taylor, 49 Wash. 511, 95 Pac. 1016; Johnson v. Northport Smelting & Ref. Co., 50 Wash. 567, 97 Pac. 746; State v. King, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322; Hendelman v. Kahan, 50 Wash. 247, 97 Pac. 109; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; Cleary v. General Contracting Co., 53 Wash. 254, 101 Pac. 888; Conover v. Carpenter, 57 Wash. 146, 106 Pac. 620; Westlake Avenue, In re, 60 Wash. 549, 111 Pac. 780; Munson v. Johnson, 80 Wash. 628, 142 Pac. 18; White v. Jansen, 81 Wash. 435, 142 Pac. 1140; Sheffield v. Union Oil Co., 82 Wash. 386, 144 Pac. 529; Bunc k v. McAulay, 84 Wash. 473, 147 Pac. 33; Farraris v. Slade Lumber Co., 88 Wash. 106, 152 Pac. 680; Jensen v. Schlenz, 89 Wash. 268, 154 Pac. 159; Calhoun, Denny & Ewing v. Whitcomb, 90 Wash. 128, 155 Pac. 759; Palmer v. Parker, 91 Wash. 683, 158 Pac. 1017.

Instructions Constituting Unlawful Comment on the Facts: See Remington's Digest, Trial, § 66; State v. Hyde, 20 Wash. 234, 55 Pac. 49; Gianini v. Cerini, 100 Wash. 687, 171 Pac. 1007.

Comments on Facts in Criminal Cases: See Remington's Digest, Crim. Law, § 255; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; State v. Carter, 15 Wash. 121, 45 Pac. 745; State v. Carey, 15 Wash. 549, 46 Pac. 1050; State v. Vance, 29 Wash. 435, 70 Pac. 34; State v. Fenton, 30 Wash. 325, 70 Pac. 741; State v. Eubank, 33 Wash. 293, 74 Pac. 378; State v. Detherage, 35 Wash. 326, 77 Pac. 504; State v. Wappenstein, 67 Wash. 501, 121 Pac. 989; State v. Primmer, 69 Wash. 400, 125 Pac. 158; State v. Miller, 72 Wash. 174, 130 Pac. 356; State v. Brownlow, 89 Wash. 582, 154 Pac. 1099.

Inferences from Evidence: See Remington's Digest, Trial, § 68; Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121; Bush v. Independent Mill Co., 54 Wash. 212, 103 Pac. 45; Caywood v. Seattle Elec. Co., 59 Wash. 566, 110 Pac. 420.

— Best and secondary evidence—
Facts described in or evidenced by writings: Proctor v. Appleby, 110 Wash. 403, 188 Pac. 481.

Assumptions by Judge as to Facts: See Remington's Digest, Trial, § 69; Bardwell v. Ziegler, 3 Wash. 34, 28 Pac. 360; Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25; Woo Dan v. Seattle E. Ry. & P. Co., 5 Wash. 466, 32 Pac. 103; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; Eggleston v. Seattle, 33 Wash. 671, 74 Pac. 806; Harris v. Carstens Packing Co., 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164; McKay v. Anderson Steamboat Co., 51 Wash. 679, 99 Pac. 1030; Caywood v. Seattle Elec. Co., 59 Wash. 566, 110 Pac. 420; Carlisle Packing Co. v. Deming, 62 Wash. 455, 114 Pac. 172; Gehri & Co. v. Dawson, 64 Wash. 240, 116 Pac. 673; Nolan v. Stillwater Lumber Co., 65 Wash. 445, 118 Pac. 340; Winston v. Terrace, 78 Wash. 146, 138 Pac. 673; Anderson v. Kinnear, 80 Wash. 638, 141 Pac. 1151; MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290.

Assumptions as to Facts in Criminal Cases: See Remington's Digest, Crim. Law, §§ 259—263; State v. Howard, 33 Wash. 250, 74 Pac. 382; State v. Wheeler, 93 Wash. 538, 161 Pac. 373; Edwards v. Territory, 1 W. T. 195; State v. Belknap, 44 Wash. 605, 87 Pac. 934; State v. Walters, 7 Wash. 246, 34 Pac. 938, 1098; State v. Straub, 16 Wash. 111, 47 Pac. 227; State v. John Port Townsend, 7 Wash. 462, 35 Pac. 367; State v. McBride, 72 Wash. 390, 130 Pac. 486; State v. Riddell, 33 Wash. 324, 74 Pac. 477; State v. Stentz, 33 Wash. 444, 74 Pac. 588; State v. Manderville, 37 Wash. 363, 74 Pac. 977.

Opinion or Belief of Judge as to Facts: See Remington's Digest, Trial, § 70; Goldthorpe v. Clark-Nickerson Lumber Co., 31 Wash. 467, 71 Pac. 1091.

See, also, Fredrich v. Territory, 2 Wash. 358, 26 Pac. 976.

Weight and Sufficiency of Evidence: See Remington's Digest, Trial, § 71; Robertson v. Woolley, 12 Wash. 326, 41 Pac. 48; Gilmore v. Seattle & Renton Ry. Co., 29 Wash. 150, 69 Pac. 743; Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747, 96 Am. St. Rep. 902, 60 L. R. A. 793; Herbert v. Hillman, 50 Wash. 83, 96 Pac. 837; Staats v. Pioneer Ins. Assn., 55 Wash. 51, 104 Pac. 185; Gasof v. Standard Ice Co., 71 Wash. 537, 129 Pac. 101; Anderson v. Kinnear, 80 Wash. 638, 141 Pac. 1151.

See, also, Buckley v. Massachusetts Bonding & Ins. Co., 113 Wash. 13, 192 Pac. 924.

In Criminal Cases: See Remington's Digest, Crim. Law, § 265; State v. Stentz,

33 Wash. 444, 74 Pac. 588; *State v. Williams*, 36 Wash. 143, 78 Pac. 780; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Cherry Point Fish Co.*, 72 Wash. 420, 130 Pac. 499; *State v. Duncan*, 101 Wash. 542, 172 Pac. 915.

Weight of Particular Facts in Criminal Cases: See Remington's Digest, *Crim. Law*, § 266; *White v. Territory*, 3 W. T. 397, 19 Pac. 37; *State v. Ware*, 58 Wash. 526, 109 Pac. 359.

Preponderance of Evidence: See Remington's Digest, *Trial*, § 71-1; *Garretson v. Tacoma R. & Power Co.*, 50 Wash. 24, 96 Pac. 511; *Morgan v. Rainier Beach Lumber Co.*, 51 Wash. 335, 98 Pac. 1120, 22 L. R. A. (N. S.) 472. See, also, *Clements v. Cook*, 112 Wash. 217, 191 Pac. 874.

Determination of Questions of Law: See Remington's Digest, *Trial*, § 72; *North Pac. L. & M. Mfg. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595; *Filley v. Christopher*, 39 Wash. 22, 80 Pac. 834, 109 Am. St. Rep. 853.

Credibility of Witnesses: See Remington's Digest, *Trial*, § 77; *Crane v. Dexter Horton & Co.*, 5 Wash. 479, 32 Pac. 223; *Lyts v. Keevey*, 5 Wash. 606, 32 Pac. 534; *Klepsch v. Donald*, 8 Wash. 162, 35 Pac. 621; *State v. McPhail*, 39 Wash. 199, 81 Pac. 683.

Presumption as to Truth: *Martin v. Jansen*, 113 Wash. 290, 193 Pac. 674, 198 Pac. 393.

In Criminal Cases: See Remington's Digest, *Crim. Law*, § 289; *State v. Friedrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *State v. Kyle*, 14 Wash. 550, 45 Pac. 147; *State v. Hawkins*, 23 Wash. 289, 63 Pac. 258; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386; *State v. Fenton*, 30 Wash. 325, 70 Pac. 741; *State v. Patchen*, 37 Wash. 24, 79 Pac. 479; *State v. McPhail*, 39 Wash. 199, 81 Pac. 683; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *State v. Gaul*, 88 Wash. 295, 152 Pac. 1029; *State v. Sullivan*, 97 Wash. 639, 166 Pac. 1123; *State v. Seablom*, 103 Wash. 53, 173 Pac. 721.

Weight and Credibility of Evidence of Accomplices: See Remington's Digest, *Crim. Law*, § 287; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139; *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123; *State v. Stapp*, 65 Wash. 438, 118 Pac. 337.

Credibility of Testimony or Statement of Accused: See Remington's Digest, *Crim. Law*, § 290; *State v. Ulsemer*, 24 Wash. 657, 64 Pac. 800; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489; *State v. King*, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322.

Application of Law to Facts: See Remington's Digest, *Trial*, § 73; *Baldwin v. Lincoln County*, 29 Wash. 509, 69 Pac.

1081; *McKenzie v. North Coast Colliery Co.*, 55 Wash. 495, 104 Pac. 801, 28 L. R. A. (N. S.) 1244.

— **Confused or Misleading Instructions:** *Sound Timber Co. v. Danaher Lbr. Co.*, 112 Wash. 314, 192 Pac. 941.

In Criminal Cases: See Remington's Digest, *Crim. Law*, § 307; *Smith v. United States*, 1 W. T. 262; *Miller v. Territory*, 3 W. T. 554, 19 Pac. 50; *State v. Jones*, 3 Wash. 175, 28 Pac. 254; *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014.

See, also, *State v. Cook*, 113 Wash. 391, 194 Pac. 401.

NECESSITY AND SUBJECT MATTER—Issues and Theories of Case in General: See Remington's Digest, *Trial*, § 75; *Jones v. Seattle*, 23 Wash. 753, 63 Pac. 553; *Lambert v. La Conner Trad. & Transp. Co.*, 37 Wash. 113, 79 Pac. 608; *Wiest v. Coal Creek R. Co.*, 42 Wash. 176, 84 Pac. 725; *Gage v. Springston Lumber Co.*, 47 Wash. 141, 91 Pac. 558; *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664; *Gardner v. Frederick*, 96 Wash. 324, 165 Pac. 85.

Presumptions and Burden of Proof: See Remington's Digest, *Trial*, § 76; *Foster v. Pacific Clipper Line*, 30 Wash. 515, 71 Pac. 48; *Bush v. Independent Mill Co.*, 54 Wash. 212, 103 Pac. 45; *Wiemann v. Jackman R. Co.*, 57 Wash. 682, 107 Pac. 844; *McKay v. Seattle Electric Co.*, 76 Wash. 257, 136 Pac. 134.

Presumptions and Burden of Proof in Criminal Cases, in General: See Remington's Digest, *Crim. Law*, § 278; *State v. Conahan*, 10 Wash. 268, 38 Pac. 996; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

— **Flight:** See Remington's Digest, *Crim. Law*, § 280; *State v. Stentz*, 33 Wash. 444, 74 Pac. 588; *State v. Pettit*, 77 Wash. 67, 137 Pac. 335.

— **Presumption of Innocence:** See Remington's Digest, *Crim. Law*, § 281; *State v. Courtemarch*, 11 Wash. 446, 39 Pac. 955; *State v. Krug*, 12 Wash. 28, 41 Pac. 126; *State v. Cushing*, 17 Wash. 544, 50 Pac. 512; *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881; *State v. Aurand*, 76 Wash. 529, 136 Pac. 1139.

— **Intent:** See Remington's Digest, *Crim. Law*, § 282; *State v. Nichols*, 15 Wash. 1, 45 Pac. 647; *State v. Williams*, 36 Wash. 143, 78 Pac. 780.

— **Presumption as to Intending Natural Consequences of Act:** See Remington's Digest, *Crim. Law*, § 283; *State v. Dolan*, 17 Wash. 499, 50 Pac. 472; *State v. Williams*, 36 Wash. 143, 78 Pac. 780; *State v. Romano*, 41 Wash. 241, 83 Pac. 1; *State v. Davis*, 72 Wash. 261, 130 Pac. 95.

Instructions as to Duties of Jury: See Remington's Digest, Trial, § 77-1; Wheeler v. Hotel Stevens Co., 71 Wash. 142, 127 Pac. 840, Ann. Cas. 1914C, 576; Nilsson v. Martinson, 72 Wash. 286, 130 Pac. 106; Shanks v. Oregon-Washington R. & Nav. Co., 98 Wash. 509, 167 Pac. 1074.

In Criminal Cases: See Remington's Digest, Crim. Law, § 269; State v. Brooks, 4 Wash. 328, 30 Pac. 147; State v. Harsted, 66 Wash. 158, 119 Pac. 24; State v. Serwe, 91 Wash. 516, 158 Pac. 81.

Influence of Arguments of Counsel: See Remington's Digest, Trial, § 78; Bay View Brewing Co. v. Tecklenberg, 19 Wash. 469, 53 Pac. 724; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.

In Criminal Cases: See Remington's Digest, Crim. Law, § 298; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Lance, 94 Wash. 484, 162 Pac. 574.

FORM, REQUISITES AND SUFFICIENCY—Written Instructions—Necessity for Reduction to Writing: See Remington's Digest, Trial, § 80; State v. Miles, 15 Wash. 534, 46 Pac. 1047; Hencke v. Babcock, 24 Wash. 556, 64 Pac. 755; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881; Collins v. Huffman, 48 Wash. 184, 93 Pac. 220; McIntosh v. Sawmill Phoenix, 49 Wash. 152, 94 Pac. 930; overruled in Sturgeon v. Tacoma Eastern R. Co., 51 Wash. 124, 98 Pac. 87; Schon v. Modern Woodmen of America, 51 Wash. 482, 99 Pac. 25; State v. Erickson, 54 Wash. 472, 103 Pac. 796; State v. Marion, 68 Wash. 675, 124 Pac. 125; Raynor v. Tacoma R. & Power Co., 70 Wash. 133, 126 Pac. 91; Wheeler v. Hotel Stevens Co., 71 Wash. 142, 127 Pac. 840, Ann. Cas. 1914C, 576; State v. Burnam, 71 Wash. 199, 128 Pac. 218; Maryland Casualty Co. v. Seattle Elec. Co., 75 Wash. 430, 134 Pac. 1097; Collins v. Terminal Transfer Co., 98 Wash. 597, 168 Pac. 174.

Error cannot be predicated upon the giving of oral instructions to the jury, "by agreement of counsel": Smith v. Bowers, 82 Wash. 80, 143 Pac. 316.

— **Delivery to Jury:** See Remington's Digest, Trial, § 82; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750.

Form and Language in General: See Remington's Digest, Trial, § 83; State v. Robinson, 12 Wash. 491, 41 Pac. 884; State v. Williams, 13 Wash. 335, 43 Pac. 15; State v. Cushing, 17 Wash. 544, 50 Pac. 512; Payne v. Whatcom County R. & Light Co., 47 Wash. 342, 91 Pac. 1084; Jones v. Seattle, 51 Wash. 245, 98 Pac. 743; Scherrer v. Seattle, 52 Wash. 4, 100 Pac. 144; Silver v. London Assurance Corp., 61 Wash. 593, 112 Pac. 666; State v. Sullivan, 97 Wash. 639, 166 Pac. 1123.

See, also, State v. Harras, 25 Wash. 416, 65 Pac. 744; State v. Armstrong, 37 Wash. 51, 79 Pac. 490; Everett v. Simmons, 86 Wash. 276, 150 Pac. 414.

See, also, Thomas v. Thomas, 105 Wash. 127, 177 Pac. 680.

— **"Find" — "Convinced":** Kane v. Nakamoto, 113 Wash. 476, 194 Pac. 381.

Repetition: See Remington's Digest, Trial, § 83-1; Alaska Steamship Co. v. Pacific Coast Gypsum Co., 78 Wash. 247, 138 Pac. 875; Rust v. Washington Tool & Hdw. Co., 101 Wash. 552, 172 Pac. 846.

In Criminal Cases: See Remington's Digest, Crim. Law, § 302; State v. Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006; State v. Churchill, 52 Wash. 210, 100 Pac. 309.

See, also, State v. Sowders, 109 Wash. 10, 186 Pac. 260.

Sufficiency as to Subject Matter: See Remington's Digest, Trial, §§ 84, 84-1; Lillie v. Shaw, 22 Wash. 234, 60 Pac. 406; McKay v. Seattle Elec. Co., 76 Wash. 257, 136 Pac. 134.

— **Preponderance of Evidence:** See Remington's Digest, Trial, § 85; Oregon Railway etc. Co. v. Owsley, 3 W. T. 38, 13 Pac. 186; Northern Pac. R. Co. v. Holmes, 3 W. T. 543, 18 Pac. 76; Wadhams v. Page, 1 Wash. 420, 25 Pac. 462; Noyes v. Pugin, 2 Wash. 653, 27 Pac. 548; Gottstein v. Seattle Lumber & C. Co., 7 Wash. 424, 35 Pac. 133; Hart v. Niagara Fire Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Prior v. Eggert, 39 Wash. 481, 81 Pac. 929; McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 Pac. 614; Johnstone v. Seattle, Renton etc. R. Co., 45 Wash. 154, 87 Pac. 1125; Childs v. Childs, 49 Wash. 27, 94 Pac. 660; Shaw v. Woodland Shingle Co., 61 Wash. 56, 111 Pac. 1070; Palmer v. Huston, 67 Wash. 210, 121 Pac. 452; McKay v. Seattle Electric Co., 76 Wash. 257, 136 Pac. 134; Yamamota v. Puget Sound Lumber Co., 84 Wash. 411, 146 Pac. 861; Caughren v. Kahan, 86 Wash. 356, 150 Pac. 445.

Argumentative Instructions: See Remington's Digest, Trial, § 87; Cowie v. Seattle, 22 Wash. 659, 62 Pac. 121; Sullivan v. Seattle Elec. Co., 44 Wash. 53, 56 Pac. 786.

— **Admissions — Acquiescence or silence**—When not an admission: Proctor v. Appleby, 110 Wash. 403, 188 Pac. 481.

Confused or Misleading Instructions: See Remington's Digest, Trial, § 88; Chamberlin v. Winn, 1 Wash. 501, 20 Pac. 780; Turner v. Great Nor. R. Co., 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883; Carson v. Old Nat. Bank, 37 Wash. 279, 79 Pac. 927; Gage v. Springston

Lumber Co., 47 Wash. 141, 91 Pac. 558; Wheeler v. Hotel Stevens Co., 71 Wash. 142, 127 Pac. 840, Ann. Cas. 1914C, 576; Revilla Fish Products Co. v. American-Hawaiian Steamship Co., 77 Wash. 49, 137 Pac. 337; Alaska Steamship Co. v. Pacific Coast Gypsum Co., 78 Wash. 247, 138 Pac. 875; Auwarter v. Kroll, 89 Wash. 347, 154 Pac. 438.

See, also, Sound Timber Co. v. Danaher Lbr. Co., 112 Wash. 314, 192 Pac. 941.

Inconsistent or Contradictory Instructions: See Remington's Digest, Trial, § 89; Miller v. Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089; Gray v. Washington Water Power Co., 30 Wash. 665, 71 Pac. 206; Tham v. Steeb Shipping Co., 39 Wash. 271, 81 Pac. 711; Mosso v. Stanton Co., 75 Wash. 220, 134 Pac. 941, L. R. A. 1916A, 943; Alaska Steamship Co. v. Pacific Coast Gypsum Co., 78 Wash. 247, 138 Pac. 875; Johnson v. Heitman, 85 Wash. 595, 153 Pac. 331; Dunn v. Puget Sound Traction Light & Power Co., 89 Wash. 36, 153 Pac. 1059; Fireman's Fund Ins. Co. v. Oregon-Washington R. & Nav. Co., 96 Wash. 113, 164 Pac. 765.

See, also, Heitmiller v. Prall, 108 Wash. 382, 184 Pac. 334.

In Criminal Cases: See Remington's Digest, Crim. Law, § 303; McClaine v. Territory, 1 Wash. 345, 25 Pac. 453; State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Rosener, 8 Wash. 42, 35 Pac. 357; State v. Burton, 27 Wash. 528, 67 Pac. 1097.

Undue Prominence of Particular Matters: See Remington's Digest, Trial, § 90; Chicago M. & St. P. R. Co. v. Alexander, 47 Wash. 131, 91 Pac. 626; Gottstein v. Seattle Lum. & Com. Co., 7 Wash. 424, 35 Pac. 133; Sexton v. School District, 9 Wash. 5, 36 Pac. 1052; Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

Instructions Correcting Previous Erroneous Instructions and Omissions: See Remington's Digest, Trial, § 91; Baxter v. Waite, 2 W. T. 228, 6 Pac. 429; Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Anderson v. McDonald, 31 Wash. 274, 81 Pac. 1037; Benson v. Spokane, 39 Wash. 101, 80 Pac. 1106.

See, also, Doctor Jack v. Territory, 2 W. T. 101, 3 Pac. 832.

APPLICABILITY TO PLEADINGS AND EVIDENCE—Abstract Instructions in General: See Remington's Digest, Trial, § 92; Yelm Jim v. Territory, 1 W. T. 63; Schmieg v. Wold, 1 W. T. 472; Foster v. Seattle Electric Co., 35 Wash. 177, 76 Pac. 995; Hiscock v. Phinney, 81 Wash. 117, 142 Pac. 461, Ann. Cas. 1916E, 1044; Henry v. Navy Yard Route, 94 Wash. 526, 162 Pac. 584.

Application of Instructions to Case—Pleadings and Issues: See Remington's Digest, Trial, § 93; Tibbitts v. Spokane, 64 Wash. 570, 117 Pac. 397; Brown v. Forest, 1 W. T. 201; State v. Jones, 3 Wash. 175, 28 Pac. 254; Nye v. Kelly, 19 Wash. 73, 52 Pac. 528; Bernhard v. Reeves, 6 Wash. 424, 33 Pac. 873; Kirby v. Rainier-Grand Hotel Co., 28 Wash. 705, 69 Pac. 378; Comegys v. American Lumber Co., 8 Wash. 661, 36 Pac. 1087; Howells v. North American T. & T. Co., 24 Wash. 689, 64 Pac. 786; Rowe v. Whatcom County R. & Light Co., 44 Wash. 658, 87 Pac. 921; Schwaninger v. McNeeley & Co., 44 Wash. 447, 87 Pac. 514; Buyken v. Lewis Const. Co., 51 Wash. 627, 99 Pac. 1007; Staats v. Pioneer Ins. Assn., 55 Wash. 51, 104 Pac. 185; Williams v. Wurdemann, 71 Wash. 390, 128 Pac. 639; Van Dyke v. Johnson, 82 Wash. 377, 144 Pac. 540; Bruenn v. North Yakima School Dist. No. 7, 101 Wash. 374, 172 Pac. 569; Ahlman v. Wilson, 102 Wash. 677, 174 Pac. 970.

See, also, Bleitz v. Bryant Lbr. Co., 110 Wash. 437, 188 Pac. 509; Fehler v. Montesano, 110 Wash. 143, 188 Pac. 5; Burlie v. Stephens, 113 Wash. 182, 193 Pac. 684.

— **Facts and Evidence:** See Remington's Digest, Trial, § 94; Fox v. Utter, 6 Wash. 299, 33 Pac. 354; Guley v. Northwestern Coal Co., 7 Wash. 491, 35 Pac. 372; Lichty v. Tannatt, 11 Wash. 37, 39 Pac. 260; Martin v. Union Mutual Ins. Co., 13 Wash. 275, 43 Pac. 53; Secor v. Oregon Imp. Co., 15 Wash. 35, 45 Pac. 654; Cole v. Noerdlinger, 22 Wash. 51, 60 Pac. 57; Irwin v. Buffalo Pitts Co., 39 Wash. 346, 81 Pac. 849; Childs v. Childs, 49 Wash. 27, 94 Pac. 660; Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170, 19 Ann. Cas. 1148; Gabrielson v. Hague Box & Lumber Co., 55 Wash. 342, 104 Pac. 635, 133 Am. St. Rep. 1032; Helland v. Bridenstine, 55 Wash. 470, 104 Pac. 626; Brydges v. Cunningham, 69 Wash. 8, 124 Pac. 131; Wainwright v. United States Lumber Co., 73 Wash. 222, 131 Pac. 820; Crandall v. Puget Sound Traction, Light & Power Co., 77 Wash. 37, 137 Pac. 319; Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co., 85 Wash. 395, 148 Pac. 567; Liliopoulos v. Oregon-Washington R. & Nav. Co., 87 Wash. 396, 151 Pac. 818.

See, also, Johnson v. Seattle, 113 Wash. 487, 194 Pac. 417.

Instructions Excluding or Ignoring Issues, Defenses or Evidence: See Remington's Digest, Trial, § 95; Dignan v. Spurr, 3 Wash. 309, 28 Pac. 529; Caywood v. Seattle Elec. Co., 59 Wash. 566, 110 Pac. 420; Larson v. McMillan, 99 Wash. 626, 170 Pac. 324.

In Criminal Cases: See Remington's Digest, Crim. Law, § 308; *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State v. Barker*, 56 Wash. 510, 106 Pac. 133; *State v. Moss*, 73 Wash. 430, 131 Pac. 1132.

Submission to Jury of Matters not Sustained by Evidence: See Remington's Digest, Trial, § 96; *Brown v. Forest*, 1 W. T. 201; *Frost v. Ainslie Lumber Co.*, 3 Wash. 241, 28 Pac. 354, 915; *Edison Gen. El. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315; *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122; *Washington Iron Works v. McNaught*, 35 Wash. 10, 76 Pac. 301; *Rastelli v. Henry*, 73 Wash. 227, 131 Pac. 643; *Clark Lloyd Lumber Co. v. Puget Sound & Cascade R. Co.*, 96 Wash. 313, 165 Pac. 94; *Walters v. Seattle*, 97 Wash. 657, 167 Pac. 124.

In Criminal Cases: See Remington's Digest, Crim. Law, § 309; *Doctor Jack v. Territory*, 2 W. T. 101, 3 Pac. 832; *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

REQUESTS OR PRAYERS — Necessity in General: See Remington's Digest, Trial, § 98; *Cogswell v. West St. Ry. Co.*, 5 Wash. 46, 31 Pac. 411; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Lownsdale v. Gray's Harbor Boom Co.*, 21 Wash. 542, 58 Pac. 663; *Howe v. West Seattle Land & Imp. Co.*, 21 Wash. 594, 69 Pac. 495; *Eggleston v. Seattle*, 33 Wash. 671, 74 Pac. 806; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903; *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090; *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*, 85 Wash. 395, 148 Pac. 567; *George v. Kurdy*, 92 Wash. 277, 158 Pac. 965.

See, also, *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 88 Pac. 755; *Ziomko v. Puget Sound Elec. Ry.*, 112 Wash. 426, 192 Pac. 1009.

Further or More Specific Instructions: See Remington's Digest, Trial, § 99; *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46, 31 Pac. 411; *Brown v. Porter*, 7 Wash. 327, 34 Pac. 1105; *Gottstein v. Seattle Lum. & Com. Co.*, 7 Wash. 424, 35 Pac. 133; *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *McQuillan v. Seattle*, 13 Wash. 600, 43 Pac. 893; *Dow v. Dempsey*, 21 Wash. 86, 57 Pac. 355; *Allend v. Spokane etc. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404; *Box v. Kelso*, 5 Wash. 360, 31 Pac. 973; *Enoch v. Spokane Falls & N. Ry. Co.*, 6 Wash. 393, 33 Pac. 966; *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. 157, 36 Am. St. Rep. 182; *Mitchell v. Tacoma Ry. & Motor Co.*, 9 Wash. 120,

37 Pac. 341; *Wilson v. Waldron*, 12 Wash. 149, 40 Pac. 740; *McQuillan v. Seattle*, 13 Wash. 600, 43 Pac. 893; *Rush v. Spokane Falls & N. Ry. Co.*, 23 Wash. 501, 63 Pac. 500; *Harvey v. Tacoma R. & Power Co.*, 64 Wash. 143, 116 Pac. 644; *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090.

Time for Asking Instructions.—It is discretionary for the court to refuse to give a further instruction after argument of the counsel: *State v. Brache*, 63 Wash. 396, 115 Pac. 853.

Form and Requisites in General: See Remington's Digest, Trial, § 100; *Blue v. McCabe*, 5 Wash. 125, 31 Pac. 431; *Woo Dan v. Seattle Electric Ry. Co.*, 5 Wash. 466, 32 Pac. 103; *Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co.*, 85 Wash. 395, 148 Pac. 567.

See, also, *Thomas v. Thomas*, 105 Wash. 127, 177 Pac. 680.

Written Requests or Prayers: See Remington's Digest, Trial, § 100-1; *Murphy v. Chicago, Milwaukee & St. Paul R. Co.*, 66 Wash. 663, 120 Pac. 525.

See, also, *Hanson v. Seattle*, 108 Wash. 586, 185 Pac. 581.

Instructions Already Given.—It is not reversible error to refuse a correct instruction in the form requested, if its substance is given in the general charge fairly stating the law applicable to the case: See Remington's Digest, Trial, § 101, and cases cited; Crim. Law, § 316, and cases cited.

See, also, *Engstrand v. Hartnett*, 106 Wash. 404, 180 Pac. 132; *Lund v. Griffiths & Sprague Stevedoring Co.*, 108 Wash. 220, 183 Pac. 123; *Reames v. Heymansson*, 109 Wash. 132, 186 Pac. 325; *Johnson v. Pearson*, 109 Wash. 147, 186 Pac. 667; *Fehler v. Montesano*, 110 Wash. 143, 188 Pac. 5; *Proctor v. Appleby*, 110 Wash. 403, 188 Pac. 481; *Clark Lloyd Lbr. Co. v. Puget Sound & Cascade R. Co.*, 111 Wash. 232, 190 Pac. 226; *Beeman v. Tacoma Ry. & Power Co.*, 112 Wash. 164, 191 Pac. 813; *Ziomko v. Puget Sound Elec. Railway*, 112 Wash. 426, 192 Pac. 1009.

Instructions Partly Erroneous: See Remington's Digest, Trial, § 102; *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. 157, 36 Am. St. Rep. 182; *Croft v. Northwestern Steamship Co.*, 20 Wash. 175, 55 Pac. 42; *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674; *Wiemann v. Jackman R. Co.*, 57 Wash. 682, 107 Pac. 844; *Nollmeyer v. Tacoma R. & Power Co.*, 95 Wash. 595, 164 Pac. 229; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105; *Kennedy v. Supreme Tent of Knights of Maccabees*, 100 Wash. 36, 170 Pac. 371.

See, also, *Fehler v. Montesano*, 110 Wash. 143, 188 Pac. 5.

Manner of Giving Instructions Asked: See Remington's Digest, Trial, § 103;

Seattle v. Buzby, 2 W. T. 25, 3 Pac. 180; Gottstein v. Seattle Lumber & C. Co., 7 Wash. 424, 35 Pac. 133; State v. Anderson, 30 Wash. 14, 70 Pac. 104; Akin v. Bradley Eng. & Mach. Co., 51 Wash. 658, 99 Pac. 1038; Rangenier v. Seattle Elec. Co., 52 Wash. 401, 100 Pac. 842; Averbuch v. Great Northern R. Co., 55 Wash. 633, 104 Pac. 1103; Hall v. Northwest Lumber Co., 61 Wash. 351, 112 Pac. 369; State v. Hankins, 93 Wash. 124, 160 Pac. 307.

See, also, Jones v. Elliott, 111 Wash. 138, 189 Pac. 1007.

In Criminal Cases: See Remington's Digest, Crim. Law, § 317; State v. Murphy, 13 Wash. 229, 43 Pac. 44; State v. Baldwin, 15 Wash. 15, 45 Pac. 650; State v. Klein, 19 Wash. 368, 53 Pac. 364; State v. McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State v. Anderson, 30 Wash. 14, 70 Pac. 104.

Modification by Court: See Remington's Digest, Trial, § 104; Columbia & P. S. R. Co. v. Hawthorne, 3 W. T. 353, 19 Pac. 25; Cogswell v. West St. etc. E. Ry. Co., 5 Wash. 46, 31 Pac. 411; Seattle Gas & Elec. Co. v. Seattle, 6 Wash. 101, 32 Pac. 1058; Duggan v. Pacific Boom Co., 6 Wash. 593, 34 Pac. 157, 36 Am. St. Rep. 182; McQuillan v. Seattle, 13 Wash. 600, 43 Pac. 893; Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391; Henry v. Grant St. Elec. R. Co., 24 Wash. 246, 64 Pac. 137; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Roberts v. Port Blakeley Mill Co., 30 Wash. 25, 70 Pac. 111; McDannald v. Washington & Columbia R. Co., 31 Wash. 585, 72 Pac. 481.

See, also, State v. Baldwin, 15 Wash. 15, 45 Pac. 650; State v. Cushing, 17 Wash. 544, 50 Pac. 512.

Refusal of Requests: See Remington's Digest, Trial, § 105; McGee v. Wincholt, 23 Wash. 748, 63 Pac. 571; Roberts v. Port Blakeley Mill Co., 30 Wash. 25, 70 Pac. 111; Tergeson v. Robinson Mfg. Co., 48 Wash. 294, 93 Pac. 428; Suell v. Jones, 49 Wash. 582, 96 Pac. 4; Ramm v. Hewitt-Lea Lumber Co., 49 Wash. 263, 94 Pac. 1081; Harkins v. Veness Lumber Co., 69 Wash. 196, 124 Pac. 492; Cranford v. O'Shea, 75 Wash. 33, 134 Pac. 486.

Construction and Effect of Charge as a Whole.—The instructions must be considered as a whole to determine whether prejudicial error was committed, and one misleading statement is not prejudicial if all together fairly state the law: See Remington's Digest, Trial, § 116, and cases cited; Crim. Law, § 311, and cases cited.

See, also, State v. Sowders, 109 Wash. 10, 186 Pac. 260.

Error in Instructions Cured by Withdrawal or Giving Other Instructions: See Remington's Digest, Trial, § 117; Baxter

v. Waite, 2 W. T. 228, 6 Pac. 429; Cameron v. Union Truck Line, 10 Wash. 507, 39 Pac. 128; Mitchell v. Tacoma R. & M. Co., 13 Wash. 560, 43 Pac. 528; Carroll v. Burleigh, 15 Wash. 208, 46 Pac. 232; Davis v. Atlas Assur. Co., 16 Wash. 232, 47 Pac. 885; Gallagher v. Buckley, 31 Wash. 380, 72 Pac. 79; State v. Williams, 36 Wash. 143, 78 Pac. 780; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532; Sullivan v. Wood & Co., 43 Wash. 259, 86 Pac. 629, 117 Am. St. Rep. 1047; Averbuch v. Great Northern R. Co., 55 Wash. 633, 104 Pac. 1103; Rosin v. Danaher Lumber Co., 63 Wash. 430, 115 Pac. 833, 40 L. R. A. (N. S.) 913, 2 N. C. C. A. 265; Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; McDonald v. McDougall, 86 Wash. 339, 150 Pac. 625; MacDermid v. Seattle, 93 Wash. 167, 160 Pac. 290.

See, also, Bullock v. Yakima Valley Transp. Co., 108 Wash. 413, 184 Pac. 641, 187 Pac. 410.

In Criminal Cases: See Remington's Digest, Crim. Law, § 312; McClaine v. Territory, 1 Wash. 345, 25 Pac. 453; State v. Carter, 15 Wash. 121, 45 Pac. 745; State v. Crawford, 31 Wash. 260, 71 Pac. 1031; State v. Peasley, 80 Wash. 99, 141 Pac. 316.

OBJECTIONS AND EXCEPTIONS—Right to Object—Estoppel or Waiver: See Remington's Digest, Trial, § 106; Reiner v. Crawford, 23 Wash. 669, 63 Pac. 516, 83 Am. St. Rep. 848; Howard v. Washington Water Power Co., 75 Wash. 255, 134 Pac. 927, 52 L. R. A. (N. S.) 578; Peterson v. Seattle, 100 Wash. 618, 171 Pac. 657.

This section authorizing exceptions to instructions at any time before motion for new trial relates to their sufficiency as matter of law, and not to the manner in which they are given: Taylor v. Kidd, 72 Wash. 18, 129 Pac. 406.

The purpose of the last sentence in this section being to allow the court to correct error at the time of passing on a motion for a new trial, exceptions to the refusal to give instructions may be taken at the same time and in the same way: Radburn v. Fir Tree Lumber Co., 83 Wash. 643, 145 Pac. 632.

This section, as to the manner of taking exceptions to instructions applies also to the exceptions to refusals to give instructions: Cramer v. Cramer, 106 Wash. 681, 180 Pac. 915.

OBJECTIONS AND MOTIONS TO STRIKE OUT—Right to Object—Estoppel or Waiver: See Remington's Digest, Trial, § 34; Tacoma Light & Water Co. v. Huson, 13 Wash. 124, 42 Pac. 536; State v. Shelton, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064; Anderson v. White, 18 Wash. 658, 52 Pac. 231; Kenney Presby-

terian Home v. Kenney, 45 Wash. 106, 88 Pac. 108; Pearce v. Greek Boys' Min. Co., 48 Wash. 38, 92 Pac. 773; Holly Street Land Co. v. Beyer, 48 Wash. 422, 93 Pac. 1065; State v. Bridgham, 51 Wash. 18, 99 Pac. 1096; Helmer v. Title Guaranty & Surety Co., 55 Wash. 558, 104 Pac. 783; Rockwood v. Turner, 89 Wash. 356, 154 Pac. 465; King County v. Joyce, 96 Wash. 520, 165 Pac. 399.

Sufficiency and Scope of Objections—Statement of Grounds: See Remington's Digest, Trial, § 35; Earles v. Bigelow, 7 Wash. 581, 35 Pac. 390; McElroy v. Williams, 14 Wash. 627, 45 Pac. 306; Chezum v. Parker, 19 Wash. 645, 54 Pac. 22; Richardson v. Agnew, 46 Wash. 117, 59 Pac. 404; Pacific Drug Co. v. Hamilton, 71 Wash. 469, 128 Pac. 1069; Benham v. Columbia Canal Co., 74 Wash. 110, 132 Pac. 884; Evergreen Farm v. Attalia Land Co., 91 Wash. 192, 157 Pac. 487; Forsyth v. Wallace, 92 Wash. 523, 159 Pac. 696; State v. Moser, 94 Wash. 465, 162 Pac. 582; Seattle v. Hewetson, 95 Wash. 612, 164 Pac. 234; Island Gun Club v. National Surety Co., 101 Wash. 185, 172 Pac. 209; Drescher Lumber Co. v. Forest Mills of B. C., 102 Wash. 664, 173 Pac. 630.

See, also, Moore v. Stetson Machine Works, 110 Wash. 649, 188 Pac. 769.

— **Scope, and Questions Raised:** See Remington's Digest, Trial, § 36; Lieben-

thal v. Price, 8 Wash. 206, 36 Pac. 1078; Gustin v. Jose, 11 Wash. 348, 39 Pac. 687; State v. Owens, 15 Wash. 468, 46 Pac. 1039; Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345; Anderson v. New York Life Ins. Co., 34 Wash. 616, 76 Pac. 109; Beebe v. Redward, 35 Wash. 615, 77 Pac. 102; Meyers v. Syndicate Heat & Power Co., 47 Wash. 48, 91 Pac. 549; State v. Bridgham, 51 Wash. 18, 97 Pac. 1096; Kinnane v. Conroy, 52 Wash. 651, 101 Pac. 223; Knutson v. Moe Brothers, 72 Wash. 290, 130 Pac. 347; Marks v. Seattle, 88 Wash. 61, 152 Pac. 706.

— **Evidence Admissible in Part:** See Remington's Digest, Trial, §§ 37, 39; Spurlock v. Port Townsend Southern R. R. Co., 13 Wash. 29, 42 Pac. 520; Yake v. Pugh, 13 Wash. 78, 42 Pac. 528, 52 Am. St. Rep. 17; Spokane v. Costello, 42 Wash. 182, 84 Pac. 652; State v. Meyerkamp, 82 Wash. 607, 144 Pac. 942.

Propriety of instruction containing technical terms. 11 Ann. Cas. 622.

Necessity of giving definition of legal or technical term in different parts of instruction in which it is employed. 7 A. L. R. 135.

Instruction to jury to pay no attention to remarks of counsel as reversible error. Ann. Cas. 1912C, 817; Ann. Cas. 1915B, 736.

§ 340. Directing Judgment and Discharging Jury.

In all cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision. [L. '95, p. 64, § 1.]

Cited in 20 Wash. 255, 543; 21 Wash. 331, 513; 22 Wash. 474; 23 Wash. 507, 531; 28 Wash. 176; 31 Wash. 631; 35 Wash. 81; 60 Wash. 272, 273, 275; 99 Wash. 433; 110 Wash. 28—30, 32, 35; 112 Wash. 296.

Restriction or Invasion of Functions of Jury—Nonsuit or Directing Verdict: See Remington's Digest, Jury, § 25; Furth v. Snell, 13 Wash. 660, 43 Pac. 935; Creagh v. Equitable Life Assur. Soc., 19 Wash. 108, 52 Pac. 526.

This section changed the common-law rule that plaintiff had an absolute right to a voluntary dismissal at any time before judgment, but only limits such right to the extent that it should be asserted before passing on the challenge: Kosinski v. Hines, 110 Wash. 25, 180 Pac. 125.

A plaintiff has the right to take a voluntary nonsuit after defendant's motion to discharge the jury and for directed judgment under this section; and

the motion for voluntary nonsuit is timely if made before the ruling upon the defendant's motion, even though the judge has expressed his views of the law and indicated that he is about to grant defendant's motion: Kosinski v. Hines, 110 Wash. 25, 180 Pac. 125.

Uncontroverted or Conflicting Evidence: See Remington's Digest, Trial, § 54; National Bank of Commerce v. Galland, 14 Wash. 502, 45 Pac. 35; Tacoma v. Tacoma Light etc. Co., 17 Wash. 458, 50 Pac. 55; Pronger v. Old Nat. Bank, 20 Wash. 618, 56 Pac. 391; Brown v. Seattle City R. Co., 16 Wash. 465, 47 Pac. 890; Johnson v. Great Northern R. Co., 49 Wash. 98, 94 Pac. 895; Coombs v. James, 82 Wash. 403, 144 Pac. 536; McLaughlin v. Dopps, 84 Wash. 442, 147 Pac. 6; Beck v. International Harvester Co., 85 Wash. 413, 148 Pac. 35; Washington Boom Co. v. Chelalis Boom Co., 90 Wash. 350, 156 Pac.

24; *Inglis v. Morton*, 99 Wash. 570, 169 Pac. 962.

See, also, *Clements v. Cook*, 112 Wash. 217, 191 Pac. 874.

Where there is no substantial conflict in the testimony, whether a promise was a collateral one to answer for the debt of another, or an original undertaking, is one of law: *Sieffert Company v. Wright*, 108 Wash. 616, 185 Pac. 577.

Withdrawal of Particular Counts or Issues: See *Remington's Digest*, Trial, § 55-2; *Herrick v. Washington Water Power Co.*, 75 Wash. 149, 134 Pac. 934, 48 L. R. A. (N. S.) 640.

Where no evidence is given to support an affirmative defense, it should be withdrawn from the consideration of the jury: *Blomskog, Erickson & Cotton v. Seattle*, 107 Wash. 471, 182 Pac. 571.

PROVINCE OF COURT AND JURY IN GENERAL IN CRIMINAL CASES: See *Remington's Digest*, Crim. Law, §§ 246—249; *Hartigan v. Territory*, 1 W. T. 447; *Thompson v. Territory*, 1 W. T. 547; *State v. Cushing*, 17 Wash. 544, 50 Pac. 712; *State v. Barr*, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 90, 29 L. R. A. 154; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Crossen*, 77 Wash. 438, 137 Pac. 1030.

Weight, Inferences from, and Effect of Evidence in Criminal Cases: See *Remington's Digest*, Crim. Law, §§ 250—252; *State v. Crawford*, 31 Wash. 260, 71 Pac. 1031; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Schuman*, 9 Wash. 89, 153 Pac. 1084, Ann. Cas. 1918A, 633; *State v. Brooks*, 89 Wash. 427, 154 Pac. 795; *State v. Walters*, 7 Wash. 246, 34 Pac. 936, 1098; *State v. Yourex*, 30 Wash. 611, 71 Pac. 203; *State v. Elswood*, 15 Wash. 453, 46 Pac. 727.

See, also, *State v. Miller*, 105 Wash. 475, 178 Pac. 459; *State v. Swager*, 110 Wash. 431, 188 Pac. 504.

DIRECTION OF VERDICT—Nature and Grounds—When Verdict Should be Directed: See *Remington's Digest*, Trial, § 60; *Morgan v. Henderson*, 2 W. T. 367, 8 Pac. 491; *Clancy v. Reis*, 5 Wash. 271, 31 Pac. 971; *Clancy v. Williams*, 5 Wash. 492, 32 Pac. 770; *Wadhams v. Page*, 6 Wash. 103, 32 Pac. 1068; *Squires v. Zumwalt*, 12 Wash. 241, 40 Pac. 986; *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031; *Creagh v. Equitable Life Assurance Soc.*, 19 Wash. 108, 52 Pac. 526; *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879; *Pacific Nat. Bank v. Aetna Indemnity Co.*, 33 Wash. 428, 74 Pac. 590; *Lownsdale v. Grays Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904; *Adams v. Peterman Mfg. Co.*, 47 Wash. 484, 92 Pac. 339; *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915; *Jensen v. Williams Co.*, 72 Wash. 606, 131 Pac. 204.

See, also, *Harris v. Saunders*, 108 Wash. 195, 182 Pac. 949.

When Verdict Should not be Directed: See *Remington's Digest*, Trial, § 60; *Brookman v. State Ins. Co.*, 18 Wash. 308, 51 Pac. 395; *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Richardson v. Spangle*, 22 Wash. 14, 60 Pac. 64; *Menasha Wooden Ware Co. v. Nelson*, 45 Wash. 543, 88 Pac. 1018; *Davies v. Rose-Marshall Coal Co.*, 74 Wash. 565, 134 Pac. 180; *Caughren v. Kahan*, 86 Wash. 356, 150 Pac. 445; *Fobes Supply Co. v. Kendrick*, 88 Wash. 284, 152 Pac. 1028; *Osborne v. Phoenix Insurance Co.*, 90 Wash. 387, 156 Pac. 5.

Insufficiency of Opening Statement: See *Remington's Digest*, Trial, § 61; *Redding v. Puget Sound Iron etc. Co.*, 36 Wash. 642, 79 Pac. 308; *Brooks v. McCabe & Hamilton*, 39 Wash. 62, 80 Pac. 1004; *James v. Pearson*, 64 Wash. 263, 116 Pac. 852; *Frisell v. Surry*, 99 Wash. 201, 169 Pac. 317.

See, also, *Dyer v. Title Guar. & Surety Co.*, 106 Wash. 186, 179 Pac. 834.

Direction of Verdict in Criminal Cases: See *Remington's Digest*, Crim. Law, § 254; *State v. Coella*, 8 Wash. 512, 36 Pac. 474; *State v. Wilson*, 10 Wash. 402, 39 Pac. 106; *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477, 933; *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044; *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810.

Power of Court, Direction of Verdict, Grant of Nonsuit, or New Trial, and Discretion Generally: See *Remington's Digest*, Trial, § 63; *Weir v. Seattle Electric Co.*, 41 Wash. 657, 84 Pac. 597; *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 42, 7 Ann. Cas. 687; *Messir v. McLean*, 51 Wash. 140, 98 Pac. 106; *Spokane Grain Co. v. Great Northern Express Co.*, 55 Wash. 545, 104 Pac. 794; *O'Connor v. Force*, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166; *Beck v. International Harvester Co. of America*, 85 Wash. 413, 148 Pac. 35; *Washington Trust Co. v. Keyes*, 88 Wash. 287, 152 Pac. 1029; *West Waite Street, Seattle, In re*, 89 Wash. 688, 155 Pac. 165; *Payzant v. Caudill*, 89 Wash. 250, 154 Pac. 170; *Mattson v. Griffin Transfer Co.*, 90 Wash. 1, 155 Pac. 392; *Phoenix Assur. Co. v. Columbia & Puget Sound Ry.*, 92 Wash. 419, 159 Pac. 369; *Stevens v. Selvidge*, 103 Wash. 683, 175 Pac. 294.

See, also, *Hendrickson v. Smith*, 111 Wash. 82, 189 Pac. 550.

Operation and Effect of Motion or Request: See *Remington's Digest*, Trial, § 64; *Knox v. Fuller*, 23 Wash. 34, 62

Pac. 131; *Frye & Bruhn v. Phillips*, 46 Wash. 190, 89 Pac. 559, 93 Pac. 668; *Sevier v. Hopkins*, 101 Wash. 404, 172 Pac. 550.

See, also, *Haines v. Coastwise Steamship & Barge Co.*, 104 Wash. 685, 177 Pac. 648; *McClure v. Wilson*, 109 Wash. 166, 186 Pac. 302.

Where the court withdraws a case from the jury and enters judgment dismissing the action, it is not required to make findings of fact and conclusions of law: *Fidelity Trust Co. v. Palmer*, 22 Wash. 473, 61 Pac. 158, 79 Am. St. Rep. 953.

Where the court has granted the motion of defendant to discharge the jury and for judgment in its favor, a motion of plaintiff for a dismissal of his case without prejudice comes too late: *Dunkle v. Spokane Falls & N. R. Co.*, 20 Wash. 254, 55 Pac. 51.

A judgment reciting that the defendants challenged the legal sufficiency of the evidence and moved the court to decide, as a matter of law, that the defendants were entitled to a verdict in their favor, and that the jury be discharged and judgment entered in favor of the defendants upon the ground that the plaintiff failed to prove a sufficient cause for the jury and granting the motion in all things, is a judgment on the merits and a bar to another action, under this section, and not a judgment of nonsuit, under section 408, for plaintiff's failure "to prove a sufficient cause for the jury": *McKim v. Porter*, 60 Wash. 270, 110 Pac. 1073.

Hearing and Determination: See *Remington's Digest*, Trial, § 64-1; *Aldredge v. Oregon-Washington R. & Nav. Co.*, 79 Wash. 349, 140 Pac. 550.

Discharge of Jury and Decision by

§ 341. Special Findings.

Any party may, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written, and handed to the court, or, at the option of the court, oral, and entered in the judge's minutes. [L. '69, p. 56, § 226; Cd. '81, § 222; 2 H. C., § 355.]

Cited in 109 Wash. 431.

Where requests for special findings are made the court should, after having determined that the requests are proper, instruct the jury that it is their duty to answer each one of them, and until such requests have been answered by the jury, without any attempt at evasion, the general verdict should not be received: *Red-*

Court: See *Remington's Digest*, Trial, § 65; *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35; *Murray v. Bush*, 29 Wash. 662, 70 Pac. 133; *West Seattle Land etc. Co. v. Novelty M. Co.*, 31 Wash. 435, 72 Pac. 69; *Easterly v. Mills*, 54 Wash. 356, 103 Pac. 475, 29 L. R. A. (N. S.) 952; *Puget Sound Iron & Steel Works v. First International Bank*, 91 Wash. 109, 157 Pac. 212; *State ex rel. Stone v. Superior Court*, 97 Wash. 172, 166 Pac. 69.

See, also, *Ludberg v. Barghoorn*, 73 Wash. 476, 131 Pac. 1165.

Right of court to direct verdict in favor of one codefendant at close of plaintiff's case. *Ann. Cas.* 1912D, 1061.

Effect of request by both parties for direction of verdict. 6 *Ann. Cas.* 545; 13 *Ann. Cas.* 372; *Ann. Cas.* 1913C, 1342.

Waiver of exception to denial of application to take case from jury by subsequent introduction of evidence. 14 *Ann. Cas.* 222; *Ann. Cas.* 1914A, 146.

Power of trial court to direct verdict at close of opening statement of counsel. 14 *Ann. Cas.* 699; 29 L. R. A. (N. S.) 218.

Power of court to direct verdict in action of libel or slander where jury is vested with power to determine law and facts. *Ann. Cas.* 1915D, 1270; 51 L. R. A. (N. S.) 369.

Direction of verdict for party on uncontradicted evidence in his favor. 8 A. L. R. 802.

ford v. Spokane St. Ry. Co., 9 Wash. 55, 36 Pac. 1085.

Where special interrogatories are submitted under this section, counsel have a right to argue them to the jury: *Crowl v. West Coast Steel Co.*, 109 Wash. 426, 186 Pac. 866.

Refusal to make requested findings as constituting contrary findings. 7 *Ann. Cas.* 380.

§ 342. Questions of Law—Duty of Court.

All questions of law, including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes and

other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it. [L. '69, p. 56, § 227; Cd. '81, § 223; 2 H. C., § 356.]

Cited in 81 Wash. 681; 82 Wash. 622.

Questions of Law or of Fact in General: See Remington's Digest, Trial, § 53; *Livesley v. O'Brien*, 3 Wash. 546, 28 Pac. 920; *Ault v. Interstate Sav. & Loan Assn.*, 15 Wash. 627, 47 Pac. 13; *Remington v. Fidelity Deposit Co.*, 27 Wash. 429, 67 Pac. 989; *Kleet v. Long-Bell Lum. Co.*, 27 Wash. 648, 68 Pac. 202; *Lost Lake Lum. Co. v. Smith*, 29 Wash. 713, 70 Pac. 134; *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016; *Ongaro v. Twohy*, 57 Wash. 668, 107 Pac. 834; *Scarpelli v. Washington Water Power Co.*, 63 Wash. 18, 114 Pac. 870; *Citizens' National Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593; *Girocamo v. Tribble*, 70 Wash. 25, 126 Pac. 67; *Bogitch v. Potlatch Lum-*

ber Co., 93 Wash. 585, 161 Pac. 487; *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056, Ann. Cas. 1918E, 494.

Where a transaction consists wholly of letters and telegrams, whether the correspondence constituted a contract is a question for the court: *Schulze v. General Electric Co.*, 108 Wash. 401, 184 Pac. 342.

Under sections 342, 343, the jury are the judges of the facts alone, while it is the duty of the court to decide all questions of law: *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 143 Pac. 146.

Presence of Jury During Argument as to Admission: See Remington's Digest, Trial, § 21; *State v. Coella*, 3 Wash. 99, 28 Pac. 28; *Gilcher v. Seattle Electric Co.*, 82 Wash. 414, 144 Pac. 530.

§ 343. Questions of Fact—Duty of Jury.

All questions of fact, other than those mentioned in the section preceding, shall be decided by the jury, and all evidence thereon addressed to them. [L. '69, p. 56, § 228; Cd. '81, § 224; 2 H. C., § 357.]

Cited in 30 Wash. 325; 81 Wash. 681; 82 Wash. 622.

Sufficiency of Evidence: See Remington's Digest, Trial, § 55; *Tibbals v. Mt. Olympus Water Co.*, 10 Wash. 329, 38 Pac. 1120; *Lambuth v. Stetson & Post Mill Co.*, 14 Wash. 187, 44 Pac. 148; *Tacoma v. Tacoma L. & W. Co.*, 17 Wash. 458, 50 Pac. 55; *Knox v. Fuller*, 23 Wash. 34, 62 Pac. 131; *Meyers v. Syndicate Heat & Power Co.*, 47 Wash. 48, 91 Pac. 549; *Anderson v. Pacific National Lumber Co.*, 60 Wash. 415, 111 Pac. 337; *Butterworth v. Bredemeyer*, 74 Wash. 524, 133 Pac. 1061; *Atwood v. Washington Water Power Co.*, 79 Wash. 427, 140 Pac. 343; *Lindquist v. Pacific Coast Coal Co.*, 81 Wash. 73, 142 Pac. 445; *Norris-Short Co. v. Everson Mercantile Co.*, 103 Wash. 399, 174 Pac. 645.

On defendant's motion for nonsuit, the evidence must be viewed in the light most favorable to the plaintiff, who is not bound by unfavorable testimony of one of his own witnesses: *Johnson v. North Coast Stevedoring Co.*, 109 Wash. 236, 186 Pac. 663.

Where there is substantial evidence sustaining a verdict if believed by the jury, the court cannot weigh the evidence and sustain a challenge thereto: *Champneys v. Irwin*, 106 Wash. 438, 180 Pac. 405.

— **Credibility of Witnesses:** See Remington's Digest, Trial, § 55-1; *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 115 Pac. 841, 38 L. R. A. (N. S.) 1135; *Moore v. Roddie*, 103 Wash. 386, 174 Pac. 648; *Delaski v. Northwestern Imp. Co.*, 70 Wash. 143, 126 Pac. 421.

§ 344. View by Jury of Premises.

Whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which shall be shown to them by the judge, or by a person appointed by the court for that purpose. While the jury are thus absent, no person other than the judge, or person so appointed, shall speak to them on any subject connected with the trial. [L. '69, p. 56, § 229; Cd. '81, § 225; 2 H. C., § 358.]

Cited in 47 Wash. 245; 66 Wash. 26; 71 Wash. 648.

View and Inspection, Discretion: See Remington's Digest, Trial, § 13; *Belling-*

ham Bay etc. R. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144; Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 937; State v. Coella, 8 Wash. 512, 36 Pac. 474; East Spring Street, In re, 41 Wash. 366, 83 Pac. 242; Jackson Street, In re, 47 Wash. 243, 91 Pac. 970; Northern Pac. R. Co. v. Union Lumber Co., 76 Wash. 563, 137 Pac. 306.

See, also, Jordan v. Spokane, Portland & Seattle R. Co., 109 Wash. 476, 186 Pac. 875.

A view of premises by a jury may be ordered in condemnation proceedings, under this section, nor is said section limited by section 9223, authorizing a view in condemnation proceedings without making provision for any person to point out the place: Jackson Street, In re, 47 Wash. 243, 91 Pac. 970; Sedro-Woolley v. Willard, 71 Wash. 646, 129 Pac. 372.

Under this section, the court may appoint a person other than an officer to

point out a place to be viewed by a jury: Jackson Street, In re, 47 Wash. 243, 91 Pac. 970.

View by jury as resting in discretion of trial court. 18 Ann. Cas. 730.

View of premises by jury. 42 L. R. A. 372.

Necessity of presence of judge during view by jury. 16 Ann. Cas. 628.

Impressions made on minds of jurors by view as evidence in case. 10 Ann. Cas. 663.

Right of jury on view to experiment to make evidence. 18 Ann. Cas. 571.

View of property appropriated in condemnation proceedings as supplementary, not exclusive, of evidence. 3 Ann. Cas. 302.

View by jury outside the territorial jurisdiction. L. R. A. 1917F, 984.

§ 345. Admonitions to Jury.

The jurors [may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they] may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them. [L. '69, p. 56, § 230; Cd. '81, § 226; 2 H. C., § 359.]

Superseded as to the bracketed words.

See infra, § 2159, prohibition against separation in criminal cases.

Cited in 18 Wash. 45; 19 Wash. 275.

Under this section, the jury in a criminal case could, at any time before the submission of the cause, be allowed to separate: State v. Johnny Tommy, 19 Wash. 270, 53 Pac. 157.

Under this, and section 2159, requiring

jurors in criminal cases to be kept together, except in cases of misdemeanors, it is reversible error in a felony case for a juror to separate from his fellows, and it is not permissible for him to excuse his conduct and show that no prejudice resulted: State v. Bennett, 71 Wash. 673, 129 Pac. 409.

§ 347. Proceedings in Case Juror Becomes Ill.

If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterward formed. [L. '69, p. 56, § 231; Cd. '81, § 227; 2 H. C., § 360.]

§ 348. Juror as Witness.

A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy to his fellow jurors, nor be governed by the same in giving his verdict. [L. '69, p. 57, § 232; Cd. '81, § 228; 2 H. C., § 361.]

Cited in 30 Wash. 141.

One whose name has been indorsed on an information as a witness for the state is incompetent to serve as a juror on the ground of bias, even though he dis-

claims any, when he has knowledge of material controverted facts in the case: State v. Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807.

§ 349. Care of Jury While Deliberating.

After hearing the charge, the jury may either decide in the jury-box or retire for deliberation. If they retire they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon. [L. '54, p. 166, § 194; L. '69, p. 57, § 233; Cd. '81, § 229; 2 H. C., § 362.]

CUSTODY, CONDUCT AND DELIBERATIONS OF JURY—Misconduct of Jurors: See Remington's Digest, Trial, § 118; Hedican v. Pennsylvania Fire Ins. Co., 21 Wash. 488, 58 Pac. 574; Vowell v. Issaquah Coal Co., 31 Wash. 103, 71 Pac. 725; Schultz v. Simmons Fur Co., 46 Wash. 555, 90 Pac. 917; Brennan v. Seattle, 46 Wash. 427, 90 Pac. 434; Carlisle v. Hargreaves, 112 Wash. 383, 192 Pac. 894.

Communications Between Judge and Jury: See Remington's Digest, Trial,

§ 119; Marine Savings Bank v. Young, 5 Wash. 394, 31 Pac. 864; State v. Wroth, 15 Wash. 621, 47 Pac. 106; Mott Iron Works v. Metropolitan Bank, 90 Wash. 655, 156 Pac. 864.

Urging or Coercing Agreement: See Remington's Digest, Trial, § 120; State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; State v. Thield, 36 Wash. 365, 78 Pac. 919; Mott Iron Works v. Metropolitan Bank, 90 Wash. 655, 156 Pac. 864.

§ 350. Expenses of Keeping Jury.

If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county. [L. '69, p. 57, § 234; Cd. '81, § 230; 2 H. C., § 363.]

§ 351. Taking Papers to Jury-room.

Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers which have been received as evidence on the trial (except depositions), or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. [L. '54, p. 166, § 195; L. '69, p. 57, § 235; Cd. '81, § 231; 2 H. C., § 364.]

Cited in 21 Wash. 72; 33 Wash. 359; 52 Wash. 136; 53 Wash. 540; 109 Wash. 626.

Taking Papers to Jury-room: See Remington's Digest, Trial, § 118½; Swadling v. Barneson, 21 Wash. 699, 59 Pac. 506; Wintermute v. Standard Furniture Co., 53 Wash. 539, 102 Pac. 443.

In Criminal Cases: See Remington's

Digest, Crim. Law, § 327; State v. Cushing, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145; State v. Yourex, 30 Wash. 611, 71 Pac. 203; Edwards v. Territory, 1 W. T. 195; Doctor Jack v. Territory, 2 W. T. 101, 3 Pac. 832; State v. Moody, 18 Wash. 165, 61 Pac. 356; State v. McCormick, 20 Wash. 94, 54 Pac. 764; State v. Webster, 21 Wash. 63, 57 Pac.

361; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *State v. Simmons*, 52 Wash. 132, 100 Pac. 269; *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

— Taking exhibits to jury-room: *State v. Burcham*, 109 Wash. 625, 187 Pac. 352.

Right of jury to take to jury-room affidavit admitted as testimony of absent witness. *Ann. Cas.* 1913C, 498.

Right of jury to take paper contain-

ing calculation or estimate by party as to amount due him on retirement to jury-room. *Ann. Cas.* 1913C, 937.

Right of jury on retirement to take family Bible or other religious book introduced as evidence. 41 *L. B. A.* 456.

Effect on verdict of papers improperly in jury-room. 6 *Ann. Cas.* 931; *Ann. Cas.* 1915C, 924.

§ 352. Further Instructions to Jury.

After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of or after notice to the parties or their attorneys. [Cf. *L.* '54, p. 166, § 196; *L.* '69, p. 57, § 236; *Cd.* '81, § 232; *L.* '91, p. 103, § 1; 2 *H. C.*, § 365.]

Cited in 112 Wash. 58.

Instructions After Submission of Cause:
See *Remington's Digest*, *Crim. Law*, § 329; *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452; *State v. Yourex*, 30 Wash. 611, 71 Pac. 203; *State v. Miller*, 78 Wash. 268, 138 Pac. 896.

Where the judge, after the jury has retired, receives from them through the bailiff the form of verdict submitted for plaintiff in which the jury claim there is a mistake, and returns the same, stating that it is in form as intended, such communication between judge and jury is not prejudicial error: *Marine Sav. Bank v. Young*, 5 Wash. 394, 31 Pac. 864.

The action of the trial court in leaving

the bench and entering the jury-room, at the request of that body while in consultation, is such misconduct as to warrant a reversal: *State v. Wroth*, 15 Wash. 621, 47 Pac. 106.

Recalling a jury after it had been deliberating and insinuating what its verdict should be is reversible error: *State v. Thield*, 36 Wash. 365, 78 Pac. 919.

Error in recalling the jury for further instructions cannot be shown by affidavits: *State v. Rice*, 72 Wash. 104, 129 Pac. 911.

Necessity that further instructions requested by jury be given in open court. 14 *Ann. Cas.* 514; *Ann. Cas.* 1917A, 399.

§ 353. Discharge of Jury Without Verdict.

The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing. [*L.* '69, p. 58, § 237; *Cd.* '81, § 233; 2 *H. C.*, § 366.]

Cited in 28 Wash. 622; 29 Wash. 368; 54 Wash. 497.

A plea of once in jeopardy cannot be based upon the discharge of the jury

on a former trial, when there seemed no prospect of their being able to reach an agreement in view of this: *State v. Costello*, 29 Wash. 366, 69 Pac. 1099.

§ 354. If Jury Discharged, Cause Continued for Trial.

In all cases where a jury are discharged or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action shall thereafter be for trial anew. [Cf. *L.* '69, p. 58, § 238; *Cd.* '81, § 234; *L.* '91, p. 104, § 2; 2 *H. C.*, § 367.]

Cited in 28 Wash. 622.

§ 355. Recess of Court While Jury are Deliberating.

While the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. [Cf. L. '54, p. 166, § 197; L. '69, p. 58, § 239; Cd. '81, § 235; 2 H. C., § 368.]

§ 356. Proceedings When Jury have Agreed.

When the jury have agreed upon their verdict they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict. [L. '69, p. 58, § 240; Cd. '81, § 236; 2 H. C., § 369.]

§ 357. Manner of Giving Verdict.

If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the foreman answer in the affirmative, he shall, on being required, declare the same. [L. '69, p. 58, § 241; Cd. '81, § 237; 2 H. C., § 370.]

Rendition and Reception: See Remington's Digest, Trial, § 123; Frost v. Ainslie Lbr. Co., 3 Wash. 241, 28 Pac. 354, 915; State v. Straub, 16 Wash. 111, 47 Pac. 227; Matthews v. Spokane, 50 Wash. 107, 96 Pac. 827.

§ 358. Ten Jurors may Render Verdict in Civil Cases.

In all trials by juries of twelve in the superior court, except criminal trials, when ten of the jurors agree upon a verdict, the verdict so agreed upon shall be signed by the foreman, and the verdict shall stand as the verdict of the whole jury, and have all the force and effect of a verdict agreed to by twelve jurors. [L. '95, p. 59, § 1; Const., Art. I, § 21.]

Cited in 15 Wash. 441; 108 Wash. 434.

Upon receiving a verdict in the absence of counsel pursuant to stipulation, where, upon a poll of the jury, at first but nine agree, it is not error for the court, in the absence of counsel, to repeat the instruc-

tions as to the number necessary to agree, and to grant a request of a juror to allow him to change his vote, in case a mistake was made: Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 Pac. 839.

§ 359. Jury may be Polled.

When the verdict is returned into court either party may poll the jury, and if ten of the jurors answer that it is the verdict said verdict shall stand. In case ten of the jurors do not answer in the affirmative the jury shall be returned to the jury-room for further deliberation. [L. '95, p. 59, § 2.]

Cited in 35 Wash. 542; 75 Wash. 572.

Polling Jurors: See Remington's Digest, Trial, § 125; Norman v. Hopper, 38 Wash. 415, 80 Pac. 551; Cameron v. Stack-Gibbs Lumber Co., 68 Wash. 539, 123 Pac. 1001.

This section applies to the receipt of a sealed verdict, notwithstanding the jury had been allowed to separate, where they had reassembled to present the verdict: Coughlin v. Weeks, 75 Wash. 568, 135 Pac. 649.

Where, upon polling the jury, a juror answered "either that or a hung jury," and upon being admonished, answered "yes," the verdict should be received and cannot be impeached: State v. Millroy, 103 Wash. 193, 174 Pac. 10.

Validity of verdict rendered after jury have been polled and some jurors have dissented and jury have been sent back for further deliberations. 6 Ann. Cas. 457.

§ 360. Correction of Informal Verdict.

If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may again be sent out. [Cf. L. '69, p. 58, § 242; Cd. '81, § 238; 2 H. C., § 371; the first clause of this section is repealed by L. '95, p. 59, § 2.]

Cited in 3 Wash. 346; 17 Wash. 563.

Amendment or Correction—By Jury: See Remington's Digest, Trial, § 132; Marine Sav. Bank v. Young, 5 Wash. 394, 31 Pac. 864; Coughlin v. Weeks, 75 Wash. 568, 135 Pac. 649.

Error cannot be assigned on the action of the court in sending the jury back with the pleadings, to cure an oversight in not sending the same to the jury-room, after the verdict had been read but before it was received or filed, where the jury presently returned with the same verdict, which was received and filed: Matthews v. Spokane, 50 Wash. 107, 96 Pac. 827.

— **By Court:** See Remington's Digest, Trial, § 133; Yakima Nat. Bank v. Knipe, 6 Wash. 348, 33 Pac. 834; Hardy v. Hohl,

11 Wash. 1, 39 Pac. 277; Casety v. Jamison, 35 Wash. 478, 77 Pac. 800; Richardson v. Agnew, 46 Wash. 117, 89 Pac. 404; Buffington v. Henton, 70 Wash. 44, 126 Pac. 58; Mickelson v. Fischer, 81 Wash. 423, 142 Pac. 1160; Quarring v. Stratton, 85 Wash. 333, 148 Pac. 26. See, also, Pearson v. Arlington Dock Co., 111 Wash. 14, 189 Pac. 559.

Power of court to amend verdict by adding interest. 10 Ann. Cas. 753; 25 L. R. A. (N. S.) 311.

Effect of discharge of jury on right to correct verdict. 23 L. R. A. 732.

Amendment of sealed verdict by jury. 5 Ann. Cas. 394; 3 L. R. A. (N. S.) 1086.

Correction of special verdict. 24 L. R. A. (N. S.) 72.

§ 361. Receiving Verdict and Discharging Jury.

When the verdict is given, and is such as the court may receive, and if no juror disagree or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete, and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given. [L. '69, p. 59, § 243; Cd. '81, § 239; 2 H. C., § 372.]

Cited in 85 Wash. 334.

The court is deemed always open for the purpose of receiving the verdict of a jury in a cause submitted to them: Edwards v. Territory, 1 W. T. 195.

If the jury come into court and request the judge to correct a clerical error in a form of verdict submitted to them, and

thereafter agree upon and return such corrected verdict, no error can be predicated: Marine Sav. Bank v. Young, 5 Wash. 394, 31 Pac. 864.

Receiving verdict on Sunday. Ann. Cas. 1916B, 11, 30, 33; 7 L. R. A. 327; 39 L. R. A. (N. S.) 844.

CHAPTER III.**THE VERDICT.****§ 362. General and Special Verdict, Defined.**

The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court. [L. '54, p. 167, § 198; Cd. '81, § 240; 2 H. C., § 373.]

Cited in 84 Wash. 413.

Preparation and Formulation: See Remington's Digest, Trial, § 122; Marine Savings Bank v. Young, 5 Wash. 394, 31 Pac. 864.

Form and Language in General: See Remington's Digest, Trial, § 126; Phillipos v. Mihran, 38 Wash. 402, 80 Pac. 527; Stangair v. Roads, 46 Wash. 613, 91 Pac. 1; Tribble v. Yakima Valley Transp. Co., 100 Wash. 589, 171 Pac. 544.

In an action for legal services with verdict finding for the plaintiff in a specified sum, the addition of the words "administrator's fees left for court to decide," indicated, under an instruction, that there was no agreement therefor; and at most was merely surplusage: *Martin v. Nichols*, 110 Wash. 451, 188 Pac. 519.

Designation of Parties: See *Remington's Digest*, Trial, § 127; *Blue v. McCabe*, 5 Wash. 125, 31 Pac. 431; *Nelson v. Bromley*, 55 Wash. 256, 104 Pac. 251.

Amount of Recovery—In General: See *Remington's Digest*, Trial, § 128; *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *Yamamoto v. Puget Sound Lumber Co.*, 84 Wash. 411, 146 Pac. 861; *Haefele v. Brackett*, 95 Wash. 625, 164 Pac. 244. See, also, *Pearson v. Arlington Dock Co.*, 111 Wash. 14, 189 Pac. 559.

— **Interest:** See *Remington's Digest*, Trial, § 129; *Silsby v. Frost*, 3 W. T. 388,

17 Pac. 887; *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837; *Western Mill Co. v. Blanchard*, 11 Wash. 230, 23 Pac. 839; *Brown v. Gillett*, 39 Wash. 495, 81 Pac. 1002.

Construction and Operation: See *Remington's Digest*, Trial, § 134; *State ex rel. Holgate v. Superior Court*, 21 Wash. 33, 56 Pac. 932; *O'Brien v. American Casualty Co.*, 58 Wash. 477, 109 Pac. 52; *Norwegian Danish M. E. Church v. Home Tel. Co.*, 66 Wash. 511, 119 Pac. 834; *Cameron v. Stack-Gibbs Lumber Co.*, 68 Wash. 539, 123 Pac. 1001; *Jorgenson v. Crane*, 97 Wash. 676, 167 Pac. 49; *Cassutt v. Miller Co.*, 103 Wash. 222, 174 Pac. 433. See, also, *Walters v. Sievers*, 107 Wash. 221, 181 Pac. 853.

Affidavits of Jurors to Sustain or Impeach Verdict: See *Remington's Digest*, Trial, § 135; *Goodman v. Cody*, 1 W. T. 329; *Purdy v. Sherman*, 74 Wash. 309, 133 Pac. 440.

§ 363. Verdict in Actions for Specific Personal Property.

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury shall assess the value of the property if their verdict be in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding such property. [L. '54, p. 167, § 199; Cd. '81, § 241; 2 H. C., § 374.]

Cited in 3 Wash. 251; 5 Wash. 279; 22 Wash. 308; 35 Wash. 401; 38 Wash. 403.

Verdict and Findings—Value of Property: See *Remington's Digest*, Replev., § 42; *McGraw v. Franklin*, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810; *Meeker v.*

Johnson, 3 Wash. 247, 2 Pac. 542; *Quinn v. Parke & Lacy Mach. Co.*, 5 Wash. 276, 31 Pac. 866; *Hall v. Law Guarantee & T. Soc.*, 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935; *Armour v. Seixas*, 30 Wash. 181, 141 Pac. 308.

§ 364. Rendition of General or Special Verdict, When.

In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk and entered in the minutes. [L. '54, p. 167, § 200; Cd. '81, § 242; 2 H. C., § 375.]

Cited in 3 Wash. 495; 15 Wash. 82; 17 Wash. 592; 46 Wash. 615; 83 Wash. 178; 84 Wash. 413; 108 Wash. 434.

SPECIAL INTERROGATORIES AND FINDINGS—Power and Duty of Court to Require Special Findings: See *Remington's Digest*, Trial, § 136; *Columbia & P. S. R. R. Co. v. Hawthorne*, 3 W. T.

353, 19 Pac. 25; *Pencil v. Home Ins. Co.*, 3 Wash. 485, 28 Pac. 1031; *Bailey v. Tacoma Traction Co.*, 16 Wash. 48, 47 Pac. 241; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Hart Lum. Co. v. Rucker*, 20 Wash. 383, 55 Pac. 320; *Redford v. Spokane St. Ry. Co.*, 9 Wash. 55, 36 Pac. 1085; *McDougall v. Walling*, 15

Wash. 78, 45 Pac. 668, 55 Am. St. Rep. 871; Morrison v. Northern Pac. R. Co., 34 Wash. 70, 74 Pac. 1064; Sudden & Christenson v. Morse, 55 Wash. 372, 104 Pac. 645; Keane v. Seattle, 55 Wash. 622, 104 Pac. 819; Butler v. Supreme Court of Foresters, 60 Wash. 171, 110 Pac. 1007; Purcell v. Warburton, 70 Wash. 129, 126 Pac. 89; Loy v. Northern Pac. R. Co., 77 Wash. 25, 137 Pac. 446; Acres v. Frederick & Nelson, 79 Wash. 402, 140 Pac. 370, 5 N. C. C. A. 557; Lebovitz v. Coggs-well, 83 Wash. 174, 145 Pac. 212; Olympia Water Works v. Mottman, 88 Wash. 694, 153 Pac. 1074. See, also, McCreedy v. Fournier, 113 Wash. 351, 194 Pac. 398; Cramer v. Cramer, 106 Wash. 681, 180 Pac. 915.

Questions to be Submitted: See Remington's Digest, Trial, § 137; Wilkie v. Chandon, 1 Wash. 355, 25 Pac. 464.

Requests for Special Findings: See Remington's Digest, Trial, § 138; Dixon v. Bausman, 17 Wash. 304, 49 Pac. 540; Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564; Larson v. American Bridge Co.,

40 Wash. 224, 82 Pac. 294, 111 Am. St. Rep. 904.

Preparation and Form of Interrogatories or Findings: See Remington's Digest, Trial, § 139; Wilkie v. Chandon, 1 Wash. 355, 25 Pac. 464; Johnson v. Washington Water Power Co., 62 Wash. 619, 114 Pac. 453.

Sufficiency of Verdict or Findings in General: See Remington's Digest, Trial, § 139-1; Scarpelli v. Washington Water Power Co., 63 Wash. 18, 114 Pac. 870. See, also, Bullock v. Yakima Valley Transportation Co., 108 Wash. 413, 184 Pac. 641, 187 Pac. 410.

Failure to Answer Interrogatories or Make Findings: See Remington's Digest, Trial, § 140; Norman v. Hopper, 38 Wash. 415, 80 Pac. 551; Minor v. Stevens, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178, 2 N. C. C. A. 309.

Common-law power and duty of court to submit proper special interrogatories to jury. 15 Ann. Cas. 469.

§ 365. Special Verdict Controls.

When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. [L. '54, p. 167, § 201; Cd. '81, § 243; 2 H. C., § 376.]

Cited in 1 Wash. 522; 15 Wash. 366; 25 Wash. 77; 34 Wash. 41; 68 Wash. 543; 73 Wash. 691.

Findings Inconsistent With General Verdict—Special findings control a general verdict if inconsistent therewith: See Remington's Digest, Trial, § 141; Willey v. Morrow, 1 W. T. 474; Pepperall v. City Park Transit Co., 15 Wash. 176, 45 Pac. 743, 46 Pac. 407; Gerhard v. Worrell, 20 Wash. 492, 55 Pac. 625; Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564.

In an action for fraud, a special finding that one of the defendants had not made the promises alleged is not inconsistent with a general verdict establishing fraud on the part of the other defendant: Warwick v. Corbett, 106 Wash. 554, 180 Pac. 928.

In an action for false imprisonment, the answer to a special interrogatory referring to only a portion of the evidence as to probable cause is not inconsistent with a general verdict finding no probable cause: Eberhart v. Murphy, 110 Wash. 158, 188 Pac. 17.

Special Findings That are not Inconsistent With the General Verdict: See Remington's Digest, Trial, § 141; Mercier v. Travelers' Ins. Co., 24 Wash. 147, 64 Pac. 158; McCorkle v. Mallory, 30 Wash. 632, 71 Pac. 186; Abby v. Wood, 43 Wash. 379, 86 Pac. 558; Grant v. Spokane Traction Co., 47 Wash. 112, 91 Pac. 553;

Perry v. Centralia, 50 Wash. 670, 97 Pac. 802; Sudden & Christenson v. Morse, 55 Wash. 372, 104 Pac. 645; Evans v. Oregon & Washington R. Co., 58 Wash. 429, 108 Pac. 1095, 28 L. R. A. (N. S.) 455; Olmstead v. Olympia, 59 Wash. 147, 109 Pac. 602; Brown v. Thorne, 61 Wash. 18, 111 Pac. 1047; Feroglio v. Paulsen, 73 Wash. 417, 131 Pac. 1163, 46 L. R. A. (N. S.) 629; Campbell v. Jones, 73 Wash. 688, 132 Pac. 635; Allen v. Walla Walla Valley R. Co., 96 Wash. 397, 165 Pac. 99.

Special Findings That are Inconsistent and Control the General Verdict: See Remington's Digest, Trial, § 141; Stewart v. Walla Walla Print. & Pub. Co., 1 Wash. 521, 20 Pac. 605; Engstrom v. Merriam, 25 Wash. 73, 64 Pac. 914; Hobert v. Seattle, 32 Wash. 330, 73 Pac. 383; Gaudie v. Northern Lumber Co., 34 Wash. 34, 74 Pac. 1009; Byrne v. Funk, 38 Wash. 506, 80 Pac. 772, 3 Ann. Cas. 647; Crowley v. Northern Pac. R. Co., 46 Wash. 85, 89 Pac. 471; Boucher v. Oregon R. & Nav. Co., 50 Wash. 627, 97 Pac. 661; O'Brien v. American Casualty Co., 58 Wash. 477, 109 Pac. 52; Bullis v. Ball, 98 Wash. 342, 167 Pac. 942.

Amendment or Correction: See Remington's Digest, Trial, § 141-1; Loy v. Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372.

Construction and Operation: See Remington's Digest, Trial, § 142; Mitchell v.

Matheson, 23 Wash. 723, 63 Pac. 564; Mercier v. Travelers' Ins. Co., 24 Wash. 147, 64 Pac. 158; Curtis v. Oregon R. & Nav. Co., 36 Wash. 55, 78 Pac. 133; Skoog v. Columbia Canal Co., 63 Wash. 115, 114 Pac. 1034; Richardson v. Spokane, 67 Wash. 621, 122 Pac. 330; Schade Brewing Co. v. Chicago, Milwaukee & Puget Sound R. Co., 79 Wash. 651, 140 Pac. 897; State ex rel. Upper v. Hanna, 87 Wash. 29, 151 Pac. 83, 1087; Burleigh v. Consumers Publishing Co., 95 Wash. 49, 163 Pac. 5.

In an action for personal injuries re-

ceived when an employee, pursuant to a command, removed a halter from a vicious cow, a general verdict for plaintiff, together with a special finding that he was injured as he claims, amounts to a finding that he removed the halter pursuant to orders: Walters v. Sievers, 107 Wash. 221, 181 Pac. 853.

Objections and Exceptions: See Remington's Digest, Trial, § 143; Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740.

When special verdict will control general verdict. 6 L. R. A. 574.

§ 366. Jury to Assess Amount of Recovery.

When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a setoff for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the pleadings. [Cf. L. '54, p. 167, § 202; Cd. '81, § 244; L. '91, p. 104, § 3; 2 H. C., § 377.]

Cited in 25 Wash. 480.

Manner of Arriving at Verdict: See Remington's Digest, Trial, § 121; Goodman v. Cody, 1 W. T. 329; Watson v. Reed, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899; Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596; Bell v. Butler,

34 Wash. 131, 75 Pac. 130; Conover v. Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; United Iron Works v. Wagner, 98 Wash. 453, 167 Pac. 1107. See, also, Carlisle v. Hargreaves, 112 Wash. 383, 192 Pac. 894.

CHAPTER IV.

TRIAL BY THE COURT.

§ 367. Findings and Conclusions, How Made.

Upon the trial of an issue of fact by the court, its decisions shall be given in writing and filed with the clerk. In giving the decision, the facts found and the conclusions of law shall be separately stated. Judgment upon the decision shall be entered accordingly. [L. '54, p. 168, § 205; Cd. '81, § 246; 2 H. C., § 379.]

Cited in 1 Wash. 371, 375, 376, 406; 5 Wash. 185; 8 Wash. 590; 9 Wash. 465; 11 Wash. 459; 12 Wash. 562; 21 Wash. 142; 25 Wash. 620; 26 Wash. 455; 27 Wash. 215; 35 Wash. 66; 40 Wash. 3, 4; 47 Wash. 47; 49 Wash. 364; 54 Wash. 593; 79 Wash. 493, 494; 83 Wash. 380; 86 Wash. 478; 96 Wash. 283; 97 Wash. 445; 100 Wash. 554; 104 Wash. 263; 111 Wash. 303.

The purpose of this section is to encourage appeals without bringing up the evidence, through full findings on all issues: Colvin v. Clark, 83 Wash. 376, 145 Pac. 419; Western Dry Goods Co. v. Hamilton, 86 Wash. 478, 150 Pac. 1171.

TRIAL BY COURT—HEARING AND DETERMINATION OF CAUSE—Reception of Evidence—In General: See Remington's Digest, Trial, § 147; Scully v.

Book, 3 Wash. 182, 28 Pac. 556; Degginger v. Martin, 48 Wash. 1, 92 Pac. 674; Schultz v. Schultz, 71 Wash. 327, 128 Pac. 660.

— Effect of Error in Admission of Evidence: See Remington's Digest, Trial, § 148; Smith v. Taylor, 2 Wash. 422, 27 Pac. 812; Kimball v. Ford, 7 Wash. 603, 35 Pac. 395; Benson v. Hart, 10 Wash. 301, 38 Pac. 1041; Roher v. Snyder, 29 Wash. 199, 69 Pac. 748; Main v. Johnson, 7 Wash. 321, 35 Pac. 67.

Rulings on Weight and Sufficiency of Evidence—Dismissal or Nonsuit: See Remington's Digest, Trial, § 149; Lambuth v. Stetson & Post Mill Co., 14 Wash. 187, 44 Pac. 148; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; King County v. Whittlesey, 52 Wash. 206, 100 Pac. 320.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Findings Necessary in Actions at Law, but not in Equity: See Remington's Digest, Trial, § 150, and cases cited. See, also, *Hanson v. Roesch*, 104 Wash. 257, 176 Pac. 349.

This section has no application to the trial on a petition to vacate a judgment of default because of excusable neglect, mistake or inadvertence: *Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690.

What delay and lapse of time is not a sufficient defense to mandamus proceedings to compel a judge to make findings: *State ex rel. Eilers Music House v. French*, 100 Wash. 552, 171 Pac. 527.

Necessity of Findings of Fact for Purposes of Review: See Remington's Digest, App. & E., § 162, and cases cited.

Requests for Findings: See Remington's Digest, Trial, § 151; *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534; *Western Dry Goods Co. v. Hamilton*, 86 Wash. 478, 150 Pac. 1171; *Allen v. Allen*, 96 Wash. 689, 165 Pac. 889.

See, also, *Shelton v. Powers*, 111 Wash. 302, 190 Pac. 900.

Preparation and Form in General: See Remington's Digest, Trial, § 152; *Bartlett v. Reichennecker*, 5 Wash. 369, 32 Pac. 96; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *Lindsay v. Scott*, 56 Wash. 206, 105 Pac. 462; *Gray v. Fuller*, 85 Wash. 13, 147 Pac. 402.

Separate Statement of Facts and Law: See Remington's Digest, Trial, § 153; *Shepard v. Gove*, 26 Wash. 452, 67 Pac. 256; *Barnham's Estate, In re*, 41 Wash. 570, 84 Pac. 602; *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361.

Sufficiency in General: See Remington's Digest, Trial, § 154; *Bard v. Kleeb*, 1 Wash. 370, 25 Pac. 467, 27 Pac. 273; *King County v. Hill*, 1 Wash. 404, 25 Pac. 451; *Gaffney v. Megrath*, 11 Wash. 456, 39 Pac. 973; *Barbre v. Hibschan*, 77 Wash. 563, 137 Pac. 997.

Conformity to Pleadings: See Remington's Digest, Trial, § 154½; *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66

Pac. 151; *Ballard v. Collins*, 63 Wash. 493, 115 Pac. 1050.

Failure to Find on Particular Questions: See Remington's Digest, Trial, § 155; *Gaffney v. Megrath*, 11 Wash. 456, 39 Pac. 973.

Amendment or Correction: See Remington's Digest, Trial, § 156; *Eakin v. McCraith*, 2 W. T. 112, 3 Pac. 838; *Calhoun v. Gilliland*, 2 W. T. 174, 2 Pac. 355; *Powelson v. Seattle*, 87 Wash. 617, 152 Pac. 329.

Construction and Operation: See Remington's Digest, Trial, § 157; *Willey v. Morrow*, 1 W. T. 474; *Reynolds v. Dexter Horton*, 2 Wash. 185, 26 Pac. 221; *Thornton v. Dow*, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968; *Field v. Copping, Agnew & Scales*, 65 Wash. 359, 118 Pac. 329, 36 L. R. A. (N. S.) 488; *Laughlin v. Seattle Taxicab & Transfer Co.*, 84 Wash. 342, 146 Pac. 847; *Kitsap County Bank v. United States Fidelity & Guaranty Co.*, 90 Wash. 12, 155 Pac. 411; *Dobrentai v. Piehl*, 92 Wash. 433, 159 Pac. 371.

See, also, *State v. Twenty Barrels of Whiskey*, 104 Wash. 382, 176 Pac. 673.

Objections and Exceptions: See Remington's Digest, Trial, § 158; *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766.

Time of Entering Decision: See Remington's Digest, Trial, § 149-1; *Russell v. Schade Brewing Co.*, 49 Wash. 362, 95 Pac. 327.

The superior court does not lose jurisdiction by failing to decide a cause within ninety days from the time it is submitted, as required by the constitution: *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362; *Moylan v. Moylan*, 49 Wash. 341, 95 Pac. 271; *Olympic Oil Co. v. Kane*, 56 Wash. 199, 105 Pac. 477.

Waiver of right to have findings of fact made by court. *Ann. Cas.* 1914D, 797.

Duty of court to make findings of fact in contempt proceeding. *Ann. Cas.* 1913A, 957; 30 L. R. A. (N. S.) 564.

§ 368. Order of Proceedings—Findings Deemed Verdict.

The order of proceedings on a trial by the court shall be the same as provided in trials by jury. The finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reason, as far as applicable, and a new trial granted. [L. '69, p. 60, § 251; Cd. '81, § 247; 2 H. C., § 380.]

Cited in 2 Wash. 190; 20 Wash. 495; 35 Wash. 66; 49 Wash. 364; 67 Wash. 477; 83 Wash. 380; 104 Wash. 383.

The findings of the court upon the facts are deemed a verdict: *Willey v. Morrow*,

1 W. T. 474; *Enos v. Wilcox*, 3 Wash. 44, 28 Pac. 364; and must be supported by the testimony: *Sheehan v. Levy*, 1 Wash. 149, 23 Pac. 802.

CHAPTER V.

TRIAL BY REFEREES.

§ 369. Reference by Consent.

All or any of the issues in the action, whether of fact or law, or both, may be referred upon the written consent of the parties; but either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury. [Cf. L. '54, p. 168, § 206; Cd. '81, § 248; 2 H. C., § 381.]

Cited in 1 Wash. 405; 16 Wash. 385.

NATURE AND GROUNDS OF REFERENCE: See Remington's Digest, Refer., §§ 1—3; Lammon v. Giles, 3 W. T. 117, 13 Pac. 417; Lindley v. McGlaulin, 57 Wash. 581, 107 Pac. 355; Producers' Union v. Williams, 58 Wash. 64, 107 Pac. 1040, 137 Am. St. Rep. 1041.

Order of Reference, Operation and Effect: See Remington's Digest, Refer., §§ 4—6; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709; Park v. Mitchell, 7 Wash. 304, 35 Pac. 63; Howard

v. Hanson, 49 Wash. 314, 95 Pac. 265; Hunley v. Ingle, 88 Wash. 446, 153 Pac. 313.

For text treatment of "Reference," see 23 B. C. L. 283.

Right to order compulsory reference in equitable action independent of statute. *Ann. Cas.* 1912D, 1136.

Compulsory reference as denial of constitutional right to jury trial: 25 L. B. A. 68; 13 L. B. A. (N. S.) 146; 39 L. B. A. (N. S.) 46.

§ 370. Reference Without Consent, When.

When the parties do not consent, the court or judge may, upon the application of either [or of its own motion], direct a reference in all cases formerly cognizable in chancery in which reference might be made:—

1. When the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or

2. When the taking of an account shall be necessary for the information of the court, before judgment upon an issue of law, or for carrying a judgment or order into effect; or

3. When a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action; or

4. When it is necessary for the information of the court in a special proceeding. [L. '54, p. 168, § 207; Cd. '81, § 249; 2 H. C., § 382.]

Cited in 57 Wash. 585; 88 Wash. 448.

§ 371. To Whom Reference may be Ordered.

A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge may appoint one or more, not exceeding three. [L. '54, p. 168, § 208; L. '69, p. 61, § 254; Cd. '81, § 250; 2 H. C., § 383.]

§ 372. Qualifications of Referees.

When the appointment of referees is made by the court or judge, each referee shall be,—

1. Qualified as a juror as provided by statute;

2. Competent as juror between the parties;

3. A duly admitted and practicing attorney. [L. '54, p. 169, § 209; Cd. '81, § 251; 2 H. C., § 384.]

§ 373. Challenges to Referees.

When the referees are chosen by the court, each party shall have the same right of challenge as to such referees, which shall be made and determined in the same manner and with like effect as in the formation of juries, except that neither party shall be entitled to a peremptory challenge. [L. '69, § 256; Cd. '81, § 252; 2 H. C., § 385.]

§ 374. Trial by Referees.

Subject to the limitations and directions prescribed in the order of reference, the trial by referees shall be conducted in the same manner as a trial by the court. They shall have the same power to grant adjournments, administer oaths, preserve order, punish all violations thereof upon such trial, compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or testify, as is possessed by the court. [Cf. L. '54, p. 169, § 210; L. '69, p. 62, § 257; Cd. '81, § 253; 2 H. C., § 386.]

Proceedings on Trial: See Remington's Digest, Refer., §§ 8—11.

Adjournments: Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

Pleadings and Amendments: Walsh Lumber Co. v. Chaney, 67 Wash. 573, 122 Pac. 10.

Reception of Evidence—Reopening Case for Further Evidence: Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Merchants' Nat. Bank of Tacoma v. Peet, 9 Wash. 237, 37 Pac. 290.

Compensation of Referee: Park v. Mighell, 3 Wash. 737, 29 Pac. 556.

Right of referee to call witnesses on own initiative. 18 Ann. Cas. 165.

Necessity for taking exception or objection to error in hearing before referee. 20 Ann. Cas. 193.

Necessity that referee determine all matters submitted for decision. Ann. Cas. 1916A, 359.

Necessity that all referees join in award. 15 Ann. Cas. 507; Ann. Cas. 1916B, 808.

§ 375. Referee's Report—Contents—Filing Evidence—Cost of Frivolous Evidence.

The report of the referees shall state the facts found, and when the order of reference includes an issue of law, it shall state the conclusions of law separately from the facts. The referees shall file with their report the evidence received upon the trial. If evidence offered by either party shall not be admitted on the trial, and the party offering the same except to the decision rejecting such evidence at the time, the exceptions shall be noted by the referees, and they shall take and receive such testimony and file it with the report. Whatever judgment the court may give upon the report, it shall, when it appears that such evidence was frivolous and inadmissible, require the party at whose instance it was taken and reported to pay all costs and disbursements thereby incurred. [Cf. L. '54, p. 169, § 210; L. '69, p. 62, § 258; Cd. '81, § 254; 2 H. C., § 387.]

Cited in 3 Wash. 471; 7 Wash. 123; 101 Wash. 312.

Requisites and Sufficiency of Report: See Remington's Digest, Refer., §§ 12, 13; Park v. Mighell, 3 Wash. 737, 29 Pac. 556; Bash v. Culver Gold Min. Co., 7 Wash. 122, 34 Pac. 462; Pratsch v. Aberdeen Packing Co., 7 Wash. 346, 35 Pac. 123.

Report of Evidence With Decision or Findings: See Remington's Digest, Refer., § 14; Likens v. Cain, 4 Wash. 307, 30 Pac. 80; Healy v. Seward, 5 Wash. 319, 31 Pac. 874; Walsh Lumber Co. v. Chaney, 67 Wash. 583, 122 Pac. 10; Hopkins v. Craib, 101 Wash. 309, 172 Pac. 201.

§ 376. Filing Report and Proceedings Thereon.

The report shall be filed with the clerk. Either party may, within such time as may be prescribed by the rules of the court, or by special order, move to set the same aside, or for judgment thereon, or such order or proceeding as the nature of the case may require. [Cf. L. '69, p. 62, § 259; Cd. '81, § 255; 2 H. C., § 388.]

Objections and Exceptions and Hearings Thereon: See Remington's Digest, Refer., § 16; Pederson v. Parke, 68 Wash. 482, 123 Pac. 777.

Findings of a referee which are not excepted to import verity: Commercial Bank of Snohomish County, In re, 57 Wash. 381, 106 Pac. 1124.

Effect of failure of referee to file report within time required by statute or order of reference. *Ann. Cas.* 1913D, 604; 34 L. R. A. (N. S.) 581.

Impeachment of award of referee for mistake of fact not involving exercise of judgment. *Ann. Cas.* 1918C, 974, 1001.

§ 377. Judgment on Referee's Report.

The court may affirm or set aside the report, either in whole or in part. If it affirms the report, it shall give judgment accordingly. If the report be set aside, either in whole or in part, the court may make another order of reference, as to all or so much of the report as is set aside, to the original referees or others, or it may find the facts and determine the law itself and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of the jury. [L. '69, p. 62, § 260; Cd. '81, § 256; 2 H. C., § 389.]

Cited in 1 Wash. 405, 407; 2 Wash. 341; 5 Wash. 731.

CHAPTER VI.

AGREED CASES.

§ 378. Submission of Controversies Without Action.

Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon as if an action were pending. [L. '69, p. 73, § 300; Cd. '81, § 298; 2 H. C., § 421.]

Cited in 33 Wash. 540; 77 Wash. 496, 499.

Scope of Inquiry and Powers of Court: See Remington's Digest, Submis., § 1; Leonardo v. Bunnell, 77 Wash. 495, 137 Pac. 1033, *Ann. Cas.* 1915D, 253.

Trial or Hearing: See Remington's Digest, Submis., § 2; Leonardo v. Bunnell, 77 Wash. 495, 137 Pac. 1033, *Ann. Cas.* 1915D, 253.

Submission on agreed case as waiver

of defect in pleading. 8 A. L. R. 1172.

Power of guardian ad litem to join in agreed statement of facts. *Ann. Cas.* 1915A, 1292.

Court's power of inference on submission of agreed case. 11 *Ann. Cas.* 148.

Power of court to receive additional evidence on a submitted controversy. *Ann. Cas.* 1915D, 256.

§ 379. Judgment as in Other Cases.

Judgment shall be entered in the judgment-book as in other cases, but without costs for any proceedings prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment-roll. [L. '69, p. 74, § 301; Cd. '81, § 299; 2 H. C., § 422.]

§ 380. Judgments Enforced as in Other Cases.

The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal. [L. '69, p. 74, § 302; Cd. '81, § 300; 2 H. C., § 423.]

CHAPTER VII.

EXCEPTIONS.

§ 381. Definition.

An exception is a claim of error in a ruling or decision of a court, judge or other tribunal, or officer exercising judicial functions, made in the course of an action or proceeding or after judgment therein. [L. '93, p. 111, § 1.]

For former laws on the subject of this chapter, see L. '54, p. 169, §§ 211—214; L. '77, §§ 261—267; Cd. '81, §§ 257—263; L. '85, pp. 70—73, §§ 1—8; L. '90, p. 333; L. '91, p. 348, §§ 25—27; 2 H. C., §§ 390—398.

Cited in 3 Wash. 122; 7 Wash. 362, 363; 28 Wash. 615; 74 Wash. 476; 83 Wash. 9 Wash. 299, 465, 573; 10 Wash. 154, 165; 523.
11 Wash. 336, 410; 12 Wash. 26, 68, 336;

§ 382. When to be Taken.

It shall not be necessary or proper to take or enter an exception to any ruling or decision mentioned in the last section which is embodied in a written judgment, order or journal entry in the cause. But this section shall not apply to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury. [L. '93, p. 112, § 2.]

Cited in 13 Wash. 202; 29 Wash. 43; 32 Wash. 452; 34 Wash. 584; 39 Wash. 49; 50 Wash. 697; 59 Wash. 182; 64 Wash. 352; 74 Wash. 476; 82 Wash. 559; 88 Wash. 165; 90 Wash. 259; 98 Wash. 64; 102 Wash. 579; 103 Wash. 506.

Necessity in General: See Remington's Digest, App. & E., § 136; Brown v. Forest, 1 W. T. 201; Blumberg v. McNear, 1 W. T. 141, and cases infra; Rice v. Stevens, 9 Wash. 298, 37 Pac. 440; Thompson v. Territory, 1 W. T. 547; Lytle v. Territory, 1 W. T. 435; State ex rel. Mackintosh v. Superior Court, 45 Wash. 248, 88 Pac. 207; Gottstein v. Simmons, 59 Wash. 178, 109 Pac. 596; Scandinavian-American State Bank v. Downs, 76 Wash. 62, 135 Pac. 807.

An order denying a motion for a new trial is a "written order" within this

section: Paich v. Northern Pac. R. Co., 88 Wash. 163, 152 Pac. 719.

See, also, State v. Storrs, 112 Wash. 675, 192 Pac. 984, 197 Pac. 17.

Necessity of Exceptions to Judgment: See Remington's Digest, App. & E., § 151, and cases cited.

Under this section a motion for a new trial is not a prerequisite to an appeal from the dismissal of an action at law tried to the court in which no findings were made: Deaver v. Trahey, 98 Wash. 63, 167 Pac. 68.

Review of Rulings as to Pleadings: See Remington's Digest, App. & E., § 137; Pettygrove v. Rothschild, 2 Wash. 6, 25 Pac. 907; Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490; Burnett v. Ewing, 39 Wash. 45, 80 Pac. 855; Creech v. Aberdeen, 44 Wash. 72, 87 Pac. 44, 12 Ann.

Cas. 370; Meeker v. Waddle, 83 Wash. 628, 145 Pac. 967.

Review of Proceedings at Trial: See Remington's Digest, App. & E., § 138; State v. Owens, 15 Wash. 468, 46 Pac. 1039; Earles v. Bigelow, 7 Wash. 581, 35 Pac. 390; State v. Clem, 49 Wash. 273, 94 Pac. 1079; Peyser v. Western Dry Goods Co., 53 Wash. 633, 102 Pac. 750; Peery v. London Assurance Corp., 103 Wash. 62, 173 Pac. 721.

— **Mode and Conduct of Trial in general:** See Remington's Digest, App. & E., § 139; Gilmore v. Baker Co., 12 Wash. 468, 41 Pac. 124; Smith v. Hewitt-Lea Lumber Co., 55 Wash. 357, 104 Pac. 651.

— **Rulings as to Evidence and Arguments:** See Remington's Digest, App. & E., §§ 140, 141; Tolmie v. Dean, 1 W. T. 46; Oregon Ry. etc. Co. v. Owsley, 3 W. T. 250, 13 Pac. 710; Scully v. Book, 3 Wash. 182, 28 Pac. 556; Smith v. Taylor, 2 Wash. 422, 27 Pac. 812; State v. McCann, 16 Wash. 249, 47 Pac. 43, 49 Pac. 216; Mantle v. Dabney, 47 Wash. 394, 92 Pac. 134; State v. Wilson, 68 Wash. 464, 123 Pac. 795; Keil v. Grays Harbor & Puget Sound R. Co., 71 Wash. 163, 127 Pac. 1113; Columbia etc. R. Co. v. Hawthorne, 3 W. T. 353, 19 Pac. 25; Papoutsikis v. Spokane, Portland & Seattle R. Co., 89 Wash. 1, 153 Pac. 1053.

See, also, Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599; Utterback v. Johnson, 110 Wash. 57, 187 Pac. 369.

Necessity for Exceptions to Decision or Findings in general: See Remington's Digest, App. & E., § 145, and cases cited.

See, also, Ready v. McGillivray, 109 Wash. 387, 186 Pac. 902; Sergeant v. Russell, 110 Wash. 216, 189 Pac. 406; Shelton v. Powers, 111 Wash. 302, 190 Pac. 900; Pearson v. Gottstein Inv. Co., 112 Wash. 60, 191 Pac. 796.

— **Necessity to Review Errors of Law:** See Remington's Digest, App. & E., § 146, and cases cited.

Necessity for Exceptions to Conclusions of Law: See Remington's Digest, App. &

E., § 148; Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501; Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113; Adams v. Washington etc. Co., 38 Wash. 243, 80 Pac. 446; Vansant v. Hartman, 88 Wash. 636, 153 Pac. 1062; Gerhard v. Worrell, 20 Wash. 492, 55 Pac. 625; First Nat. Bank v. Coles, 40 Wash. 528, 82 Pac. 892; Katterhagen v. Meister, 75 Wash. 112, 134 Pac. 673.

See, also, Nishimoto v. Vernon, 107 Wash. 555, 182 Pac. 617.

Striking Statement for failure to except: See Remington's Digest, App. & E., § 147, and cases cited.

Waiver of Exceptions: See Remington's Digest, App. & E., § 152, and cases cited.

Necessity for objection in addition to exception in order to save giving of instruction for review. *Ann. Cas.* 1912B, 1231.

Sufficiency of exceptions and objections to improper argument of counsel. 7 *Ann. Cas.* 231; *Ann. Cas.* 1916A, 551; *Ann. Cas.* 1918A, 1128.

Failure to object to admission of evidence at former trial as precluding objection at subsequent trial. 19 *Ann. Cas.* 1279; *Ann. Cas.* 1913B, 1057.

Exception to action of court in calling and examining witnesses. 57 *L. R. A.* 884; *L. R. A.* 1916A, 1207.

Waiver of exception to denial of application to take case from jury by subsequent introduction of evidence. 14 *Ann. Cas.* 222; *Ann. Cas.* 1914A, 146.

Necessity of taking exception to directed verdict. *Ann. Cas.* 1917A, 849.

Right to question sufficiency of complaint for first time on appeal. 3 *Ann. Cas.* 545.

Filing of other pleading as waiver of objection to overruling of demurrer. *Ann. Cas.* 1913B, 388.

§ 383. Manner of Taking in Cases Tried by Court.

Exceptions to the report of a referee or commissioner, or to findings of fact or conclusions of law in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury, may be taken by any party, either by stating to the judge, referee or commissioner when the report or decision is signed, that such party excepts to the same, specifying the part or parts excepted to (whereupon the judge, referee or commissioner, shall note the exceptions in the margin or at the foot of the report or decision); or by filing like written exceptions within five days after the filing of the report or decision, or, where the report or decision is signed subsequently to the hearing and in the absence of

the party excepting, within five days after the service on such party of a copy of such report or decision or of written notice of the filing thereof. [L. '93, p. 112, § 3.]

Cited in 9 Wash. 466; 12 Wash. 26, 68, 113; 15 Wash. 137; 16 Wash. 337; 17 Wash. 291; 23 Wash. 260; 26 Wash. 8; 27 Wash. 698; 29 Wash. 20; 31 Wash. 174; 33 Wash. 60; 34 Wash. 584; 40 Wash. 123; 56 Wash. 207; 68 Wash. 484; 75 Wash. 113; 83 Wash. 629; 90 Wash. 17; 95 Wash. 99; 113 Wash. 318.

Form and Sufficiency of exceptions: See Remington's Digest, App. & E., § 149, and cases cited.

See, also, Geissler's Estate, in re, 104 Wash. 452, 177 Pac. 330.

Sufficiency of General Exceptions: See Remington's Digest, App. & E., § 150, and cases cited.

See, also, Pearson v. Gottstein Inv. Co., 112 Wash. 60, 191 Pac. 796.

Under this section general exceptions to the report of a referee are sufficiently definite and specific where it is specified that the party excepts to each and every finding as contrary to the evidence and the law and that the conclusions are not supported by the findings of fact: Peder-son v. Parke, 68 Wash. 482, 123 Pac. 777.

Timely Exception and manner of tak-ing: See Remington's Digest, App. & E., § 151½, and cases cited.

See, also, Chilberg v. Parsons, 109 Wash. 90, 186 Pac. 272; Peterson v. Peterson, 113 Wash. 317, 194 Pac. 380.

§ 384. Manner of Taking in Jury Cases.

Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court, after the jury shall have retired to consider of their verdict, and, if practicable, before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or otherwise the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the judge shall note the exceptions in the minutes of the trial, or cause the stenographer (if one is in attendance) so to note the same. [L. '93, p. 112, § 4.]

Time for taking exceptions to instructions in jury trials, see supra, § 339.

Cited in 9 Wash. 7; 15 Wash. 244, 260; 29 Wash. 473; 37 Wash. 580; 53 Wash. 189; 56 Wash. 468; 59 Wash. 687; 71 Wash. 459; 72 Wash. 319.

Taking and Noting exceptions: See Remington's Digest, Trial, §§ 107, 108; Miller v. Vermurie, 7 Wash. 386, 34 Pac. 1108, 35 Pac. 600; State v. Coella, 8 Wash. 512, 36 Pac. 474; McDonough v. Great Northern Ry. Co., 15 Wash. 244, 46 Pac. 334.

An exception need not be allowed by the court, but simply taken by counsel: State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

Sufficiency and Scope of exceptions to instructions given—General or specific: See Remington's Digest, Trial, § 109; Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837; Cunningham v. Seattle Electric Ry. & P. Co., 3 Wash. 471, 28 Pac. 745; Maling v. Crummey, 5 Wash. 222, 31 Pac. 600; Patchen v. Parke & L. M. Co., 6 Wash. 486, 33 Pac. 976; Bell v. Washington C. S. Co., 8 Wash. 27, 35 Pac. 405.

— **Statement of Grounds of objection:** See Remington's Digest, Trial,

§§ 110—113; Rosner, In re, 5 Wash. 488, 32 Pac. 106; Sexton v. School District, 9 Wash. 5, 36 Pac. 1052; Shoemaker v. Bryant Lum. etc. Co., 27 Wash. 637, 68 Pac. 380; Anderson v. Harper, 30 Wash. 378, 70 Pac. 965; Rush v. Spokane Falls & Northern R. Co., 23 Wash. 501, 63 Pac. 500; Dyer v. Middle Kittitas Irr. Dist., 40 Wash. 238, 82 Pac. 301.

— **Instructions, and Failure or Refusal to give instructions:** See Remington's Digest, App. & E., § 142, and cases cited.

See, also, Pierce County ex rel. Bellingham v. Duffy, 104 Wash. 426, 176 Pac. 670; Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599; Kubey v. Travelers' Protective Assoc., 109 Wash. 453, 187 Pac. 335.

— **Sufficiency of General Exceptions to Instructions:** See Remington's Digest, App. & E., § 143, and cases cited.

See, also, Johnson v. Seattle, 113 Wash. 487, 194 Pac. 417.

— **Specific Exceptions to Instructions:** See Remington's Digest, App. & E., § 144, and cases cited.

§ 385. How Entered in Minutes.

Exceptions to any ruling upon an objection to the admission of evidence, offered in the course of a trial or hearing, need not be formally taken, but the question put or other offer of evidence, together with the objection thereto and the ruling thereon, shall be entered by the court, judge, referee or commissioner (or by the stenographer, if one is in attendance) in the minutes of the trial or hearing, and such entry shall import an exception by the party against whom the ruling was made. [L. '93, p. 112, § 5.]

Cited in 16 Wash. 354; 52 Wash. 183; 107 Wash. 517.

§ 386. Manner of Taking and Entry.

Exceptions to any ruling or decision made in the course of a trial or hearing, or in the progress of a cause, except those to which it is provided in this chapter that no exception need be taken and those to which some other mode of exception is in this chapter prescribed, may be taken by any party by stating to the court, judge, referee or commissioner making the ruling or decision, when the same is made, that such party excepts to the same; whereupon such court, judge, referee or commissioner shall note the exception in the minutes of the trial, hearing or cause, or shall cause the stenographer (if one is in attendance) so to note the same. [L. '93, p. 113, § 6.]

Cited in 42 Wash. 328.

§ 387. Review on Appeal.

Alleged error in any order, ruling or decision to which it is provided in this chapter that no exception need be taken, or in any report, finding of fact, conclusion of law, charge, refusal to charge, or other ruling or decision which shall have been excepted to by any party as prescribed in this chapter, shall be reviewed by the supreme court, upon an appeal taken by the party against whom any such ruling or decision was made, or in which he has joined, from any other appealable order or from the final judgment in the cause, where such error, if found to exist, would materially affect the correctness of the judgment or order appealed from: Provided, the ruling or decision, the alleged error in which is sought to be so reviewed, together with the exception thereto, if any, was a matter of record in the cause in the first instance, or before the hearing of the appeal has been brought into the record in the manner prescribed in this chapter. And any such alleged error shall also be considered in the court wherein or by a judge whereof the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion. But no exception to any appealable order or to any final judgment shall be necessary or

proper in order to secure a review of such order or judgment upon direct appeal therefrom. [L. '93, p. 113, § 7.]

Cited in 8 Wash. 185; 12 Wash. 26, 68; 31 Wash. 560; 81 Wash. 140.

§ 388. Bill of Exceptions, What Constitutes.

Any party to any action or proceeding may, at any stage thereof, have any rulings or decisions of the court, or a judge, referee or commissioner thereof, in the cause, together with the necessary evidence, papers or proceedings connected therewith or on which the same were based, and the exceptions thereto, if any, not already a part of the record in the cause, or so much of all or any thereof as is not already a part of the record, made a part of the record in the cause, by the certifying of a bill of exceptions as in this chapter provided. And any such party may, after the making of an appealable order of the final judgment in the cause, have all rulings, decisions, evidence, papers, proceedings and exceptions in the cause, or so much thereof as may be material to an appeal from such appealable order or from the final judgment, as the case may be, not already a part of the record, made a part of the record in the cause by the certifying of a statement of facts, as in this chapter provided. The certifying of a bill of exceptions or statement of facts shall not prevent the subsequent certifying of other bills of exceptions or statements of facts, or both, comprising other matters in the cause, at the instance of the same or another party; but only one bill of exceptions or statement of facts can be settled or certified after the rendition of the final judgment in the cause. [L. '93, p. 114, § 8.]

Cited in 15 Wash. 94; 21 Wash. 368; 47 Wash. 596; 58 Wash. 500; 78 Wash. 529; 80 Wash. 1, 2, 700; 81 Wash. 133; 82 Wash. 147; 97 Wash. 449, 653.

NECESSITY AND CONTENTS OF BILL OF EXCEPTIONS OR STATEMENT OF FACTS: See Remington's Digest, App. & E., §§ 262—284, and cases cited. See, also:

Disallowance of amendment: Saar v. Weeks, 105 Wash. 628, 178 Pac. 819; Erickson's Estate, In re, 106 Wash. 529, 180 Pac. 263.

Presumptions—Judgments in absence of statement: Burke v. Wilson, 107 Wash. 454, 181 Pac. 904.

Form, Arrangement and Purpose of Bill or Statement: See Remington's Digest, App. & E., § 262, and cases cited.

Incorporating Evidence—In General: See Remington's Digest, App. & E., § 263, and cases cited.

See, also, Mauseth v. Slayden, 104 Wash. 512, 177 Pac. 319; Shaw v. Oregon-Washington R. R. & Nav. Co., 105 Wash. 232, 177 Pac. 687; Tyrell v. Leege, 105 Wash. 438, 178 Pac. 467; State v. Callaghan, 107 Wash. 486, 182 Pac. 594.

Stenographers Report: See Remington's Digest, App. & E., § 271; Case v. Ham, 9 Wash. 54, 36 Pac. 1050; Mattocks v.

Great Northern R. Co., 94 Wash. 44, 162 Pac. 19.

All the Evidence in Equity: See Remington's Digest, App. & E., § 264, and cases cited.

When Evidence not Necessary in Equity: See Remington's Digest, App. & E., § 265, and cases cited.

What is an Equitable Suit: See Remington's Digest, App. & E., § 266, and cases cited.

Evidence in Actions at Law: See Remington's Digest, App. & E., § 267, and cases cited.

See, also, Shaw v. Oregon-Washington R. R. & Nav. Co., 105 Wash. 232, 177 Pac. 687; Kelly v. Schnatterly, 106 Wash. 657, 180 Pac. 887; Strang v. Person, 108 Wash. 503, 185 Pac. 944.

Evidence in Special Proceedings: See Remington's Digest, App. & E., § 268, and cases cited.

Evidence on Motion for a New Trial: See Remington's Digest, App. & E., § 269, and cases cited.

To Show Exclusion of Evidence: See Remington's Digest, App. & E., § 270, and cases cited.

See, also, Kelly v. Schnatterly, 106 Wash. 657, 180 Pac. 887.

Setting Forth Objections, Rulings and Exceptions—Objections and Proceedings at Trial: See Remington's Digest, App. & E., § 276, and cases cited.

See, also, Tyrell v. Leege, 105 Wash. 438, 178 Pac. 467.

What bill of exceptions must show. 8 L. R. A. 611.

Mode of preserving for review oral evidence in equity case. Ann. Cas. 1913A, 529.

Authentication of bill of exceptions by bystanders. 15 Ann. Cas. 737.

§ 389. Bill of Exceptions—Amendments—Notice to Settle.

A party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause and serve a copy thereof on the adverse party, and shall also serve written notice of the filing thereof on any other party who has appeared in the cause. Within ten days after such service any other party may file and serve on the proposing party, any amendments which he may propose to the bill or statement. Either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified, the time to be not less than three nor more than ten days after service of the notice, to settle and certify the bill or statement; and at such time and place, or at any other time or place specified in an adjournment made by order or stipulation, the judge shall settle and certify the bill or statement. If the judge is absent at the time named in a notice or fixed by adjournment, a new notice may be served. If no amendment shall be served within the time aforesaid, the proposed bill or statement shall be deemed agreed to and shall be certified by the judge at the instance of either party, at any time, without notice to any other party on proof being filed of its service, and that no amendments have been proposed; and if amendments be proposed and excepted [accepted], the bill or statement as so amended shall likewise be certified on proof being filed of its service and the service and acceptance of the amendments. [L. '93, p. 114, § 9.]

Cited in 7 Wash. 362, 363; 9 Wash. 540, 543; 10 Wash. 153; 11 Wash. 70, 410; 15 Wash. 425; 19 Wash. 375; 25 Wash. 154; 27 Wash. 328; 30 Wash. 62; 31 Wash. 189; 32 Wash. 72, 534; 35 Wash. 118, 407; 40 Wash. 432, 465, 547; 44 Wash. 345; 47 Wash. 596; 49 Wash. 407; 51 Wash. 240; 56 Wash. 346; 62 Wash. 346; 63 Wash. 443, 445; 67 Wash. 369; 78 Wash. 529; 80 Wash. 1, 2, 700; 81 Wash. 133; 82 Wash. 147; 85 Wash. 69; 94 Wash. 49; 97 Wash. 449, 653; 98 Wash. 338; 99 Wash. 510; 101 Wash. 3, 6, 7; 104 Wash. 513; 108 Wash. 172.

PROPOSING STATEMENT OF FACTS OR BILL OF EXCEPTIONS: See Remington's Digest, App. & E., §§ 285—291-1, and cases cited.

Filing and Serving Proposed Case or Statement—Commencement of Time for Filing: See Remington's Digest, App. & E., § 285, and cases cited.

— **Necessity of Filing Before Service:** See Remington's Digest, App. & E., § 286, and cases cited.

Notice of Filing and Service of Copy: See Remington's Digest, App. & E., § 289, and cases cited.

See, also, Swanson v. Stubb, 108 Wash. 170, 183 Pac. 91.

This section is not jurisdictional and may be waived: Patterson, *In re*, 98 Wash. 334, 167 Pac. 924.

Proposed Amendments or Objections: See Remington's Digest, App. & E., §§ 291, 291-1; Erickson v. Erickson, 11 Wash. 76, 39 Pac. 241; Warburton v. Ralph, 9 Wash. 537, 38 Pac. 140; State ex rel. Hofstetter v. Sheeks, 63 Wash. 408, 115 Pac. 859; Lauridsen v. Lewis, 47 Wash. 594, 92 Pac. 440.

SETTLEMENT OF BILL OR STATEMENT OF FACTS—Notice of and Proceedings for Settlement—Necessity of Notice: See Remington's Digest, App. & E., §§ 292, 293, and cases cited.

Sufficiency of Notice of Settlement: See Remington's Digest, App. & E., §§ 299, 300.

By Whom to be Settled: See Remington's Digest, App. & E., § 302, and cases cited.

Where Settlement may be Made: See Remington's Digest, App. & E., § 303; Marsh v. Wade, 3 W. T. 477, 17 Pac. 886; King County v. Hill, 1 Wash. 63, 23 Pac. 926; O'Neile v. Ternes, 32 Wash. 528, 73 Pac. 692; Prospectors' Development Co. v.

Brooks, 31 Wash. 187, 71 Pac. 774; Downs etc. Assn. v. Pioneer Mut. Ins. Assn., 41 Wash. 372, 83 Pac. 423.

Time of Settlement and Adjournment: See Remington's Digest, App. & E., §§ 304, 305, and cases cited.

Determining the Facts at the Settlement and Agreed Statements: See Remington's Digest, App. & E., §§ 306, 307.

§ 390. How Written Evidence Certified.

Depositions and other written evidence on file shall be appropriately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof. [L. '93, p. 115, § 10.]

Cited in 11 Wash. 78, 602; 32 Wash. 532; 40 Wash. 582; 80 Wash. 284, 286; 86 Wash. 250.

Incorporating Matters of Record, exhibits and other documents—Affidavits: See Remington's Digest, App. & E., § 272, and cases cited.

See, also, Richmond v. Denny, 104 Wash. 202, 175 Pac. 957; State v. Wernitsch, 105 Wash. 224, 177 Pac. 712; Fehler v. Montesano, 110 Wash. 143, 188

Pac. 5; Hultin v. Wagner, 110 Wash. 103, 188 Pac. 29; Burlie v. Stephens, 113 Wash. 182, 193 Pac. 684.

— **Identification of Affidavits:** See Remington's Digest, App. & E., § 272-1, and cases cited.

— **Depositions and Referee's Reports:** See Remington's Digest, App. & E., § 273, and cases cited.

— **Exhibits:** See Remington's Digest, App. & E., § 274, and cases cited.

§ 391. Certificate, What to Contain—How Signed.

The judge shall certify that the matters and proceedings embodied in the bill or statement, as the case may be, are matters and proceedings occurring in the cause and that the same are thereby made a part of the record therein; and, when such is the fact, he shall further certify that the same contains all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or (as the case may be) such thereof as the parties have agreed, to be all that are material therein. The certificate shall be signed by the judge, but need not be sealed; and thereupon all the matters and proceedings embodied in the bill of exceptions or statement of facts, as the case may be, shall become and thenceforth remain a part of the record in the cause, for all the purposes thereof and of any appeal therein. The judge may correct or supplement his certificate according to the fact, at any time before an appeal is heard. And if the judge refuse to settle or certify a bill of exceptions or statement of facts, or to correct or supplement his certificate thereto, in a proper case, he may be compelled so to do by a mandate issued out of the supreme court, either pending an appeal or prior thereto. [L. '93, p. 115, § 11.]

Cited in 7 Wash. 363, 654; 9 Wash. 542, 543; 26 Wash. 162; 32 Wash. 532; 34 Wash. 529; 35 Wash. 524; 36 Wash. 45; 38 Wash. 201; 45 Wash. 693; 83 Wash. 685; 85 Wash. 69, 454; 86 Wash. 503; 92 Wash. 365; 93 Wash. 126; 94 Wash. 49; 101 Wash. 6; 104 Wash. 513; 108 Wash. 14.

Power of Lower Court to Correct Statement After Settlement: See Remington's Digest, App. & E., § 308.

Supplemental Statements and Settlement or Correction by the Supreme Court: See Remington's Digest, App. & E., §§ 309, 310, and cases cited.

Compelling Allowance or Settlement: See Remington's Digest, App. & E., § 311.

See, also, Howell v. Dunning, 107 Wash. 369, 181 Pac. 697.

CERTIFICATE TO STATEMENT OF FACTS OR BILL OF EXCEPTIONS—Form of Certificate in General: See Remington's Digest, App. & E., § 313.

Certificate as to All the Material Facts: See Remington's Digest, App. & E., §§ 317—318, and cases cited.

See, also, *Downing v. Downing*, 108 Wash. 12, 182 Pac. 561; *Mauseth v. Slayden*, 104 Wash. 512, 177 Pac. 319.

Effect of stipulations: *Lamb-Davis Lbr. Co. v. Stowell*, 107 Wash. 212, 181 Pac. 520.

Conclusiveness of Certificate as to All the Facts: See Remington's Digest, App. & E., § 320.

Certificate as to Facts upon Agreed Statements: See Remington's Digest, App. & E., § 321.

Supplemental Certificate: See Remington's Digest, App. & E., § 322, and cases cited.

Validity of bill of exceptions signed on Sunday. *Ann. Cas.* 1916B, 23.

§ 392. How Certified upon Change or Death of Judge.

If the judge before whom the cause was pending or tried shall from any cause have ceased to be such judge he shall, notwithstanding, settle and certify, as the late judge, any bill of exceptions or statement of facts that it would be proper for him to settle and certify if he were still such judge, and such acts on his part shall have the same effect as if he were still in office; and he may be compelled by mandate so to do, as if still in office. If such judge shall die or remove from the state while in office or afterward, within the time which a bill of exceptions or statement of facts, in a cause that was pending or tried before him, might be settled and certified under the provisions of this chapter, and before having certified such bill or statement, such bill or statement may be settled by stipulation of the parties with the same effect as if duly settled and certified by such judge while still in office. But if the parties cannot agree, and if such judge, when removed from the state, does not attend within the state and settle and certify a bill of exceptions or statement of facts in case one has been duly proposed, his successor in office shall settle and certify such bill or statement in the manner in this chapter provided, and in so doing he shall be guided, so far as practicable, by the minutes taken by his predecessor in office, or by the stenographer, if one was in attendance on the court or judge, and may, in order to determine any disputed matter not sufficiently appearing upon such minutes, examine under oath the attorneys in the cause who were present at the trial or hearing, or any of them. [L. '93, p. 116, § 12.]

Cited in 7 Wash. 364; 19 Wash. 21; 26 Wash. 164; 54 Wash. 85.

Who may Certify Statement: See Remington's Digest, App. & E., § 315, and cases cited.

Authority of judge pro tem. as to bill of exceptions. 42 L. R. A. (N. S.) 616.

Mandamus to compel judge to sign bill of exceptions after expiration of term. 36 L. R. A. (N. S.) 1087. Authority of successor to trial judge to pass upon motion for new trial. 7 Ann. Cas. 493; 10 Ann. Cas. 327; Ann. Cas. 1914B, 1235.

§ 393. When to be Filed—Effect of Irregularity.

A proposed bill of exceptions or statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, or (as the case may be), from an order with a view to an appeal from which the bill or statement is proposed: Provided, that the time herein prescribed may be enlarged either before or after its expiration,

once or more, but not for more than sixty days additional in all, by stipulation of the parties, or for good cause shown and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. And the certifying of a bill of exceptions or statement of facts provided for by this chapter, and the filing and service of the proposed bill or statement, the notice of application for the settlement thereof, and all other steps and proceedings leading up to the making of the certificate, shall be deemed steps and proceedings in the cause itself, resting upon the jurisdiction originally acquired by the court in the cause, and no irregularity or failure to pursue the steps prescribed by this chapter on the part of any party, or the judge, shall affect the jurisdiction of the judge to settle or certify a proper bill of exceptions or statement of facts. [L. '93, p. 116, § 13.]

Cited in 8 Wash. 587; 9 Wash. 574; 21 Wash. 369; 25 Wash. 146; 26 Wash. 306; 27 Wash. 34; 30 Wash. 62; 31 Wash. 217; 32 Wash. 318, 533; 33 Wash. 198; 35 Wash. 65, 406; 38 Wash. 674; 51 Wash. 474; 61 Wash. 179; 67 Wash. 369; 74 Wash. 331, 602; 77 Wash. 111; 80 Wash. 3; 92 Wash. 534; 97 Wash. 448, 449; 98 Wash. 31; 101 Wash. 75; 104 Wash. 345; 108 Wash. 172; 110 Wash. 452.

Time of Filing proposed statement or bill: See Remington's Digest, App. & E., § 287, and cases cited.

See, also, Ellensburg Creamery & Produce Co. v. Toppenish Creamery Co., 104 Wash. 230, 176 Pac. 1; Martin v. Nichols, 110 Wash. 451, 188 Pac. 519.

Under sections 388 and 389, the statement of facts may be filed and served at any time, the only limitation being section 393, providing that it must be filed before or within thirty days after the time begins to run within which an appeal may be taken: Bisbee v. Lacky, 97 Wash. 447, 166 Pac. 638; Siegley v. Nakata, 101 Wash. 73, 172 Pac. 203.

This section fixes the utmost limit at ninety days after the date of final judgment: State ex rel. Sefrit v. Superior Court, 74 Wash. 601, 134 Pac. 183.

Extension of Time for Filing: See Remington's Digest, App. & E., § 288, and cases cited.

See, also, Universal Motor Co. v. McGeorge, 104 Wash. 344, 176 Pac. 331.

— Excuse for delay: Howell v. Dunning, 107 Wash. 369, 181 Pac. 697.

— Compelling allowance: Howell v. Dunning, 107 Wash. 369, 181 Pac. 697.

— Dismissal: State v. Terrien, 111 Wash. 345, 190 Pac. 1017.

Extension of Time for Notice of settlement: See Remington's Digest, App. & E., § 295, and cases cited.

Notice, Waiver and Proof of Service: See Remington's Digest, App. & E., §§ 296—298, and cases cited.

Notice of Settlement—Waiver: Kosinski v. Hines, 110 Wash. 25, 187 Pac. 712.

Consent of parties as conferring on court jurisdiction to sign bill of exceptions after time fixed by statute. 13 Ann. Cas. 1115.

Effect of neglect of judge to sign bill of exceptions within time required by law. Ann. Cas. 1913A, 914.

§ 394. Return of Bill—Extension of Time for Brief.

The copy of a proposed bill or statement which is served as in this chapter prescribed, shall be returned to the party serving the same upon the bill or statement being certified, if he has appealed to the supreme court, or upon his thereafter appealing, for his use in preparing his brief on the appeal, and the time limited by any law or rule of court for the service and filing of his brief shall be enlarged by any delay in returning such copy as herein required to the extent of such delay; and when he served his brief he shall return such copy to the party on whom it was originally served, and his brief shall not be deemed served till such copy is so returned by him. [L. '93, p. 117, § 14.]

Cited in 31 Wash. 218; 78 Wash. 529; 80 Wash. 1, 2, 700; 81 Wash. 133; 82 Wash. 147; 85 Wash. 450.

§ 395. What shall be Part of Record.

All reports of referees or commissioners, with the testimony and other evidence returned into court therewith, all findings of fact and conclusions of law made in writing by a judge, referee or commissioner and signed by him, all charges to a jury made wholly in writing, all instructions requested in writing to be given as part of a charge, all verdicts, general or special, and all rulings and decisions embodied in a written judgment, order or journal entry in the cause, together with all exceptions, if any, taken to any thereof, as well as all papers and matters hitherto deemed a part of the record, shall be deemed and are hereby declared to become, upon being filed in the cause, or, as the case may be, embodied in a journal entry, a part of the record in the cause, for all the purposes thereof and of any appeal therein; and it shall not be necessary or proper, for any purpose, to embody the same in any bill of exceptions or statement of facts. [L. '93, p. 117, § 15.]

Cited in 12 Wash. 324; 14 Wash. 545; 529; 80 Wash. 1, 2, 285, 700; 81 Wash. 33 Wash. 212; 48 Wash. 299; 54 Wash. 133; 82 Wash. 147; 86 Wash. 250; 90 451; 59 Wash. 254; 70 Wash. 135, 136; Wash. 346; 99 Wash. 511. 72 Wash. 319; 75 Wash. 439; 78 Wash.

§ 396. How Certified When Cases Consolidated.

When two or more causes shall have been consolidated it shall not be necessary, for any purposes of an appeal which concerns only one or more, and not all of the original causes, to embody in a bill of exceptions or statement of facts any fact, matter or proceeding that relates solely to an original cause with which the appeal is not concerned; and the bill or statement shall be certified as in this act prescribed, notwithstanding the omission therefrom of such facts, matters and proceedings. [L. '93, p. 118, § 16.]

§ 397. Construction of Chapter.

This chapter shall apply to and govern all civil actions and proceedings, both legal and equitable, and all criminal causes, in the superior courts, but shall not apply to courts of justices of the peace or other inferior courts or tribunals from which an appeal does not lie directly to the supreme court. This chapter shall govern proceedings had after it shall take effect, in actions then pending as well as those in actions thereafter begun; but it shall not affect any right acquired or proceeding had prior to the time when it shall take effect, nor restore any right or enlarge any time then already lost or expired. And except as above provided all acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [L. '93, p. 118, §§ 17, 18.]

Cited in 8 Wash. 586; 9 Wash. 575.

Under this section, where a notice of appeal was given before the law went into effect, the statement should be settled under the law in force at the time

of the settlement: *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490.

This section applies only to subsequent proceedings in pending actions: *Oliver v. Lewis*, 9 Wash. 572, 38 Pac. 139.

CHAPTER VIII.

NEW TRIALS.

§ 398. New Trial, Defined.

A new trial is a re-examination of an issue [of fact] in the same court after a trial and decision by a jury, court, or referees. [L. '54, p. 170, § 215; Cd. '81, § 275; 2 H. C., § 399.]

Cited in 12 Wash. 2; 17 Wash. 602; 26 620; 86 Wash. 111; 98 Wash. 99; 102 Wash. 329; 28 Wash. 624; 35 Wash. 66; Wash. 13.
67 Wash. 477; 68 Wash. 200; 75 Wash.

§ 399. New Trial—Grounds for Granting.

The former verdict or other decision may be vacated and a new trial granted, on the motion of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;

2. Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict to a finding on any question or questions submitted to the jury by the court, other and different from his own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Error in the assessment of the amount of recovery, whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

7. Insufficiency of the evidence to justify the verdict or the decision, or that it is against law;

8. Error in law occurring at the trial and excepted to at the time by the party making the application. [L. '09, p. 53, § 1. Cf. L. '54, p. 170, § 216; L. '69, p. 67, § 278; Cd. '81, § 276; 2 H. C., § 400.]

Cited in 3 Wash. 21; 8 Wash. 185; 9 Wash. 53; 11 Wash. 34; 12 Wash. 2, 617; 15 Wash. 440; 18 Wash. 347; 19 Wash. 280; 22 Wash. 682; 26 Wash. 329; 28 Wash. 624; 34 Wash. 335; 35 Wash. 67; 42 Wash. 8, 481; 53 Wash. 360; 54 Wash. 257; 59 Wash. 312; 62 Wash. 66; 66 Wash. 460; 69 Wash. 21; 75 Wash. 39, 433, 435; 79 Wash. 183; 80 Wash. 473; 81 Wash. 29; 82 Wash. 328, 486; 86 Wash. 111; 87 Wash. 549—551; 88 Wash. 691; 89 Wash. 45; 92 Wash. 646; 96 Wash. 44; 112 Wash. 95.

Discretion of Court.—The granting of a new trial upon statutory grounds is

within the discretionary power of the lower court: See Remington's Digest, New Tr., § 3; Gove v. Moses, 1 W. T. 7; Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134; Trumbull v. Jackman, 9 Wash. 524, 37 Pac. 680; Rinehart v. Watson, 11 Wash. 526, 40 Pac. 127; Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132; Seattle Operating Co. v. Cavanaugh, 14 Wash. 701, 44 Pac. 266; State v. Buhmann, 16 Wash. 700, 47 Pac. 961; State v. Symes, 17 Wash. 596, 50 Pac. 487; McBroom & Wilson Co. v. Gandy, 18 Wash. 79, 50 Pac. 572; Holgate v. Parker, 18 Wash. 206, 51 Pac. 368; Langston v.

Ephriam, 21 Wash. 282, 57 Pac. 808; Callihan v. Washington Water P. Co., 27 Wash. 154, 67 Pac. 697, 91 Am. St. Rep. 829, 56 L. R. A. 772.

It is a matter within the discretion of the trial court to grant a new trial on the ground that the damages awarded by the verdict of the jury are excessive: See Remington's Digest, New Tr., § 3; Kohler v. Fairhaven & N. W. R. Co., 8 Wash. 452, 36 Pac. 253, 681; Sharp v. Greene, 22 Wash. 677, 62 Pac. 147; Moylan v. Moylan, 49 Wash. 341, 95 Pac. 271; Brown v. Walla Walla, 76 Wash. 670, 136 Pac. 1166.

An order granting a new trial does not involve the discretion of the trial court when such order is based upon an error of law: See Remington's Digest, New Tr., § 3; Dunkle v. Spokane Falls & N. R. Co., 20 Wash. 254, 55 Pac. 51; Gardner v. Lovergren, 27 Wash. 356, 67 Pac. 615; Gray v. Washington Water etc. Co., 27 Wash. 713, 68 Pac. 360; Doyle v. Great Northern R. Co., 43 Wash. 558, 86 Pac. 861; Cranford v. O'Shea, 75 Wash. 33, 134 Pac. 486.

Right to New Trial in General: See Remington's Digest, New Tr., § 3-1; O'Brien v. American Casualty Co., 57 Wash. 598, 107 Pac. 519.

New Trial as to One or More Coparties: See Remington's Digest, New Tr., § 4; Lowman & Hanford etc. Print. Co., Ex parte, 2 Wash. 427, 27 Pac. 232; State ex rel. Holgate v. Superior Court, 19 Wash. 114, 52 Pac. 522.

New Trial as to Part of Issues: See Remington's Digest, New Tr., § 4-1; Auwarter v. Kroll, 79 Wash. 179, 140 Pac. 326.

GROUND—ERRORS AND IRREGULARITIES IN GENERAL: See Remington's Digest, New Tr., §§ 6—8; Sharp v. Greene, 22 Wash. 677, 62 Pac. 147; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Ernst v. Fox, 26 Wash. 526, 67 Pac. 258; Robbins v. Wyman, Partridge & Co., 75 Wash. 617, 135 Pac. 656; Elston v. McGlauffin, 79 Wash. 355, 140 Pac. 396, Ann. Cas. 1916A, 255.

Necessity of Objection: See Remington's Digest, New Tr., § 9; Collins v. Fidelity Trust Co., 33 Wash. 136, 73 Pac. 1121; Grant v. Huschke, 70 Wash. 174, 126 Pac. 416; Cranford v. O'Shea, 75 Wash. 33, 134 Pac. 486; Hopkins v. Copalis Lumber Co., 97 Wash. 119, 165 Pac. 1062.

Sufficiency and Scope of Statement of Grounds: See Remington's Digest, App. & E., § 161; Tacoma Grocery Co. v. Barlow, 12 Wash. 21, 40 Pac. 380; Sweeney v. Pacific Coast Elevator Co., 14 Wash. 562, 45 Pac. 151; Harris v. Van de Vanter, 17 Wash. 489, 50 Pac. 50.

Conduct of Party: See Remington's Digest, New Tr., § 10; McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; Friedman v. Manley, 21 Wash. 675, 59 Pac. 490; Connell v. Seattle Renton etc. R. Co., 47 Wash. 510, 92 Pac. 377; Agnew v. Hackett, 80 Wash. 236, 141 Pac. 319; Anderson v. Seattle, 99 Wash. 556, 169 Pac. 964.

See, also, Seal v. Long, 112 Wash. 370, 192 Pac. 896.

Arguments and Conduct of Counsel: See Remington's Digest, New Tr., § 11; Sears v. Seattle Consol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081; Spencer v. Arlington, 49 Wash. 121, 94 Pac. 904; Kiehlhoefer v. Washington Water Power Co., 49 Wash. 646, 96 Pac. 220; Hoyt v. Independent Asphalt Paving Co., 52 Wash. 672, 101 Pac. 367; Ralton v. Sherwood Logging Co., 54 Wash. 254, 103 Pac. 28; Deighton v. Hover, 58 Wash. 12, 107 Pac. 853, 137 Am. St. Rep. 1035, 21 Ann. Cas. 860; Snider v. Washington Water Power Co., 66 Wash. 598, 120 Pac. 88; Wolpers v. Spokane, 72 Wash. 562, 131 Pac. 230; Cranford v. O'Shea, 75 Wash. 33, 134 Pac. 486; Johansen v. Pioneer Mining Co., 77 Wash. 421, 137 Pac. 1019; Neitzel v. Spokane International R. Co., 80 Wash. 30, 141 Pac. 186; Munson v. Johnson, 80 Wash. 628, 142 Pac. 18; De Lor v. Symons, 93 Wash. 231, 160 Pac. 424.

Rulings Ground for Application in General: See Remington's Digest, New Tr., § 12; Newberg v. Farmer, 1 W. T. 182; Carroll v. Centralia Water Co., 5 Wash. 613, 32 Pac. 609, 33 Pac. 431; Merritt v. Hibbard, 61 Wash. 368, 112 Pac. 350; Pugsley v. Stebbins, 87 Wash. 187, 151 Pac. 501.

Instructions: See Remington's Digest, New Tr., § 13; Armstrong v. Musser Lumber & Mfg. Co., 43 Wash. 584, 86 Pac. 944; Pealer v. Grays Harbor Boom Co., 54 Wash. 415, 103 Pac. 451; Grass v. Seattle, 100 Wash. 542, 171 Pac. 533.

DISQUALIFICATION OR MISCONDUCT OF OR AFFECTING JURY: See Remington's Digest, New Tr., §§ 13½—15; Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474; Hedican v. Pennsylvania Fire Ins. Co., 21 Wash. 488, 58 Pac. 574; Buchanan v. Laber, 39 Wash. 410, 81 Pac. 911; Shannon v. Tacoma, 41 Wash. 220, 83 Pac. 186; Haggard v. Seattle, 61 Wash. 499, 112 Pac. 503; Hansen v. Lemley, 100 Wash. 444, 171 Pac. 255.

Manner of Arriving at Verdict: See Remington's Digest, New Tr., § 16; Rice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 Pac. 839; Conover v. Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; Wiles v. Northern Pac. R. Co., 66 Wash. 337, 119 Pac. 810; Loy v. Northern Pac. R. Co., 77 Wash. 25, 137

Pac. 446; Bouton-Perkins Lumber Co. v. Huston, 81 Wash. 678, 143 Pac. 146.

Inconsistent Findings: See Remington's Digest, New Tr., § 18; Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564; Loy v. Northern Pac. R. Co., 68 Wash. 33, 122 Pac. 372.

VERDICT CONTRARY TO LAW, OR EVIDENCE—Power and Duty of Court in General: See Remington's Digest, New Tr., § 19; Tacoma v. Tacoma Light & Water Co., 16 Wash. 288, 47 Pac. 738; Clark v. Great Northern R. Co., 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760; Sharp v. Greene, 22 Wash. 677, 62 Pac. 147; Naslund v. Svea Insurance Co., 64 Wash. 520, 117 Pac. 264; Ritter v. Seattle, 82 Wash. 325, 144 Pac. 61; Klock Produce Co. v. Diamond Ice & Storage Co., 98 Wash. 676, 168 Pac. 476; Carkonen v. Columbia & Puget S. R. Co., 102 Wash. 11, 172 Pac. 816.

Verdict Contrary to Law or Instructions: See Remington's Digest, New Tr., § 20; Wallerich v. Puget Sound Warehouse Co., 38 Wash. 501, 80 Pac. 763; Leek v. Northern Pac. R. Co., 65 Wash. 453, 118 Pac. 345.

Verdict Contrary to Evidence—In General: See Remington's Digest, New Tr., § 21; Trumbull v. Jackman, 9 Wash. 524, 37 Pac. 680; Tilden v. Gordon & Co., 25 Wash. 593, 66 Pac. 50; Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037.

— Sufficiency of Evidence: See Remington's Digest, New Tr., § 22; Pederson v. Seattle etc. St. R. Co., 6 Wash. 202, 33 Pac. 351, 34 Pac. 665; Corbitt v. Harrington, 14 Wash. 197, 44 Pac. 132; Welever v. Advance Shingle Co., 34 Wash. 331, 75 Pac. 863; Faben v. Muir, 59 Wash. 250, 109 Pac. 798; Koenig v. Whatcom Falls Mill Co., 67 Wash. 632, 122 Pac. 16; Thomas & Co. v. Hillis, 70 Wash. 53, 126 Pac. 62; Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266, 140 Pac. 377; Jensen v. Lawrence, 94 Wash. 148, 162 Pac. 40, Ann. Cas. 1917E, 133; McCabe v. Lindberg, 99 Wash. 430, 169 Pac. 841.

See, also, Brace v. Pederson, 106 Wash. 573, 180 Pac. 917; Knecht v. Sims, 111 Wash. 419, 191 Pac. 399; Ziomko v. Puget Sound Elec. Railway, 112 Wash. 426, 192 Pac. 1009.

— Conflicting Evidence: See Remington's Digest, New Tr., § 23; Friedman v. Manley, 21 Wash. 43, 56 Pac. 832; Page v. Rodney, 2 W. T. 461, 7 Pac. 895; Rotting v. Cleman, 12 Wash. 615, 41 Pac. 907; Bender v. Rinker, 21 Wash. 636, 59 Pac. 504; Trumbull v. School Dist. No. 7, 22 Wash. 631, 61 Pac. 714; O'Rourke v. Jones, 22 Wash. 629, 61 Pac. 709; Sharp v. Greene, 22 Wash. 677, 62 Pac. 147; Money v. Seattle, Renton & S. R. Co., 59 Wash. 120, 109 Pac. 307; Westlake

Avenue, In re, 60 Wash. 549, 111 Pac. 780; Independent Order of Foresters v. Bonner, 84 Wash. 13, 145 Pac. 987.

See, also, Swafford v. Carnation Lbr. & Shingle Co., 108 Wash. 315, 183 Pac. 92; Heitmiller v. Prall, 108 Wash. 382, 184 Pac. 334.

— Weight of Evidence: See Remington's Digest, New Tr., § 24; Tacoma v. Tacoma Light & W. Co., 16 Wash. 288, 47 Pac. 738. But see, Id., 17 Wash. 458, 50 Pac. 55; Clark v. Great Northern R. Co., 37 Wash. 537, 79 Pac. 1108, 2 Ann. Cas. 760; Kincaid v. Walla Walla Valley Traction Co., 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982; Renton, In re, 61 Wash. 330, 112 Pac. 348.

See, also, Ross v. Rose, 109 Wash. 273, 186 Pac. 892.

Inadequate Damages: See Remington's Digest, New Tr., § 24-1; Bernard v. North Yakima, 80 Wash. 472, 141 Pac. 1034; Krulikowski v. Sparling, 82 Wash. 474, 144 Pac. 692; Jorgenson v. Crane, 92 Wash. 642, 159 Pac. 796.

See, also, Aboltin v. Heney, 62 Wash. 65, 113 Pac. 245.

Excessive Damages: See Remington's Digest, New Tr., § 25; Wait v. Robertson Mtg. Co., 37 Wash. 282, 70 Pac. 926; Prosch v. Seattle, 46 Wash. 553, 90 Pac. 920; McOwen v. Seattle Elec. Co., 48 Wash. 362, 93 Pac. 518; Winningham v. Philbrick, 56 Wash. 38, 105 Pac. 144; Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson, 56 Wash. 323, 105 Pac. 636; Jett v. Old National Bank Building, 79 Wash. 562, 140 Pac. 554; Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023; Lagomarsino v. Pacific Alaska Nav. Co., 100 Wash. 105, 170 Pac. 368.

SURPRISE, ACCIDENT, INADVERTENCE OR MISTAKE—Power and Duty of Court in General: See Remington's Digest, New Tr., § 26; State v. John Port Townsend, 7 Wash. 462, 35 Pac. 367; Lafond v. Smith, 8 Wash. 26, 35 Pac. 404; Allen v. Chambers, 18 Wash. 341, 51 Pac. 478; Pincus v. Puget Sound Brewing Co., 18 Wash. 108, 50 Pac. 930; Friedman v. Manley, 21 Wash. 43, 58 Pac. 832; Miles v. Mead, 98 Wash. 215, 167 Pac. 106.

Absence of Witness or Evidence: See Remington's Digest, New Tr., § 27; Clemans v. Western, 39 Wash. 290, 81 Pac. 824; Mueller v. Washington Water Power Co., 56 Wash. 556, 106 Pac. 476; Mortimer v. Dirks, 57 Wash. 402, 107 Pac. 184; Scandinavian-American State Bank v. Downs, 72 Wash. 79, 129 Pac. 894; Lindblom v. Johnston, 92 Wash. 171, 158 Pac. 972.

Evidence in General: See Remington's Digest, New Tr., § 28; Lafond v. Smith, 8 Wash. 26, 35 Pac. 404; Pincus v. Puget

Sound Brew. Co., 18 Wash. 108, 50 Pac. 930; Hardman Estate v. McNair, 61 Wash. 74, 111 Pac. 1059; Burger v. Covert, 75 Wash. 528, 135 Pac. 30, Ann. Cas. 1915C, 81; Henry v. Chicago, Mil. & P. S. R. Co., 84 Wash. 633, 147 Pac. 425.

Testimony and Conduct of Witness: See Remington's Digest, New Tr., § 29; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Friedman v. Manley, 21 Wash. 43, 56 Pac. 832; Czarecki v. Seattle & S. F. R. & Nav. Co., 30 Wash. 288, 70 Pac. 750.

Inadvertence or Mistake of Counsel: See Remington's Digest, New Tr., § 30; O'Toole v. Phoenix Ins. Co., 39 Wash. 688, 82 Pac. 175.

Rulings and Decisions: See Remington's Digest, New Tr., § 31; Hull v. Vining, 17 Wash. 352, 49 Pac. 537; Allen v. Chambers, 18 Wash. 341, 51 Pac. 478; Henry v. Yost, 88 Wash. 93, 152 Pac. 714.

Prudence and Diligence in Guarding Against Surprise or Accident: See Remington's Digest, New Tr., § 32; Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; Nye v. Manley, 69 Wash. 631, 125 Pac. 1009.

See, also, Bundy v. Dickinson, 108 Wash. 52, 182 Pac. 947.

Necessity of Objection or Application for Relief at Trial: See Remington's Digest, New Tr., § 33; Woods v. Globe Nav. Co., 40 Wash. 376, 82 Pac. 401; Knapp v. Chehalis, 65 Wash. 350, 118 Pac. 211; Chicago, Milwaukee & Puget Sound R. Co. v. Thayer, 65 Wash. 402, 118 Pac. 318; Orcas Street etc. Seattle, In re, 87 Wash. 218, 151 Pac. 506.

NEWLY DISCOVERED EVIDENCE—Power and Duty of Court in General: See Remington's Digest, New Tr., § 34; State v. Stowe, 3 Wash. 206, 28 Pac. 237, 14 L. R. A. 609; State v. Webb, 20 Wash. 500, 55 Pac. 935; Kenway v. Hoffman, 51 Wash. 105, 98 Pac. 98; Anderson v. Woolley, 61 Wash. 236, 112 Pac. 271; Walgraf v. Wilkeson Coal & Coke Co., 65 Wash. 464, 118 Pac. 343; Armstrong v. Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233; Olson v. Seldovia Salmon Co., 88 Wash. 225, 132 Pac. 1033.

See, also, Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599.

Diligence in Procuring Evidence: See Remington's Digest, New Tr., § 35; Chapin v. Bokee, 4 Wash. 1, 29 Pac. 936; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; Both v. Columbia etc. R. Co., 6 Wash. 531, 33 Pac. 1075; Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; Jordan v. Seattle, 30 Wash. 298, 70 Pac. 743; Bullock v. White Star Steamship Co., 30 Wash. 448, 70 Pac. 1106; Collins v. Bacon, 38 Wash. 80, 80 Pac. 268; Dumontier v. Stetson & Post Mill Co., 39 Wash. 264, 81 Pac. 693;

Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Goodrich v. Kimble, 49 Wash. 516, 95 Pac. 1084; Kenway v. Hoffman, 51 Wash. 105, 98 Pac. 98; Jensen v. Spokane Falls & Northern R. Co., 51 Wash. 448, 98 Pac. 1124; Schoening v. Young, 55 Wash. 90, 104 Pac. 132; Kincaid v. Walla Walla Valley Traction Co., 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982; Mortimer v. Dirks, 57 Wash. 402, 107 Pac. 184; Coffey v. Erickson, 61 Wash. 559, 112 Pac. 643; Chicago, Milwaukee & Puget Sound R. Co. v. Thayer, 65 Wash. 402, 118 Pac. 318; Citizens' National Bank v. Ariss, 68 Wash. 448, 123 Pac. 593; Spokane Portland Cement Co. v. Larson, 71 Wash. 301, 128 Pac. 641; Field v. Spokane, Portland & Seattle R. Co., 74 Wash. 356, 133 Pac. 611; McCanna v. Silke, 75 Wash. 383, 134 Pac. 1063; Woodard v. Cline Lumber Co., 81 Wash. 85, 142 Pac. 475; State v. Gay, 82 Wash. 423, 144 Pac. 711; Yamamoto v. Puget Sound Lumber Co., 84 Wash. 411, 146 Pac. 861; Burwell & Morford v. Barnes, 85 Wash. 153, 147 Pac. 657; Forsyth v. Wallace, 92 Wash. 523, 159 Pac. 696; Starwich v. Ernst, 100 Wash. 198, 170 Pac. 584; Roe v. Snyder, 100 Wash. 311, 170 Pac. 1027.

See, also, Bundy v. Dickinson, 108 Wash. 52, 182 Pac. 947.

Materiality: See Remington's Digest, New Tr., § 36; Tolmie v. Dean, 1 W. T. 46; McKilver v. Manchester, 1 W. T. 255; Dahlstrom v. Northern Pac. R. Co., 98 Wash. 390, 167 Pac. 1078.

Cumulative Evidence: See Remington's Digest, New Tr., § 37; McKilver v. Manchester, 1 W. T. 255; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398; Benson v. Hamilton, 34 Wash. 201, 75 Pac. 805; O'Toole v. Faulkner, 34 Wash. 371, 75 Pac. 975; State v. Underwood, 35 Wash. 558, 79 Pac. 863; Thayer v. Spokane County, 36 Wash. 63, 78 Pac. 200; Brennan v. Seattle, 39 Wash. 640, 81 Pac. 1092; Shannon v. Tacoma, 41 Wash. 220, 83 Pac. 186; Galena Nat. Bank v. Ripley, 55 Wash. 615, 104 Pac. 807, 26 L. R. A. (N. S.) 993; Kincaid v. Walla Walla Valley Traction Co., 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982; Hardman Estate v. McNair, 61 Wash. 74, 111 Pac. 1059; State v. Gay, 82 Wash. 423, 144 Pac. 711; Wells, In re, 60 Wash. 518, 111 Pac. 778; State v. Gray, 61 Wash. 549, 112 Pac. 641; Ronald v. Pacific Traction Co., 65 Wash. 430, 118 Pac. 311; Stewart v. Bowen, 70 Wash. 195, 126 Pac. 414; Miller's Estate, In re, 87 Wash. 64, 151 Pac. 105; Moore v. Saunders, 88 Wash. 602, 153 Pac. 329; State v. Brooks, 89 Wash. 427, 154 Pac. 795; Shell v. Svensson, 93 Wash. 40, 159 Pac. 1076; Gilson v. Washington Water Power Co., 93 Wash. 480, 161 Pac. 352; Skarlatos v. Brice, 96 Wash. 205, 164 Pac. 939;

Deitchler v. Ball, 99 Wash. 483, 170 Pac. 123; Roe v. Snyder, 100 Wash. 311, 170 Pac. 1027.

See, also, Molitor v. Blackwell Motor Co., 112 Wash. 279, 191 Pac. 1103.

Impeachment of Witness: See Remington's Digest, New Tr., § 38; Seattle Lumber Co. v. Sweeney, 43 Wash. 1, 85 Pac. 677; State v. Gaasch, 56 Wash. 381, 105 Pac. 817; State v. Gay, 82 Wash. 423, 144 Pac. 711.

Credibility: See Remington's Digest, New Tr., § 39; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; Olson v. Gill Home Inv. Co., 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884.

Sufficiency and Probable Effect: See Remington's Digest, New Tr., § 40; Tyler v. North Amer. Trad. etc. Co., 24 Wash. 252, 64 Pac. 162; Pierson v. Pierce, 42 Wash. 164, 84 Pac. 731; Strunz v. Hood, 44 Wash. 99, 87 Pac. 45; Cummings v. Sunich, 44 Wash. 665, 87 Pac. 949; Binns v. Emery, 45 Wash. 215, 88 Pac. 133; Harris v. Seattle, Renton & Southern R. Co., 65 Wash. 27, 117 Pac. 601; Knapp v. Chehalis, 65 Wash. 350, 118 Pac. 211; National Surety Co. v. Udd, 65 Wash. 471, 118 Pac. 347; Conrads v. Green, 92 Wash. 269, 159 Pac. 102; Hazlett v. Seattle Elec. Co., 71 Wash. 377, 128 Pac. 677; Armstrong v. Spokane & Inland Empire R. Co., 71 Wash. 624, 129 Pac. 379; Hoxsey v. Murray, 84 Wash. 588, 147 Pac. 205; School District No. 172 of King County v. Josenhans, 88 Wash. 624, 153 Pac. 326; Roe v. Snyder, 100 Wash. 311, 170 Pac. 1027; Peters v. Casualty Co. of America, 101 Wash. 208, 172 Pac. 220.

See, also, Alverson v. Hooper, 108 Wash. 510, 185 Pac. 808; Fisher v. McNeely, 110 Wash. 283, 188 Pac. 478.

Necessity for new trial where verdict is found contrary to erroneous instruction. 14 *Ann. Cas.* 973.

Inability to perfect record for appeal, or loss thereof, as ground for new trial. 13 *A. L. R.* 102; *L. R. A.* 1915B, 353.

Admission of incompetent evidence as ground for granting new trial by trial court. *Ann. Cas.* 1917D, 545.

Refusal to allow cross-examination on relevant matter covered by examination in chief as ground for new trial. 25 *L. R. A. (N. S.)* 683.

Presence of persons in courtroom tending to overawe or influence jury as ground for new trial. *Ann. Cas.* 1913E, 806; *Ann. Cas.* 1915B, 894.

Misstatement of facts or statement of facts not in evidence by counsel to the jury as ground for new trial. *L. R. A.* 1918D, 45.

Rem. Wash. Code, Vol. I—25

Abuse of witness by counsel as ground for new trial. 4 *A. L. R.* 414.

Conduct of counsel in getting inadmissible evidence before jury as ground for new trial. 6 *Ann. Cas.* 224; 19 *Ann. Cas.* 296; *Ann. Cas.* 1917A, 441.

Misconduct of party to action subsequent to verdict as ground for new trial. 12 *Ann. Cas.* 958.

Negligence, incompetency or intoxication of attorney as ground for new trial. *Ann. Cas.* 1913D, 489, 500.

New trial for misconduct of jury as resting in discretion of trial court. *Ann. Cas.* 1912D, 1018.

Expression of opinion or prejudice by juror during trial as ground for new trial. 16 *Ann. Cas.* 175.

Treating juror as ground for new trial. *Ann. Cas.* 1912B, 747; 19 *L. R. A. (N. S.)* 733; 49 *L. R. A. (N. S.)* 889.

Communication by judge with jury not in open court as ground for new trial. 16 *Ann. Cas.* 1141; 17 *L. R. A. (N. S.)* 609; *L. R. A.* 1915B, 703.

Presence of custodian in jury-room or communication by him or other court officer with jury as ground for new trial. 8 *Ann. Cas.* 652; 13 *Ann. Cas.* 522.

Inattention of juror from sleepiness or other cause as ground for new trial. 12 *A. L. R.* 663.

Perjury as ground for new trial. 51 *L. R. A. (N. S.)* 286.

Attack out of court in presence of jurors on credibility of witnesses as ground for new trial. *L. R. A.* 1917B, 248.

Right to new trial for newly discovered evidence which was not in existence when trial was had. *Ann. Cas.* 1913E, 147.

Right to new trial on ground of newly discovered evidence where incompetency of witness has been removed since trial. 17 *Ann. Cas.* 1165.

Newly discovered evidence of contradictory statements made by witness as ground for new trial. *Ann. Cas.* 1912D, 856; 42 *L. R. A.* 692.

What is cumulative evidence within rule excluding it when offered in support of motion for new trial. *Ann. Cas.* 1913D, 157.

Inadequacy of damages in personal injury action as ground for setting aside verdict. 8 *Ann. Cas.* 903; 17 *Ann. Cas.* 1073; *Ann. Cas.* 1914C, 850.

§ 400. Specification of Grounds for New Trial.

In no case of motion for a new trial hereafter made in the courts of this state shall it be necessary to specify the grounds thereof, otherwise than in the language of the last preceding section, specifying the grounds upon which a motion for a new trial may be made. [L. '88, p. 30, § 1; 2 H. C., § 401.]

Cited in 3 Wash. 21.

§ 401. Affidavits may be Used.

The motion for a new trial shall state the grounds or causes for which a new trial is asked, and if made for any of the causes mentioned in the first, second, third, or fourth subdivision of section 399, the facts upon which it is based may be shown by affidavit. [Cd. '81, § 278; 2 H. C., § 403.]

Cited in 2 Wash. 562; 75 Wash. 433, 435; 82 Wash. 486.

Affidavits and Extrinsic Evidence in general: See Remington's Digest, New Tr., § 48-1; State v. Simmons, 52 Wash. 132, 100 Pac. 269; Mueller v. Washington Water Power Co., 56 Wash. 556, 106 Pac. 476; Maryland Casualty Co. v. Seattle Elec. Co., 75 Wash. 430, 134 Pac. 1097.

Misconduct of the jury must be shown by affidavit on motion for new trial: Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029.

Affidavits and Testimony of Jurors—Impeachment of verdict: See Remington's Digest, New Tr., § 49; Marvin v. Yates, 26 Wash. 50, 66 Pac. 131; State v. Simmons, 52 Wash. 132, 100 Pac. 269; Ralton v. Sherwood Logging Co., 54 Wash. 254, 103 Pac. 28; Sexsmith v. Brown, 61 Wash. 164, 112 Pac. 337; Maryland Casualty Co. v. Seattle Elec. Co., 75 Wash. 430, 134 Pac. 1097; Allen v. Farmers & Merchants'

Bank of Wenatchee, 76 Wash. 51, 135 Pac. 621; State v. Gay, 82 Wash. 423, 144 Pac. 711; Lindquist v. Pacific Coast Coal Co., 86 Wash. 408, 150 Pac. 619; Wagoner v. Warn, 88 Wash. 688, 153 Pac. 1072.

See, also, State v. Lyle, 105 Wash. 435, 178 Pac. 468; State v. Cook, 113 Wash. 391, 194 Pac. 401; Bundy v. Dickinson, 108 Wash. 52, 182 Pac. 947.

Evidence as to Statements of Jurors: See Remington's Digest, New Tr., § 49-1; Maryland Casualty Co. v. Seattle Elec. Co., 75 Wash. 430, 134 Pac. 1097.

Affidavits as to Surprise, accident or mistake—Necessity and sufficiency in general: See Remington's Digest, New Tr., § 50; Pincus v. Puget Sound Brew. Co., 18 Wash. 108, 50 Pac. 930; Reeder v. Traders' Nat. Bank, 28 Wash. 139, 68 Pac. 461; O'Toole v. Phoenix Ins. Co., 39 Wash. 688, 82 Pac. 175.

§ 402. Notice and Motion, Practice.

The party moving for a new trial must, within two days after the verdict of a jury, if the action was tried by a jury, or two days after notice in writing of the decision of the court or referee, if the action was tried without a jury, file with the clerk, and serve upon the adverse party, his motion for a new trial, designating the grounds upon which it will be made. If the motion is made upon affidavits, the moving party must, within two days after serving the motion, or such further time as the court in which the action is pending, or the judge thereof may allow, file such affidavits with the clerk, and serve a copy thereof upon the adverse party, who shall have two days to file counter affidavits, or such further time as the court may allow, a copy of which must be served upon the moving party. [Cf. L. '69, p. 68, § 282; Cd. '81, §§ 279, 280; L. '91, p. 102, § 1; 2 H. C., § 404; L. '97, p. 13, § 1.]

Cited in 11 Wash. 413; 17 Wash. 126; 26 Wash. 3; 35 Wash. 67; 40 Wash. 39; 57 Wash. 599; 67 Wash. 477; 87 Wash. 549; 94 Wash. 623; 100 Wash. 259; 101 Wash. 550; 112 Wash. 95, 248.

PROCEEDINGS TO PROCURE NEW TRIAL—Mode and Form in General: See Remington's Digest, New Tr., § 41; Thompson v. Territory, 1 W. T. 547; State ex rel. Payson v. Chapman, 35 Wash. 64, 76

Pac. 525; *Nelson v. Pacific Coast Casualty Co.*, 96 Wash. 43, 164 Pac. 594.

Court or Judge to Which Application may be Made: See *Remington's Digest*, New Tr., § 42; *Rauh v. Scholl*, 19 Wash. 30, 52 Pac. 332; *Nelson v. Seattle Traction Co.*, 25 Wash. 602, 66 Pac. 61.

MOTIONS FOR NEW TRIAL—NECESSITY FOR: See *Remington's Digest*, App. & E., §§ 153—156; *State v. Owens*, 15 Wash. 468, 46 Pac. 1039; *Jones v. Jenkins*, 3 Wash. 17, 27 Pac. 1022; *Burns v. Commencement Bay Land & Improvement Co.*, 4 Wash. 558, 30 Pac. 668, 709; *Sultan Water & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766; *Littlejohn v. Miller*, 5 Wash. 399, 31 Pac. 758; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *Fullis v. Shannon*, 3 Wash. 716, 29 Pac. 449; *Crooker v. Pacific Lounge etc. Co.*, 34 Wash. 191, 75 Pac. 632; *Rowe v. Northport Smelting & Ref. Co.*, 35 Wash. 101, 76 Pac. 529; *Dubeich v. Grand Lodge A. O. U. W.*, 33 Wash. 651, 74 Pac. 832; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59.

Rulings as to Evidence: See *Remington's Digest*, App. & E., § 157; *Tolmie v. Dean*, 1 W. T. 46; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098.

Instructions and Failure or Refusal to Give Instructions: See *Remington's Digest*, App. & E., § 158; *State v. Nichols*, 15 Wash. 1, 45 Pac. 647.

Necessity of Motion for Review of Objections to Findings, or Judgment: See *Remington's Digest*, App. & E., §§ 159, 160; *Johnson v. Maxwell*, 2 Wash. 482, 27 Pac. 1071; *Belles v. Carroll*, 6 Wash. 131, 32 Pac. 1060; *Walton v. Hartman*, 38 Wash. 34, 80 Pac. 196; *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766; *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399; *Peterson v. Lone Lake Lumber Co.*, 58 Wash. 72, 107 Pac. 857; *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098; *Migge v. Northern Pac. R. Co.*, 75 Wash. 197, 134 Pac. 815.

Successive Applications: See *Remington's Digest*, New Tr., § 5; *Burnham v. Spokane Mer. Co.*, 18 Wash. 207, 51 Pac. 363; *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733; *Kincaid v. Walla Walla Valley Traction Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982; *Green v. Russell*, 71 Wash. 379, 128 Pac. 645.

See, also, *Rogers v. Savage*, 112 Wash. 246, 192 Pac. 13.

Time for Application—In General: See *Remington's Digest*, New Tr., § 42; *Boarman v. Hinckley*, 17 Wash. 126, 49 Pac. 226; *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572; *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115; *Kubillus v. Ewert*, 40 Wash. 38, 82 Pac. 147; *O'Brien v. American Casualty Co.*,

57 Wash. 598, 107 Pac. 519; *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904; *Clark v. Ellington*, 86 Wash. 110, 149 Pac. 350; *Vermont Farm Machine Co. v. Lamka*, 94 Wash. 622, 162 Pac. 984.

It is not prejudicial that the motion for new trial was premature, under *Rem. Code*, § 402; *Mann v. American Bonding Co.*, 100 Wash. 258, 170 Pac. 565.

— **Extension of Time:** See *Remington's Digest*, New Tr., § 44; *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631; *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107; *Bullock v. White Star Steamship Co.*, 30 Wash. 448, 70 Pac. 1106; *McAllister v. Seattle Brewing & Malting Co.*, 44 Wash. 179, 87 Pac. 68; *O'Brien v. American Casualty Co.*, 57 Wash. 598, 107 Pac. 519; *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

Notice of Intention to Apply: See *Remington's Digest*, New Tr., § 45; *Boarman v. Hinckley*, 17 Wash. 126, 49 Pac. 226.

Specification of Errors: See *Remington's Digest*, New Tr., § 46; *Jones v. Wiley*, 1 W. T. 603; *Bradshaw v. Territory*, 3 W. T. 265, 14 Pac. 594; *Dawson v. Baum*, 3 W. T. 464, 19 Pac. 46.

Statement of Facts: See *Remington's Digest*, New Tr., § 47; *Littlejohn v. Miller*, 5 Wash. 399, 31 Pac. 758.

Notice of Motion: See *Remington's Digest*, New Tr., § 48; *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363; *State Bank of Washington v. Spokane-Columbia River R. & Nav. Co.*, 53 Wash. 528, 102 Pac. 414.

Amendment of Motion: See *Remington's Digest*, New Tr., § 52; *Bailey v. Drake*, 12 Wash. 99, 40 Pac. 631; *Kreielshimer v. Nelson*, 31 Wash. 406, 72 Pac. 72.

Operation and Effect of Application: See *Remington's Digest*, New Tr., § 53; *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652.

Grant of New Trial Ineffectual or not Beneficial: See *Remington's Digest*, New Tr., § 54; *State v. Owens*, 15 Wash. 468, 46 Pac. 1039; *Abbott v. Thorne*, 34 Wash. 692, 76 Pac. 302, 101 Am. St. Rep. 1021, 65 L. R. A. 826.

Conditions on Granting or Refusing New Trial: See *Remington's Digest*, New Tr., § 55; *Casey v. Malidore*, 19 Wash. 279, 53 Pac. 60; *O'Toole v. Phoenix Ins. Co.*, 39 Wash. 688, 82 Pac. 175; *Staton v. Cook*, 45 Wash. 27, 87 Pac. 914; *Bernard v. North Yakima*, 80 Wash. 472, 141 Pac. 1034.

See, also, *Hurd v. Wysong*, 109 Wash. 202, 186 Pac. 301.

Remission or Reduction of Excess of Recovery: See *Remington's Digest*, New Tr., § 56; *Kohler v. Fairhaven & New W. R. Co.*, 8 Wash. 452, 36 Pac. 253, 681;

Winter v. Shoudy, 9 Wash. 52, 36 Pac. 1049; Rigney v. Tacoma Light & W. Co., 9 Wash. 245, 37 Pac. 297; Washington v. Spokane St. R. Co., 13 Wash. 9, 42 Pac. 628; McDonough v. Great N. R. Co., 15 Wash. 244, 46 Pac. 334; Hughes v. Dexter Horton Co., 26 Wash. 110, 66 Pac. 109; Bailey v. Cascade Timber Co., 35 Wash. 295, 77 Pac. 377; McDonough v. Great N. R. Co., 15 Wash. 244, 46 Pac. 334; Waite v. Robertson Mtg. Co., 37 Wash. 282, 79 Pac. 926; Meza v. Pfister Co., 54 Wash. 7, 102 Pac. 871; Winningham v. Philbrick, 56 Wash. 38, 105 Pac. 144; Matsuda v. Hammond, 77 Wash. 120, 137 Pac. 328, 51 L. R. A. (N. S.) 920.

See, also, Yarrough v. Hines, 112 Wash. 310, 192 Pac. 886.

Order Granting or Refusing New Trial: See Remington's Digest, New Tr., § 56-1; Best v. Seattle, 50 Wash. 533, 97 Pac. 772.

Order for Judgment Instead of New Trial: See Remington's Digest, New Tr., § 57;

Griffith v. Maxwell, 19 Wash. 614, 54 Pac. 35; Buffalo Pitts Co. v. Dearing, 37 Wash. 591, 79 Pac. 1104.

Vacating or Setting Aside Order on Motion for New Trial: See Remington's Digest, New Tr., § 58; Little Bill v. Dyslin, 51 Wash. 675, 99 Pac. 1026.

Affidavit of jurors in support of verdict on motion for new trial. **Ann. Cas.** 1913B, 671.

Amendment of motion for new trial. **Ann. Cas.** 1917D, 104.

Voluntary remittitur of excessive damages as justifying denial of new trial. 2 **Ann. Cas.** 675.

Power of trial court to cure an excessive verdict by requiring or permitting a reduction where true measure of damages not ascertainable by mere computation. 39 **L. R. A. (N. S.)** 1064.

§ 403. Affidavits for Motion—Contents.

If the motion be supported by affidavits and the cause be newly discovered evidence, the affidavits of any witness or witnesses, showing what their testimony will be, shall be produced, or good reasons shown for their nonproduction. [L. '54, p. 170, § 219; L. '69, p. 68, § 284; Cd. '81, § 282; L. '91, p. 103, § 2; 2 H. C., § 405.]

Cited in 39 Wash. 268; 113 Wash. 645.

Affidavits as to Newly Discovered Evidence—Necessity and Sufficiency in General: See Remington's Digest, New Tr., § 51; Wilson v. Waldron, 12 Wash. 149, 40 Pac. 740; Brennan v. Seattle, 39 Wash.

640, 81 Pac. 1092; Dumontier v. Stetson & Post Mill Co., 39 Wash. 264, 81 Pac. 693; Wiles v. Northern Pac. R. Co., 66 Wash. 337, 119 Pac. 810; State v. Hodoff, 88 Wash. 413, 153 Pac. 377.

CHAPTER IX.

JUDGMENTS IN GENERAL.

§ 404. Judgment, Defined.

A judgment is the final determination of the rights of the parties in the action. [L. '54, p. 171, § 220; Cd. '81, § 283; 2 H. C., § 406.]

See supra, § 278, judgment on pleadings for want of reply.

Cited in 25 Wash. 656; 31 Wash. 186; 53 Wash. 427; 74 Wash. 480.

NATURE AND ESSENTIALS IN GENERAL—Authority of Court or Other Tribunal—In General: See Remington's Digest, Judgm., § 1; Kalb v. German Sav. & Loan Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397.

A justice's announcement of judgment for the plaintiff at the close of the trial is the rendition of judgment under this section: Mundy v. Kern, 74 Wash. 477, 133 Pac. 1035.

Death of Party Before Judgment: See Remington's Digest, Judgm., § 3; Allen v.

Peterson, 38 Wash. 599, 80 Pac. 849; Picardo v. Peck, 95 Wash. 474, 164 Pac. 65.

Action or Other Formal Proceeding: See Remington's Digest, Judgm., § 4; State ex rel. Martin v. Pendergast, 39 Wash. 132, 81 Pac. 324.

Jurisdiction of Cause of Action: See Remington's Digest, Judgm., § 5; Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; Trumbull v. Jefferson County, 37 Wash. 604, 79 Pac. 1105.

Jurisdiction of the Person: See Remington's Digest, Judgm., § 6; Madison v. Madison, 1 W. T. 60; Weisbach v. Arnold, 3 W. T. 111, 13 Pac. 417; Nelfelder v.

German Am. Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287; *Stalleup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207.

Process or Notice to Sustain Judgment: See *Remington's Digest*, Judgm., § 7; *McCoy v. Bell*, 1 Wash. 504, 20 Pac. 595; *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477; *State ex rel. Boyd v. Superior Court*, 6 Wash. 352, 33 Pac. 827; *Osborne & Co. v. Columbia County etc. Corporation*, 9 Wash. 666, 38 Pac. 160; *State ex rel. Nolte v. Superior Court*, 15 Wash. 500, 46 Pac. 1031; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Jones v. Seattle Brick & Tile Co.*, 56 Wash. 166, 105 Pac. 238; *Lutkens v. Young*, 63 Wash. 452, 115 Pac. 1038; *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018; *State ex rel. Giles v. French*, 102 Wash. 273, 172 Pac. 1156.

— **Nonresidents:** See *Remington's Digest*, Judgm., § 8; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441; *Howard v. McNaught*, 9 Wash. 355, 37 Pac. 455, 43 Am. St. Rep. 837; *Cosh-Murray Co. v. Tutlich*, 10 Wash. 449, 38 Pac. 1134.

— **Defective Process of Service:** See *Remington's Digest*, Judgm., § 9; *Montgomery v. Manning*, 1 W. T. 434; *Garrison v. Cheeney*, 1 W. T. 489; *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207; *Kalb v. German Sav. & L. Soc.*, 25 Wash. 349, 87 Am. St. Rep. 757, 65 Pac. 559.

Certainty of Determination: See *Remington's Digest*, Judgm., § 11; *Brown, In re*, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540.

Formal Requisites in General: See *Remington's Digest*, Judgm., § 13; *Nesqually Mill Co. v. Taylor*, 1 W. T. 1; *Eakin v. McCraith*, 2 W. T. 112, 3 Pac. 838; *Kilroy v. Mitchell*, 2 Wash. 407, 26 Pac. 865; *Winton Motor Carriage Co. v. Blomberg*, 84 Wash. 451, 147 Pac. 21.

See, also, *Hull v. Crescent Mfg. Co.*, 109 Wash. 129, 186 Pac. 322.

Designation of Amount, Interest and Costs: See *Remington's Digest*, Judgm., §§ 57, 57½; *Huntington v. Blakeney*, 1 W. T. 111; *Western Mill & L. Co. v. Blanchard*, 1 Wash. 230, 23 Pac. 839; *Mason v. McLean*, 6 Wash. 31, 32 Pac. 1006; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348, 33 Pac. 834; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76.

Provisions as to Payment and Enforcement and Alternatives: See *Remington's Digest*, Judgm., § 58; *Allen v. Chambers*, 18 Wash. 341, 51 Pac. 478; *State ex rel. Gordon v. Smith*, 98 Wash. 100, 167 Pac. 91, 169 Pac. 468.

CONFORMITY TO PLEADINGS AND PROOFS—Necessity of Conformity to Pleadings and Proof: See *Remington's Digest*, Judgm., §§ 61—63; *Dexter-Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *State v. Paggett*, 8 Wash. 579, 36 Pac. 487; *Ach v. Carter*, 21 Wash. 140, 57 Pac. 344; *Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106.

Issues Raised by Pleadings: See *Remington's Digest*, Judgm., § 64; *Davis v. Hinchcliffe*, 7 Wash. 199, 34 Pac. 915; *Campbell v. Simpkins*, 10 Wash. 160, 38 Pac. 1039; *American Bldg. & Loan Assn. v. Farmers' Ins. Co.*, 11 Wash. 619, 40 Pac. 125; *State ex rel. Weidert v. Superior Court*, 36 Wash. 81, 78 Pac. 198.

Amount Demanded: See *Remington's Digest*, Judgm., § 65; *King County v. Ferry*, 5 Wash. 536, 32 Pac. 538, 34 Am. St. Rep. 880, 19 L. R. A. 500; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Nelson v. Nelson*, 56 Wash. 571, 106 Pac. 138, 107 Pac. 195.

Pleadings to Sustain Judgment: See *Remington's Digest*, Judgm., § 10; *King v. Ilwaco R. & Nav. Co.*, 1 Wash. 127, 23 Pac. 924; *Snohomish Land Co. v. Blood*, 40 Wash. 626, 82 Pac. 933; *First National Bank v. Dudley*, 80 Wash. 376, 141 Pac. 884.

CONSTRUCTION AND OPERATION, IN GENERAL—Application of General Rules of Construction: See *Remington's Digest*, Judgm., § 165; *Seattle v. Whitworth*, 18 Wash. 126, 51 Pac. 345.

See, also, *Gordon v. Hillman*, 109 Wash. 223, 186 Pac. 651.

Recitals: See *Remington's Digest*, Judgm., § 165-1; *Gould v. Austin*, 52 Wash. 457, 100 Pac. 1029.

Construction With Reference to Decision: See *Remington's Digest*, Judgm., § 166; *State ex rel. Jensen v. Bell*, 34 Wash. 185, 75 Pac. 641.

Amount: See *Remington's Digest*, Judgm., § 169; *Roeder v. Brown*, 1 W. T. 112; *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877; *Fairhaven Land Co. v. Jordan*, 6 Wash. 551, 34 Pac. 142; *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348.

Operation and Effect of Recitals of Jurisdictional Facts: See *Remington's Digest*, Judgm., § 171; *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Ballard v. Way*, 34 Wash. 116, 74 Pac. 1067, 101 Am. St.

Rep. 993; *Nolan v. Arnott*, 36 Wash. 101, 78 Pac. 463; *French v. Ajax Oil & Dev. Co.*, 44 Wash. 305, 697, 87 Pac. 359.

For text treatment of "Judgments," see 15 B. C. L. 554.

§ 405. Order and Motion, Defined.

Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order. An application for an order is a motion. [L. '97, p. 10, § 1.]

Cited in 23 Wash. 249; 25 Wash. 656; 31 Wash. 186.

Application for Judgment: See Remington's Digest, Judgm., § 56; *Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161.

Judgment Distinguished from Rule or Order: See Remington's Digest, Judgm., § 12; *Spokane & Idaho Lumber Co. v. Stanley*, 25 Wash. 653, 66 Pac. 92.

Necessity of Motions for Purposes of

Review: See Remington's Digest, App. & E., § 163; *Rockford Watch Co. v. Rumpf*, 12 Wash. 647, 42 Pac. 213; *Osten v. Winehill*, 10 Wash. 333, 38 Pac. 1123; *Wilson v. Martin*, 43 Wash. 95, 86 Pac. 205, 10 Ann. Cas. 37.

What constitutes order of court. Ann. Cas. 1917C, 1041.

What entry or record is necessary to complete order of court. 28 L. R. A. 621.

§ 406. Judgment for or Against Any of the Parties.

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. [L. '54, p. 171, § 221; Cd. '81, § 284; 2 H. C., § 407.]

Cited in 11 Wash. 563, 564; 49 Wash. 407; 63 Wash. 89, 92; 70 Wash. 255; 83 Wash. 176; 94 Wash. 265; 98 Wash. 619.

PARTIES—Judgment Against One or More Coparties—Action for Tort: See Remington's Digest, Judgm., § 59; *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743.

What would not be a misjoinder of defendants, in view of this section: *Lebovitz v. Cogswell*, 83 Wash. 174, 145 Pac. 212; *Huxtable v. Berg*, 98 Wash. 616, 168 Pac. 187.

Parties Liable—In General: See Remington's Digest, Judgm., § 167; *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855; *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012; *Schroeder v. Hotel Commercial Co.*, 84 Wash. 685, 147 Pac. 417.

Relief as Between Codefendants: See Remington's Digest, Judgm., § 55; *Jones v. Sander*, 2 Wash. 329, 26 Pac. 224.

See, also, *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189; *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

COLLATERAL ATTACK—JUDGMENTS IMPEACHABLE COLLATERALLY—Judgments Presumed Valid in General: See Remington's Digest, Judgm., § 143; *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205; *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; *State ex rel. State Ins. Co. v. Superior Court*,

14 Wash. 203, 44 Pac. 131; *Kalb v. German Sav. & Loan Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; *Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064; *Collett v. Northern Pac. R. Co.*, 23 Wash. 600, 63 Pac. 225; *Jorgenson v. Winter*, 62 Wash. 573, 125 Pac. 957; *Phillips v. Thompson*, 73 Wash. 78, 131 Pac. 461, Ann. Cas. 1914D, 672.

Courts or Other Tribunals Rendering Judgment—Concurrent or Co-ordinate Jurisdiction: See Remington's Digest, Judgm., § 144; *Case Threshing Machine Co. v. Sires*, 21 Wash. 322, 58 Pac. 209; *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433; *Doble v. State*, 95 Wash. 62, 163 Pac. 37; *Rowe v. Silbaugh*, 96 Wash. 138, 164 Pac. 923.

— **Probate Jurisdiction:** See Remington's Digest, Judgm., § 145; *Scott v. McNeal*, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240.

— **Appellate Courts:** See Remington's Digest, Judgm., § 146; *Morrow v. Moran*, 5 Wash. 692, 21 Pac. 770.

Nature of Action or Other Proceeding: See Remington's Digest, Judgm., § 147; *Pennsylvania Mutual Life Ins. Co. v. Fife*, 15 Wash. 605, 47 Pac. 27; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240.

Judgment by Default: See Remington's Digest, Judgm., § 148; *Morrison v. Berlin*, 37 Wash. 600, 79 Pac. 1114; *Hayworth v.*

McDonald, 67 Wash. 496, 121 Pac. 984; Benjamin v. Ernst, 83 Wash. 59, 145 Pac. 79.

Judgment on Motion: See Remington's Digest, Judgm., § 149; Sullivan's Estate, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895.

Judgment Void on Its Face: See Remington's Digest, Judgm., § 150; State ex rel. Summerfield v. Tyler, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207; Yamashita, In re, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860, 59 L. R. A. 671.

GROUND—Nature of Defects or Objections: See Remington's Digest, Judgm., § 151; Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

Insufficiency or Illegality of Cause of Action: See Remington's Digest, Judgm., § 152; Dubuque v. Stich, 16 Wash. 641, 48 Pac. 344; State v. Washington Dredging etc. Co., 43 Wash. 508, 86 Pac. 936.

Want of Jurisdiction—Want of or Defects in Process, Service or Notice: See Remington's Digest, Judgm., § 153; Munch v. McLaren, 9 Wash. 676, 38 Pac. 205; Kalb v. German Sav. & Loan Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Tilton v. O'Shea, 31 Wash. 513, 72 Pac. 106; Seattle & Northern R. Co. v. Bowman, 53 Wash. 416, 102 Pac. 27; Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005.

See, also, Schmelling v. Hoffman, 111 Wash. 408, 191 Pac. 618.

Right of Third Persons to Impeach Judgment: See Remington's Digest, Judgm., § 154; Wick v. Rea, 54 Wash. 424, 103 Pac. 462; Holly v. Munro, 55 Wash. 311, 104 Pac. 508, 133 Am. St. Rep. 1028.

Presumptions as to Process or Notice and Service: See Remington's Digest, Judgm., § 155; Kalb v. German Sav. & Loan Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73; State ex rel. Pagett v. Superior Court, 47 Wash. 11, 91 Pac. 241; Merz v. Mehner, 57 Wash. 324, 106 Pac. 1118.

Effect of Judgment Record or Recitals Therein: See Remington's Digest, Judgm., § 156; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Ballard v. Way, 34 Wash. 116, 74 Pac. 1067, 101 Am. St. Rep. 993; Nolan v. Arnot, 36 Wash. 101, 78 Pac. 463; State ex rel. Le Brook v. Wheeler, 43 Wash. 183, 86 Pac. 394; Bauer v. Widholm, 49 Wash. 310, 95 Pac. 277; Holly v. Monro, 55 Wash. 311, 104 Pac. 508, 133 Am. St. Rep. 1028; Teynor

v. Heible, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033.

Extrinsic Evidence as to Jurisdictional Facts: See Remington's Digest, Judgm., § 157; Dolan v. Jones, 37 Wash. 176, 79 Pac. 640; Waterman v. Bash, 46 Wash. 212, 89 Pac. 556; Gould v. White, 54 Wash. 394, 103 Pac. 460; Hembree v. McFarland, 55 Wash. 605, 104 Pac. 837; Graver v. Mossbach, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016.

Errors and Irregularities—Defects and Objections as to Pleadings: See Remington's Digest, Judgm., § 158; Baldwin v. Baer, 10 Wash. 414, 39 Pac. 117; Christofferson v. Pfennig, 16 Wash. 491, 48 Pac. 264; Stern v. State Board of Dental Examiners, 50 Wash. 100, 96 Pac. 693.

Irregularities in Proceedings: See Remington's Digest, Judgm., § 159; McCoy v. Ayres, 2 W. T. 203, 5 Pac. 843; Tacoma Grocery Co. v. Draham, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907; Baldwin v. Baer, 10 Wash. 414, 39 Pac. 117; Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054; Pollack v. Horn, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66; Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064.

Defects in the Entry or Form of Judgment: See Remington's Digest, Judgm., § 160; Munch v. McLaren, 9 Wash. 676, 38 Pac. 205; Belles v. Miller, 10 Wash. 259, 38 Pac. 1050.

Fraud or Collusion as Against Creditors: See Remington's Digest, Judgm., § 161; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757.

Matters Available or Questions Presented in Original Action: See Remington's Digest, Judgm., § 162; Budlong v. Budlong, 32 Wash. 672, 73 Pac. 783; State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

PROCEEDINGS—Collateral Nature of Proceeding in General: See Remington's Digest, Judgm., § 163; State ex rel. Boyd v. Superior Court, 6 Wash. 352, 33 Pac. 827; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862; Sturgis v. Dart, 23 Wash. 244, 62 Pac. 858; Dane v. Daniel, 28 Wash. 155, 88 Pac. 446; Kalb v. German Sav. & Loan Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Northwestern & P. H. Band v. Ridpath, 29 Wash. 687, 70 Pac. 139; Donaldson v. Winningham, 48 Wash. 374, 93 Pac. 534, 125 Am. St. Rep. 937; Noble v. Aune, 50 Wash. 73, 96 Pac. 688; Magee v. Big Bend Land Co., 51 Wash. 406, 99 Pac. 16; McLiesh v. Ball, 58 Wash. 690, 109 Pac. 209, 137 Am. St. Rep. 1087.

Fraud—Defects in service of process—Pleading—Designation of answer: Schmel-

ling v. Hoffman, 111 Wash. 408, 191 Pac. 618.

Proceedings to Prevent Enforcement of Judgment: See Remington's Digest, Judgm., § 164; Bowman v. McGregor, 6 Wash. 118, 32 Pac. 1059; Quinby v. Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899; McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764; Cochrane v. Van De Vanter, 13 Wash. 323, 43 Pac. 42.

CONCLUSIVENESS OF ADJUDICATION—JUDGMENTS CONCLUSIVE IN GENERAL—Nature and Requisites of Former Adjudication as Ground of Estoppel in General: See Remington's Digest, Judgm., § 172; Dawson v. Baum, 3 W. T. 464, 19 Pac. 46; Davis v. Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526; Dawson v. Carstens, 98 Wash. 96, 167 Pac. 86.

Courts or Other Tribunals Rendering Judgment—Probate Jurisdiction: See Remington's Digest, Judgm., § 173; Webster v. Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1086; Nash v. Wakefield, 30 Wash. 581, 71 Pac. 35; Meeker v. Winyer, 48 Wash. 27, 92 Pac. 883; McDowell v. Beckman, 72 Wash. 224, 130 Pac. 350; Burke v. Bladine, 99 Wash. 383, 169 Pac. 811.

— **Judges and Judicial Officers:** See Remington's Digest, Judgm., § 174; Graham, In re, 7 Wash. 237, 34 Pac. 931.

— **Appellate Courts:** See Remington's Digest, Judgm., § 175; Parke v. Seattle, 8 Wash. 78, 35 Pac. 594; Northern Pac. Lumber etc. Co. v. Kerron, 5 Wash. 214, 31 Pac. 595; Hughes v. Bravinder, 14 Wash. 304, 44 Pac. 530; Richardson v. Carbon Hill Coal Co., 18 Wash. 368, 51 Pac. 402, 1046; Wilkes v. Davis, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113; Dennis v. Kass & Co., 13 Wash. 137, 42 Pac. 540; Tibbals v. Mt. Olympus Water Co., 16 Wash. 480, 48 Pac. 236; Taake v. Seattle, 18 Wash. 178, 51 Pac. 362; Smith v. Seattle, 20 Wash. 613, 56 Pac. 389; State v. Boyce, 25 Wash. 422, 65 Pac. 763; State ex rel. Holgate v. Superior Court, 19 Wash. 114, 52 Pac. 522; Miller v. Lake Irr. Co., 33 Wash. 132, 74 Pac. 61; Furth v. Snell, 13 Wash. 660, 43 Pac. 935; Taylor v. Gale, 24 Wash. 336, 64 Pac. 533; Payette v. Ferrier, 31 Wash. 43, 71 Pac. 546; Crooker v. Pacific Lounge etc. Co., 34 Wash. 191, 75 Pac. 632; Clarke v. Eltinge, 34 Wash. 323, 75 Pac. 866.

— **State Courts and United States Courts:** See Remington's Digest, Judgm., § 176; MacDonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Hennessy v. Tacoma Smelting etc. Co., 33 Wash. 423, 74 Pac. 584.

Nature of Action or Other Proceeding—In General: See Remington's Digest,

Judgm., § 177; Traders' Nat. Bank of Spokane v. Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; Larsen v. Winder, 20 Wash. 419, 55 Pac. 563.

— **Actions at Law and Suits in Equity:** See Remington's Digest, Judgm., § 178; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935.

— **Special Proceedings Other Than Actions:** See Remington's Digest, Judgm., § 179; Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027; Drasdo v. Jobst, 39 Wash. 425, 81 Pac. 857.

Nature, Rendition and Form of Judgment in General: See Remington's Digest, Judgm., § 180; Kellogg v. Maddocks, 1 W. T. 407; Wadhams v. Page, 6 Wash. 103, 32 Pac. 1068; Magnus v. Woolery, 14 Wash. 43, 44 Pac. 130; Belt v. Washington Water P. Co., 24 Wash. 387, 64 Pac. 525; Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

Necessity for Decision on Merits: See Remington's Digest, Judgm., § 181; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Dunsmuir v. Port Angeles Gas etc. Co., 30 Wash. 586, 71 Pac. 9.

— **What Constitutes Judgment on the Merits:** See Remington's Digest, Judgm., § 182; Cloud v. Lawrence, 12 Wash. 163, 40 Pac. 741; State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; Magee v. Risley, 82 Wash. 178, 143 Pac. 1088; State ex rel. Prentice v. Superior Court, 86 Wash. 90, 149 Pac. 321; State ex rel. Bradway v. De Mattos, 88 Wash. 35, 152 Pac. 721.

Finality of Determination: See Remington's Digest, Judgm., § 183; Chezum v. Claypool, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955; Wilson v. Seattle Dry Dock etc. Co., 26 Wash. 297, 66 Pac. 384; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Childs v. Blethen, 40 Wash. 340, 82 Pac. 405; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777.

See, also, Diamond Ice & Storage Co. v. Klock Produce Co., 110 Wash. 683, 189 Pac. 257.

Judgment by Default: See Remington's Digest, Judgm., § 185; Seattle Nat. Bank v. School District No. 40, 20 Wash. 368, 55 Pac. 317; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571.

Judgment on Motion or Summary Proceedings in General: See Remington's Digest, Judgm., § 186; Hadlan v. Ott, 2 W. T. 165, 3 Pac. 826; Spokane Merchants' Assn. v. First Nat. Bank of Colville, 86 Wash. 367, 150 Pac. 434, L. R. A. 1918A, 323; Paich v. Northern Pac. R. Co., 88 Wash. 163, 152 Pac. 719.

Judgment by Confession or on Consent or Offer: See Remington's Digest, Judgm., § 186-1; State Medical Examining Board v. Stewart, 46 Wash. 79, 89 Pac. 475, 123

Am. St. Rep. 915, 13 Ann. Cas. 653, 11 L. R. A. (N. S.) 557; Nebraska Inv. Co. v. Corlett, 102 Wash. 151, 172 Pac. 851.

Judgment on Discontinuance, Dismissal, or Nonsuit: See Remington's Digest, Judgm., § 187; Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Von Sobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788; Union Bank v. Nelson, 32 Wash. 208, 73 Pac. 373; Lee v. Pasco Theater Co., 93 Wash. 204, 160 Pac. 435.

— **Voluntary:** See Remington's Digest, Judgm., § 187-1; Budlong v. Budlong, 48 Wash. 645, 94 Pac. 478; Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082.

— **Involuntary:** See Remington's Digest, Judgm., § 187-2; Krug v. Hendricks, 54 Wash. 209, 102 Pac. 1049; State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 Pac. 427; Michel v. White, 64 Wash. 341, 116 Pac. 860; Hays v. Mercantile Investment Co., 73 Wash. 586, 132 Pac. 406.

— **Merits for Controversy in General:** See Remington's Digest, Judgm., § 188; Bartelt v. Seehorn, 25 Wash. 261, 65 Pac. 185; State Medical Examining Board v. Stewart, 46 Wash. 79, 89 Pac. 475, 123 Am. St. Rep. 915, 13 Ann. Cas. 653, 11 L. R. A. (N. S.) 557; McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 Pac. 237; Nunn v. Mather, 60 Wash. 484, 111 Pac. 566; McKim v. Porter, 60 Wash. 270, 110 Pac. 1073; Alberg v. Campbell Lumber Co., 60 Wash. 533, 111 Pac. 775; Morgan v. Hart, 84 Wash. 496, 147 Pac. 26.

Judgment on Demurrer: See Remington's Digest, Judgm., § 189; State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107; Smith v. Seattle, 20 Wash. 613, 56 Pac. 389; State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 Pac. 427.

Decision or Findings of Court Without Judgment: See Remington's Digest, Judgm., § 190; Wilson v. Hubbard, 39 Wash. 671, 82 Pac. 154; Westmoreland Co. v. Howell, 62 Wash. 146, 113 Pac. 281.

Erroneous or Irregular Judgment: See Remington's Digest, Judgm., § 191; Parker v. Dacres, 1 Wash. 190, 24 Pac. 192; Goodale Phonograph Co. v. Valentine, 69 Wash. 263, 124 Pac. 691.

Pendency of Motion for New Trial, and Grant Thereof: See Remington's Digest, Judgm., § 192; State v. Largent, 9 Wash. 691, 38 Pac. 751.

Pendency of Appeal: See Remington's Digest, Judgm., § 193; Hennessy v. Tacoma Smelting etc. Co., 33 Wash. 423, 74 Pac. 584; Kaufman v. Klain, 69 Wash. 113, 124 Pac. 391; State ex rel. Keasal

v. Superior Court, 76 Wash. 291, 136 Pac. 147.

Judgment Vacated or Reversed: See Remington's Digest, Judgm., § 194; Barto v. Nix, 15 Wash. 563, 46 Pac. 1033; Fidelity & Deposit Co. v. Seattle, Renton etc. R. Co., 50 Wash. 391, 97 Pac. 453.

PERSONS CONCLUDED—Identity of Persons in General: See Remington's Digest, Judgm., § 195; De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 406; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520; Burkman v. Jamieson, 25 Wash. 606, 66 Pac. 48; Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 Pac. 775; Burgess v. Path, 79 Wash. 298, 140 Pac. 351; Assessment for Local Improvement Sewer District No. 1 of Chehalis, In re, 84 Wash. 565, 147 Pac. 199; Hart v. Bogle, 85 Wash. 125, 152 Pac. 1010.

Parties of Record—In General: See Remington's Digest, Judgm., § 196; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; Nolan v. McNamee, 82 Wash. 585, 144 Pac. 904; Morgan v. Hart, 84 Wash. 496, 147 Pac. 26; Hubbell v. Forsyth, 96 Wash. 613, 165 Pac. 481; Gray v. Hickey, 97 Wash. 278, 166 Pac. 625.

— **Interveners and Claimants:** See Remington's Digest, Judgm., § 197; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107; Simon Piano Co. v. Fairfield, 103 Wash. 206, 173 Pac. 457.

Persons Participating in or Promoting Action or Defense: See Remington's Digest, Judgm., § 198; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Shoemaker v. Finlayson, 22 Wash. 12, 60 Pac. 50; Schroeder v. Hotel Commercial Co., 84 Wash. 685, 147 Pac. 417; Allen v. Allen, 96 Wash. 689, 165 Pac. 889.

Corporations and Corporate Officers and Stockholders: See Remington's Digest, Judgm., § 198-1; American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282.

Nature of Estate or Interest in Subject Matter: See Remington's Digest, Judgm., § 199; Johnson v. Shuey, 40 Wash. 22, 82 Pac. 123; Broderick v. Puget S. Tr. L. & P. Co., 86 Wash. 399, 150 Pac. 616.

Privity in General: See Remington's Digest, Judgm., § 200; Eakin v. McCraith, 2 W. T. 112, 3 Pac. 838; Bartlett Estate Co. v. Fairhaven Land Co., 56 Wash. 434, 105 Pac. 846; Siegley v. Nakata, 101 Wash. 73, 172 Pac. 203.

See, also, Saar v. Weeks, 105 Wash. 628, 178 Pac. 819.

Successive Estates or Interests: See Remington's Digest, Judgm., § 201; Rochford v. Doty, 37 Wash. 232, 79 Pac. 782; Delacey v. Commercial Trust Co., 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112; Rader v. Sander, 100 Wash. 403, 171 Pac. 257.

ling v. Hoffman, 111 Wash. 408, 191 Pac. 618.

Proceedings to Prevent Enforcement of Judgment: See Remington's Digest, Judgm., § 164; Bowman v. McGregor, 6 Wash. 118, 32 Pac. 1059; Quinby v. Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899; McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764; Cochrane v. Van De Vanter, 13 Wash. 323, 43 Pac. 42.

CONCLUSIVENESS OF ADJUDICATION—JUDGMENTS CONCLUSIVE IN GENERAL—Nature and Requisites of Former Adjudication as Ground of Estoppel in General: See Remington's Digest, Judgm., § 172; Dawson v. Baum, 3 W. T. 464, 19 Pac. 46; Davis v. Seattle Nat. Bank, 19 Wash. 65, 52 Pac. 526; Dawson v. Carstens, 98 Wash. 96, 167 Pac. 86.

Courts or Other Tribunals Rendering Judgment—Probate Jurisdiction: See Remington's Digest, Judgm., § 173; Webster v. Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1086; Nash v. Wakefield, 30 Wash. 581, 71 Pac. 35; Meeker v. Winyer, 48 Wash. 27, 92 Pac. 883; McDowell v. Beckman, 72 Wash. 224, 130 Pac. 350; Burke v. Bladine, 99 Wash. 383, 169 Pac. 811.

— **Judges and Judicial Officers:** See Remington's Digest, Judgm., § 174; Graham, In re, 7 Wash. 237, 34 Pac. 931.

— **Appellate Courts:** See Remington's Digest, Judgm., § 175; Parke v. Seattle, 8 Wash. 78, 35 Pac. 594; Northern Pac. Lumber etc. Co. v. Kerron, 5 Wash. 214, 31 Pac. 595; Hughes v. Bravinder, 14 Wash. 304, 44 Pac. 530; Richardson v. Carbon Hill Coal Co., 18 Wash. 368, 51 Pac. 402, 1046; Wilkes v. Davis, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113; Dennis v. Kass & Co., 13 Wash. 137, 42 Pac. 540; Tibbals v. Mt. Olympus Water Co., 16 Wash. 480, 48 Pac. 236; Taake v. Seattle, 18 Wash. 178, 51 Pac. 362; Smith v. Seattle, 20 Wash. 613, 56 Pac. 389; State v. Boyce, 25 Wash. 422, 65 Pac. 763; State ex rel. Holgate v. Superior Court, 19 Wash. 114, 52 Pac. 522; Miller v. Lake Irr. Co., 33 Wash. 132, 74 Pac. 61; Furth v. Snell, 13 Wash. 660, 43 Pac. 935; Taylor v. Gale, 24 Wash. 336, 64 Pac. 533; Payette v. Ferrier, 31 Wash. 43, 71 Pac. 546; Crooker v. Pacific Lounge etc. Co., 34 Wash. 191, 75 Pac. 632; Clarke v. Eltinge, 34 Wash. 323, 75 Pac. 866.

— **State Courts and United States Courts:** See Remington's Digest, Judgm., § 176; MacDonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Hennessy v. Tacoma Smelting etc. Co., 33 Wash. 423, 74 Pac. 584.

Nature of Action or Other Proceeding—In General: See Remington's Digest,

Judgm., § 177; Traders' Nat. Bank of Spokane v. Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; Larsen v. Winder, 20 Wash. 419, 55 Pac. 563.

— **Actions at Law and Suits in Equity:** See Remington's Digest, Judgm., § 178; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935.

— **Special Proceedings Other Than Actions:** See Remington's Digest, Judgm., § 179; Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027; Drasdo v. Jobst, 39 Wash. 425, 81 Pac. 857.

Nature, Rendition and Form of Judgment in General: See Remington's Digest, Judgm., § 180; Kellogg v. Maddocks, 1 W. T. 407; Wadhams v. Page, 6 Wash. 103, 32 Pac. 1068; Magnus v. Woolery, 14 Wash. 43, 44 Pac. 130; Belt v. Washington Water P. Co., 24 Wash. 387, 64 Pac. 525; Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

Necessity for Decision on Merits: See Remington's Digest, Judgm., § 181; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Dunsmuir v. Port Angeles Gas etc. Co., 30 Wash. 586, 71 Pac. 9.

— **What Constitutes Judgment on the Merits:** See Remington's Digest, Judgm., § 182; Cloud v. Lawrence, 12 Wash. 163, 40 Pac. 741; State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; Magee v. Risley, 82 Wash. 178, 143 Pac. 1088; State ex rel. Prentice v. Superior Court, 86 Wash. 90, 149 Pac. 321; State ex rel. Bradway v. De Mattos, 88 Wash. 35, 152 Pac. 721.

Finality of Determination: See Remington's Digest, Judgm., § 183; Chezum v. Claypool, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955; Wilson v. Seattle Dry Dock etc. Co., 26 Wash. 297, 66 Pac. 384; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Childs v. Blethen, 40 Wash. 340, 82 Pac. 405; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777.

See, also, Diamond Ice & Storage Co. v. Klock Produce Co., 110 Wash. 683, 189 Pac. 257.

Judgment by Default: See Remington's Digest, Judgm., § 185; Seattle Nat. Bank v. School District No. 40, 20 Wash. 368, 55 Pac. 317; McGee v. Wincholt, 23 Wash. 748, 63 Pac. 571.

Judgment on Motion or Summary Proceedings in General: See Remington's Digest, Judgm., § 186; Hadlan v. Ott, 2 W. T. 165, 3 Pac. 826; Spokane Merchants' Assn. v. First Nat. Bank of Colville, 86 Wash. 367, 150 Pac. 434, L. R. A. 1915A, 323; Paich v. Northern Pac. R. Co., 88 Wash. 163, 152 Pac. 719.

Judgment by Confession or on Consent or Offer: See Remington's Digest, Judgm., § 186-1; State Medical Examining Board v. Stewart, 46 Wash. 79, 89 Pac. 475, 123

Am. St. Rep. 915, 13 Ann. Cas. 653, 11 L. R. A. (N. S.) 557; Nebraska Inv. Co. v. Corlett, 102 Wash. 151, 172 Pac. 851.

Judgment on Discontinuance, Dismissal, or Nonsuit: See Remington's Digest, Judgm., § 187; Bates v. Drake, 28 Wash. 447, 68 Pac. 961; Von Sobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788; Union Bank v. Nelson, 32 Wash. 208, 73 Pac. 373; Lee v. Pasco Theater Co., 93 Wash. 204, 160 Pac. 435.

— **Voluntary:** See Remington's Digest, Judgm., § 187-1; Budlong v. Budlong, 48 Wash. 645, 94 Pac. 478; Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082.

— **Involuntary:** See Remington's Digest, Judgm., § 187-2; Krug v. Hendricks, 54 Wash. 209, 102 Pac. 1049; State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 Pac. 427; Michel v. White, 64 Wash. 341, 116 Pac. 860; Hays v. Mercantile Investment Co., 73 Wash. 586, 132 Pac. 406.

— **Merits for Controversy in General:** See Remington's Digest, Judgm., § 188; Bartelt v. Seehorn, 25 Wash. 261, 65 Pac. 185; State Medical Examining Board v. Stewart, 46 Wash. 79, 89 Pac. 475, 123 Am. St. Rep. 915, 13 Ann. Cas. 653, 11 L. R. A. (N. S.) 557; McGuire v. Bryant Lumber & Shingle Mill Co., 53 Wash. 425, 102 Pac. 237; Nunn v. Mather, 60 Wash. 484, 111 Pac. 566; McKim v. Porter, 60 Wash. 270, 110 Pac. 1073; Alberg v. Campbell Lumber Co., 60 Wash. 333, 111 Pac. 775; Morgan v. Hart, 84 Wash. 496, 147 Pac. 26.

Judgment on Demurrer: See Remington's Digest, Judgm., § 189; State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107; Smith v. Seattle, 20 Wash. 613, 56 Pac. 389; State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 Pac. 427.

Decision or Findings of Court Without Judgment: See Remington's Digest, Judgm., § 190; Wilson v. Hubbard, 39 Wash. 671, 82 Pac. 154; Westmoreland Co. v. Howell, 62 Wash. 146, 113 Pac. 281.

Erroneous or Irregular Judgment: See Remington's Digest, Judgm., § 191; Parker v. Dacres, 1 Wash. 190, 24 Pac. 192; Goodale Phonograph Co. v. Valentine, 69 Wash. 263, 124 Pac. 691.

Pendency of Motion for New Trial, and Grant Thereof: See Remington's Digest, Judgm., § 192; State v. Largent, 9 Wash. 691, 38 Pac. 751.

Pendency of Appeal: See Remington's Digest, Judgm., § 193; Hennessy v. Tacoma Smelting etc. Co., 33 Wash. 423, 74 Pac. 584; Kaufman v. Klain, 69 Wash. 113, 124 Pac. 391; State ex rel. Keasal

v. Superior Court, 76 Wash. 291, 136 Pac. 147.

Judgment Vacated or Reversed: See Remington's Digest, Judgm., § 194; Barto v. Nix, 15 Wash. 563, 46 Pac. 1033; Fidelity & Deposit Co. v. Seattle, Renton etc. R. Co., 50 Wash. 391, 97 Pac. 453.

PERSONS CONCLUDED—Identity of Persons in General: See Remington's Digest, Judgm., § 195; De Mattos v. Jordan, 15 Wash. 378, 46 Pac. 406; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520; Burkman v. Jamieson, 25 Wash. 606, 66 Pac. 48; Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 80 Pac. 775; Burgess v. Path, 79 Wash. 298, 140 Pac. 351; Assessment for Local Improvement Sewer District No. 1 of Chehalis, In re, 84 Wash. 565, 147 Pac. 199; Hart v. Bogle, 88 Wash. 125, 152 Pac. 1010.

Parties of Record—In General: See Remington's Digest, Judgm., § 196; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; Nolan v. McNamee, 82 Wash. 585, 144 Pac. 904; Morgan v. Hart, 84 Wash. 496, 147 Pac. 26; Hubbell v. Forsyth, 96 Wash. 613, 165 Pac. 481; Gray v. Hickey, 97 Wash. 278, 166 Pac. 625.

— **Interveners and Claimants:** See Remington's Digest, Judgm., § 197; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107; Simon Piano Co. v. Fairfield, 103 Wash. 206, 173 Pac. 457.

Persons Participating in or Promoting Action or Defense: See Remington's Digest, Judgm., § 198; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Shoemaker v. Finlayson, 22 Wash. 12, 60 Pac. 50; Schroeder v. Hotel Commercial Co., 84 Wash. 685, 147 Pac. 417; Allen v. Allen, 96 Wash. 689, 165 Pac. 889.

Corporations and Corporate Officers and Stockholders: See Remington's Digest, Judgm., § 198-1; American Bonding Co. v. Loeb, 47 Wash. 447, 92 Pac. 282.

Nature of Estate or Interest in Subject Matter: See Remington's Digest, Judgm., § 199; Johnson v. Shuey, 40 Wash. 22, 82 Pac. 123; Broderick v. Puget S. Tr. L. & P. Co., 86 Wash. 399, 150 Pac. 616.

Privity in General: See Remington's Digest, Judgm., § 200; Eakin v. McCraith, 2 W. T. 112, 3 Pac. 838; Bartlett Estate Co. v. Fairhaven Land Co., 56 Wash. 434, 105 Pac. 846; Siegley v. Nakata, 101 Wash. 73, 172 Pac. 203.

See, also, Saar v. Weeks, 105 Wash. 628, 178 Pac. 819.

Successive Estates or Interests: See Remington's Digest, Judgm., § 201; Rochford v. Doty, 37 Wash. 232, 79 Pac. 782; Delacey v. Commercial Trust Co., 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112; Rader v. Sander, 100 Wash. 403, 171 Pac. 257.

Vendor and Purchaser: See Remington's Digest, Judgm., § 202; Eakin v. McCraith, 2 W. T. 112, 3 Pac. 838; Wilkes v. Davies, 8 Wash. 112, 85 Pac. 611, 23 L. R. A. 103; State ex rel. Olding v. Stampfly, 69 Wash. 368, 125 Pac. 148; Fleming v. Langley, 86 Wash. 346, 150 Pac. 418.

Assignor and Assignee: See Remington's Digest, Judgm., § 203; Isensee v. Austin, 15 Wash. 352, 46 Pac. 394; Davis v. Seattle National Bank, 19 Wash. 65, 52 Pac. 526.

Executors or Administrators and Devisees: See Remington's Digest, Judgm., § 204; Hill v. Lowman, 15 Wash. 503, 46 Pac. 1042.

Trustee and Cestui Que Trust: See Remington's Digest, Judgm., § 204-1; Peterson v. Wheeler, 66 Wash. 519, 120 Pac. 83.

Husband and Wife: See Remington's Digest, Judgm., § 205; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Henry v. Yost, 88 Wash. 93, 152 Pac. 714.

Parent and Child: See Remington's Digest, Judgm., § 205-1; Harris v. Puget Sound Elec. R., 52 Wash. 299, 100 Pac. 841; Flesscher v. Carstens Packing Co., 96 Wash. 505, 165 Pac. 397.

Master and Servant: See Remington's Digest, Judgm., § 206; Casey v. Northern Pac. R. Co., 15 Wash. 450, 48 Pac. 53; Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649.

Parties to Bills or Notes: See Remington's Digest, Judgm., § 207; Commercial Bank of Tacoma v. Toklas, 21 Wash. 36, 56 Pac. 927; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271; Peterson v. Nichols, 71 Wash. 656, 129 Pac. 373; Petri v. Manny, 99 Wash. 601, 170 Pac. 127.

Persons Primarily or Ultimately Liable—In General: See Remington's Digest, Judgm., § 208; Kibler v. Maryland Casualty Co., 74 Wash. 159, 132 Pac. 878; Mead v. Kalberg, 70 Wash. 517, 127 Pac. 185; Johnson v. Carr, 90 Wash. 106, 155 Pac. 778; Seattle v. Erickson, 99 Wash. 543, 169 Pac. 985; Seattle v. Peterson & Co., 99 Wash. 533, 170 Pac. 140; Larson v. Hodge, 100 Wash. 419, 171 Pac. 251.

See, also, Spokane v. Fisher, 106 Wash. 378, 180 Pac. 139; Alaska Pacific Steamship Co. v. Sperry Flour Co., 107 Wash. 545, 182 Pac. 634, 185 Pac. 583.

— **Notice of Former Action and Opportunity to Defend:** See Remington's Digest, Judgm., § 209; Cullity v. Dorfel, 18 Wash. 122, 50 Pac. 932; Payson v. Jacobs, 38 Wash. 203, 80 Pac. 429; Denny v. Sayward, 10 Wash. 422, 39 Pac. 119; Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; Spokane v. Costello, 33 Wash. 98, 74 Pac. 58; Seattle v. Northern Pac. R. Co., 47 Wash. 552, 92 Pac. 411; Bevan v. Muir, 53 Wash. 54, 101 Pac.

485, 32 L. R. A. (N. S.) 588; National Union Fire Ins. Co. of Pittsburg v. Dickinson, 92 Wash. 230, 159 Pac. 125, Ann. Cas. 1918C, 1042.

See, also, Spokane v. Fisher, 106 Wash. 378, 180 Pac. 139; National Bank of Commerce v. Seattle Nat. Bank, 109 Wash. 312, 187 Pac. 342.

Municipality and Officers, Citizens or Taxpayers: See Remington's Digest, Judgm., § 210; Stallcup v. Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; State ex rel. Porter v. Headlee, 19 Wash. 477, 53 Pac. 948; Waldron v. Snohomish, 41 Wash. 566, 83 Pac. 1106; State ex rel. Forgues v. Superior Court, 70 Wash. 670, 127 Pac. 313; Northern Pac. R. Co. v. Snohomish County, 101 Wash. 686, 172 Pac. 878.

Persons not Parties or Privies—In General: See Remington's Digest, Judgm., § 212; Osborne & Co. v. Columbia etc. Corp., 9 Wash. 666, 38 Pac. 160; Bennett v. Supreme Tent. etc., 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; Stallcup v. Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426; Cullity v. Dorfel, 18 Wash. 122, 50 Pac. 932; Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819; Brier v. Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831; State ex rel. Wolf v. Moore, 16 Wash. 350, 47 Pac. 757; Seavey v. Seattle, 17 Wash. 361, 49 Pac. 517; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; Canada Settlers' L. & T. Co. v. Murray, 20 Wash. 656, 56 Pac. 368; Harvey v. Sparks Bros., 45 Wash. 578, 88 Pac. 1108; Schmidt v. Olympia Light & Power Co., 46 Wash. 360, 90 Pac. 212; Bradley Eng. & Mfg. Co. v. Heyburn, 56 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127; State ex rel. McConihe v. Steiner, 58 Wash. 578, 109 Pac. 57; Coe v. Wormell, 88 Wash. 119, 152 Pac. 716, Ann. Cas. 1917C, 679; Allen v. Allen, 96 Wash. 689, 165 Pac. 889.

— **Witnesses:** See Remington's Digest, Judgm., § 213; Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426; Sackman v. Thomas, 24 Wash. 660, 61 Pac. 819.

CAUSES OF ACTION AND DEFENSES MERGED, BARRED OR CONCLUDED—Nature and Extent of Relief Sought or Granted: See Remington's Digest, Judgm., § 213-1; McPherson Bros. Co. v. Okanogan County, 61 Wash. 239, 112 Pac. 267; Egbers v. Fischer, 73 Wash. 308, 131 Pac. 1128; Loeper v. Loeper, 81 Wash. 454, 142 Pac. 1138.

Splitting Cause of Action—Single and Entire Causes of Action: See Remington's Digest, Judgm., § 213-2; Kline v. Stein, 46 Wash. 546, 90 Pac. 1041, 123 Am. St. Rep. 940; Brice v. Starr (overruled on

rehearing), 90 Wash. 369, 156 Pac. 12; Brice v. Starr, 93 Wash. 501, 161 Pac. 347.

— **Contracts in General:** See Remington's Digest, Judgm., § 213-3; Collins v. Gleason, 47 Wash. 69, 91 Pac. 568; Collins v. Gleason, 47 Wash. 62, 91 Pac. 566, 125 Am. St. Rep. 891; Brechlin v. Night Hawk Min. Co., 49 Wash. 198, 94 Pac. 928, 126 Am. St. Rep. 863.

— **Contracts of Employment:** See Remington's Digest, Judgm., § 213-4; Carmean v. North American Transp. & Trad. Co., 45 Wash. 446, 88 Pac. 834, 122 Am. St. Rep. 930, 13 Ann. Cas. 110, 8 L. R. A. (N. S.) 595; Harstad v. Olson, 57 Wash. 264, 106 Pac. 741.

— **Several Notes or Installments:** See Remington's Digest, Judgm., § 213-4½; State ex rel. Gladwin v. Cheney, 67 Wash. 151, 121 Pac. 48; Davis v. Hibbs, 73 Wash. 315, 131 Pac. 1135.

— **Breaches of Continuing Covenants:** See Remington's Digest, Judgm., § 213-5; Gladden v. Jacobowski, 61 Wash. 242, 112 Pac. 268; Harsin v. Oman, 68 Wash. 281, 123 Pac. 1.

BAR AND MATTERS CONCLUDED—Scope and Extent of Estoppel—Judgment as Evidence of Indebtedness: See Remington's Digest, Judgm., § 214; Stern v. Washington Nat. Bank, 14 Wash. 511, 45 Pac. 37; Lilly v. Eklund, 37 Wash. 532, 79 Pac. 1107; Brehm Lumber Co. v. Niblock, 46 Wash. 180, 89 Pac. 1134.

— **Matters Which Might have been Litigated:** See Remington's Digest, Judgm., § 215; Sayward v. Thayer, 9 Wash. 22, 36 Pac. 966, 38 Pac. 157; Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; Stallcup v. Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; State ex rel. Ledger Publishing Co. v. Gloyd, 14 Wash. 5, 44 Pac. 103; Isensee v. Austin, 15 Wash. 352, 46 Pac. 394; Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398; Dolan v. Scott, 25 Wash. 214, 65 Pac. 190; MacDonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 Pac. 515; Olson v. Title Trust Co., 58 Wash. 599, 109 Pac. 49; Perlus v. Silver, 71 Wash. 338, 128 Pac. 661; Holt Mfg. Co. v. Coss, 78 Wash. 39, 138 Pac. 322; Tacoma Mill Co. v. Northern Pac. R. R. Co., 102 Wash. 95, 172 Pac. 812.

Grounds of Setoff or Counterclaim: See Remington's Digest, Judgm., § 215-1; State ex rel. Cook v. Fairley, 45 Wash. 52, 87 Pac. 1052; Nut House v. Pacific Oil Mills, 102 Wash. 114, 172 Pac. 841; Diamond Ice & Storage Co. v. Klock Produce Co., 103 Wash. 369, 174 Pac. 435.

See, also, State ex rel. Alaska Pacific

Navigation Co. v. Superior Court, 113 Wash. 439, 194 Pac. 412.

Identity of Subject Matter: See Remington's Digest, Judgm., § 216; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373; Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786; Parker v. Galbraith, 46 Wash. 280, 89 Pac. 712; Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 Pac. 21; Morgan v. Hart, 84 Wash. 496, 147 Pac. 26; Kessler v. Seattle, 93 Wash. 192, 160 Pac. 423.

Identity of Causes of Action or Issues in General: See Remington's Digest, Judgm., § 217; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; Ryan v. Summer, 17 Wash. 228, 49 Pac. 487; Fogg v. Hoquiam, 23 Wash. 340, 63 Pac. 234; Spring Hill Irr. Co. v. Lake Irr. Co., 42 Wash. 379, 86 Pac. 6; Carlson v. Curran, 42 Wash. 647, 84 Pac. 627, 6 L. R. A. (N. S.) 260; O'Connor v. Enos, 56 Wash. 448, 105 Pac. 1039; Thompson v. Washington Nat. Bank, 68 Wash. 42, 122 Pac. 606, 39 L. R. A. (N. S.) 972; Morgan v. Hart, 84 Wash. 496, 147 Pac. 26; Denton v. Maple, 92 Wash. 290, 158 Pac. 1001.

— **What Constitutes Identical Causes:** See Remington's Digest, Judgm., § 218; Bruce v. Foley, 18 Wash. 96, 50 Pac. 935; Bird v. Winyer, 44 Wash. 264, 87 Pac. 257, 120 Am. St. Rep. 995; Wheeler v. Aberdeen, 45 Wash. 63, 87 Pac. 1061; Hawkins v. Reber, 81 Wash. 79, 142 Pac. 432; Pugsley v. Glenn, 98 Wash. 570, 168 Pac. 172; Lee v. Ryzek, 103 Wash. 622, 175 Pac. 297.

— **What Constitutes Distinct Causes:** See Remington's Digest, Judgm., § 219; Allen v. Wall, 7 Wash. 316, 35 Pac. 65; Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43; Jones v. Seattle, 23 Wash. 753, 63 Pac. 553; Dunsmuir v. Pt. Angeles etc. P. Co., 30 Wash. 586, 71 Pac. 9; Payette v. Ferrier, 31 Wash. 43, 71 Pac. 546; Carlson v. Curran, 42 Wash. 647, 85 Pac. 627, 6 L. R. A. (N. S.) 260; Chehalis v. Robinson, 87 Wash. 690, 152 Pac. 696; Munson v. Baldwin, 93 Wash. 36, 159 Pac. 1070; Weidlich v. Independent Asphalt Paving Co., 94 Wash. 395, 162 Pac. 541; Craver v. Wehr, 98 Wash. 56, 167 Pac. 98; Diamond Ice & Storage Co. v. Klock Produce Co., 103 Wash. 369, 174 Pac. 435.

See, also, Diamond Ice & Storage Co. v. Klock Produce Co., 110 Wash. 683, 189 Pac. 257.

Successive Causes of Action—Damages and Penalties: See Remington's Digest, Judgm., § 220; Dawson v. Baum, 3 W. T. 464, 19 Pac. 46; Fischer v. Quigley, 8 Wash. 327, 35 Pac. 1071.

— **Continuing Trespasses:** See Remington's Digest, Judgm., § 220-1; Far-

nandis v. Seattle, 95 Wash. 587, 164 Pac. 225.

Extinguishment by One Satisfaction: See Remington's Digest, Judgm., § 221; Dolan v. Scott, 25 Wash. 214, 65 Pac. 190.

Matters in Issue—Matters Actually Litigated and Determined: See Remington's Digest, Judgm., § 222; Sayward v. Thayer, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137; Stern v. Washington Nat. Bank, 14 Wash. 511, 45 Pac. 37; Roberts v. Shelton, S. W. R. Co., 21 Wash. 427, 58 Pac. 576; Lauman v. Hooper, 37 Wash. 382, 79 Pac. 953; Clifford, In re, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. Rep. 819; Vulcan Iron Works v. Kent Lumber Co., 39 Wash. 435, 81 Pac. 913; Schmidt v. Olympia Light & Power Co., 46 Wash. 360, 90 Pac. 212; Dexter Horton Nat. Bank of Seattle v. Washington-Alaska Bank, 86 Wash. 452, 150 Pac. 1176; Calhoun, Denny & Ewing v. Quinlan, 86 Wash. 547, 150 Pac. 1132; Munson v. Baldwin, 88 Wash. 379, 153 Pac. 338; East Hoquiam Co. v. Hoquiam, 90 Wash. 210, 155 Pac. 754; Kuehl v. Edmonds, 91 Wash. 195, 157 Pac. 850; Eggerth v. Spokane, 91 Wash. 221, 157 Pac. 859.

See, also, Colvin v. Clark, 106 Wash. 647, 180 Pac. 878; Womach v. Sandygren, 107 Wash. 80, 180 Pac. 922; White v. Chellew, 108 Wash. 526, 185 Pac. 619; Olsen v. Hagan, 108 Wash. 531, 185 Pac. 578.

— **Demands Within Scope of Issues or Litigation:** See Remington's Digest, Judgm., § 223; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; Achev v. Creech, 21 Wash. 319, 58 Pac. 208; Farwell v. Brisson, 66 Wash. 305, 119 Pac. 814; Aurora Land Co. v. Keegan, 67 Wash. 305, 121 Pac. 469; Mallory v. Olympia, 83 Wash. 499, 145 Pac. 627; Rieger v. Abrams, 98 Wash. 72, 167 Pac. 76, L. R. A. 1918A, 362; Union Central Life Ins. Co. v. Chesterley, 100 Wash. 260, 170 Pac. 558.

— **Matters Withheld or Withdrawn:** See Remington's Digest, Judgm., § 224; Sweeney v. Waterhouse & Co. 43 Wash. 613, 86 Pac. 946.

— **Facts Conceded:** See Remington's Digest, Judgm., § 225; Cloud v. Lawrence, 12 Wash. 163, 40 Pac. 741; Russell v. Blair, 18 Wash. 339, 51 Pac. 477.

Matters in Issue but not Decided. See Remington's Digest, Judgm., § 226; Long v. Eisenbeis, 21 Wash. 23, 56 Pac. 933; Marble Sav. Bank v. Williams, 23 Wash. 766, 63 Pac. 511; Budlong v. Budlong, 32 Wash. 672, 73 Pac. 783; International Development Co. v. Clemans, 66 Wash. 620, 120 Pac. 79; Allen v. Migliavacca Realty Co., 74 Wash. 347, 133 Pac. 580; Andreopoulos v. Peresteredes, 95 Wash. 282, 163 Pac. 770.

Matters not in Issue: See Remington's Digest, Judgm., § 227; Payette v. Ferrier, 20 Wash. 479, 55 Pac. 629; Long v. Eisenbeis, 21 Wash. 23, 56 Pac. 933; Bingham v. Keylor, 25 Wash. 156, 64 Pac. 942; Snyder v. Harding, 38 Wash. 666, 80 Pac. 789; Martin v. Barger, 62 Wash. 672, 114 Pac. 505; Hoffman v. Dickson, 65 Wash. 556, 118 Pac. 737, Ann. Cas. 1913B, 869, 39 L. R. A. (N. S.) 67; Walla Walla v. Dement Brothers Co., 67 Wash. 186, 121 Pac. 63; State ex rel. Grant Smith & Co. v. Seattle, 74 Wash. 438, 133 Pac. 1005; State ex rel. Murphy v. Wright, 76 Wash. 383, 136 Pac. 482; Chehalis v. Robinson, 87 Wash. 690, 152 Pac. 696; Spear v. Bremerton, 90 Wash. 507, 156 Pac. 825; East Hoquiam Co. v. Hoquiam, 90 Wash. 210, 155 Pac. 754; Engstrom v. Edendale Land Co., 91 Wash. 241, 157 Pac. 683; Pasco v. Pacific Coast Casualty Co., 101 Wash. 496, 172 Pac. 566.

See, also, Womach v. Sandygren, 107 Wash. 80, 180 Pac. 922; State ex rel. School Dist. No. 301 v. Clausen, 109 Wash. 37, 186 Pac. 319; Oberleitner v. Moore, 112 Wash. 592, 192 Pac. 904.

— **Facts Assumed or Immaterial in Former Decision:** See Remington's Digest, Judgm., § 228; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; Brier v. Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831; Savage v. Tacoma, 61 Wash. 1, 112 Pac. 78.

Matters Which Could not have been Adjudicated: See Remington's Digest, Judgm., § 229; Harding v. Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222; Brandon v. Leavenworth, 99 Wash. 339, 169 Pac. 867.

See, also, Womach v. Sandygren, 107 Wash. 80, 180 Pac. 922; State ex rel. School Dist. No. 301 v. Clausen, 109 Wash. 37, 186 Pac. 319.

Judgment on Matters not in Issue: See Remington's Digest, Judgm., § 230; O'Brien v. Allen, 42 Wash. 393, 85 Pac. 8.

Inferences from Judgment: See Remington's Digest, Judgm., § 231; Allen v. Wall, 7 Wash. 316, 35 Pac. 65; State ex rel. Ledger Pub. Co. v. Gloyd, 14 Wash. 5, 44 Pac. 103.

See, also, Olsen v. Hagan, 108 Wash. 531, 185 Pac. 578.

Personal Status or Right: See Remington's Digest, Judgm., § 231-1; Averbuch v. Averbuch, 80 Wash. 257, 141 Pac. 701, Ann. Cas. 1916B, 873.

Title or Claim to Property: See Remington's Digest, Judgm., § 232; Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; Field v. Greiner, 11 Wash. 8, 39 Pac. 259; Cuschner v. Longbehn, 44 Wash. 546, 87 Pac. 817; Snowden v. Anderson, 51 Wash. 234, 98 Pac. 610.

JUDGMENTS IN PARTICULAR CLASSES OF ACTIONS AND PROCEEDINGS—Actions Relating to Real Property—In General: See Remington's Digest, Judgm., § 233; Denny v. Northern Pac. R. Co., 19 Wash. 298, 53 Pac. 341.

— **Ejectment:** See Remington's Digest, Judgm., § 234; George v. Columbia & Puget S. R. Co., 38 Wash. 480, 80 Pac. 767; Struntz v. Hood, 57 Wash. 578, 107 Pac. 352; State v. Sturtevant, 70 Wash. 158, 135 Pac. 1035, 138 Pac. 650.

— **Quiet Title:** See Remington's Digest, Judgm., § 234-1; Merz v. Mehner, 67 Wash. 135, 120 Pac. 893.

— **Mortgage Foreclosure:** See Remington's Digest, Judgm., § 235; Hanna v. Kasson, 26 Wash. 568, 67 Pac. 271; Bradley Engineering & Mach. Co. v. Muzzy, 54 Wash. 27, 103 Pac. 37, 18 Ann. Cas. 1072; Kaufman v. Klain, 69 Wash. 113, 124 Pac. 391.

Condemnation Proceedings: See Remington's Digest, Judgm., § 236; Compton v. Seattle, 38 Wash. 514, 80 Pac. 757; State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 Pac. 427; Olson Land Co. v. Alki Park Co., 63 Wash. 521, 115 Pac. 1083, Ann. Cas. 1912D, 365; Johnson v. Spokane, 72 Wash. 298, 130 Pac. 341; Kaier v. Puget Sound Bridge & Dredging Co., 72 Wash. 497, 130 Pac. 894; Gross-

hoff v. Spokane, 73 Wash. 681, 132 Pac. 643; Dose v. Seattle, 78 Wash. 571, 139 Pac. 594.

Probate Proceedings: See Remington's Digest, Judgm., § 236-1; Fairfax v. Walters, 66 Wash. 583, 120 Pac. 81; Denton v. Schneider, 80 Wash. 506, 142 Pac. 9.

PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE: See Remington's Digest, Judgm., §§ 285-1—292, and cases cited.

Single or separate judgments in consolidated actions. 3 **Ann. Cas.** 534.

Validity of judgment entered against deceased person. 49 **L. R. A.** 153.

Effect of judgment in favor of one defendant charged with negligence on liability of codefendant. 2 **L. R. A. (N. S.)** 764.

Effect of judgment in an action against part of the obligors on a joint or joint and several contract to release or limit the liability of other obligors. 43 **L. R. A.** 161.

Effect of judgment against one tortfeasor upon liability of the other: 58 **L. R. A.** 410; **L. R. A.** 1918D, 308.

§ 407. Judgments Against Several Defendants.

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, whenever a several judgment is proper, leaving the action to proceed against the others. [L. '54, p. 171, § 222; Cd. '81, § 285; 2 H. C., 408.]

Cited in 49 Wash. 407; 59 Wash. 464; 63 Wash. 89, 92.

Joint or Several Judgment: See Remington's Digest, Judgm., § 60; Gove v.

Moses, 1 W. T. 7; Childs v. Blethen, 40 Wash. 340, 82 Pac. 405; Brownfield v. Holland, 63 Wash. 86, 114 Pac. 890; Nolan v. McNamee, 82 Wash. 585, 144 Pac. 904.

CHAPTER X.

JUDGMENT OF NONSUIT.

§ 408. Judgment of Dismissal or Nonsuit—Grounds.

An action may be dismissed, or a judgment of nonsuit entered, in the following cases:—

1. By the plaintiff himself, at any time before the jury retire to consider their verdict, unless setoff be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject matter of the action;

2. By either party, upon the written consent of the other;

3. By the court, when the plaintiff fails to appear on trial, and the defendant appears and asks for a dismissal;

4. By the court, when, upon the trial and before the final submission of [the] case, the plaintiff abandons it;

5. By the court, on the refusal or neglect of the plaintiff to make the necessary parties, after having been ordered by the court;

6. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence;

7. By the court, for disobedience of the plaintiff to an order concerning the proceedings in the action;

8. By the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient cause for the jury. [L. '54, p. 171, § 223; Cd. '81, § 286; 2 H. C., § 409.]

Cited in 2 Wash. 542; 3 Wash. 141, 638; 4 Wash. 119, 326, 373, 652, 810; 7 Wash. 408; 8 Wash. 636; 15 Wash. 430; 17 Wash. 602; 20 Wash. 126; 23 Wash. 445; 24 Wash. 325; 25 Wash. 263, 666; 33 Wash. 540; 43 Wash. 521; 44 Wash. 405; 46 Wash. 82; 49 Wash. 515; 53 Wash. 359, 428; 58 Wash. 305; 60 Wash. 271, 274, 534; 64 Wash. 486; 99 Wash. 382; 106 Wash. 414; 110 Wash. 27, 28, 35.

VOLUNTARY—Condition of Cause—Before Trial or Decision in General: See Remington's Digest, Dismissal, § 1; Dunkle v. Spokane Falls & N. R. Co., 20 Wash. 254, 55 Pac. 51; Fisk v. Tacoma Smelting Co., 49 Wash. 514, 95 Pac. 1082; McPherson v. Seattle Elec. Co., 53 Wash. 358, 101 Pac. 1084; Williams v. Spokane, 64 Wash. 484, 117 Pac. 251.

See, also, Kosinski v. Hines, 110 Wash. 25, 187 Pac. 712.

— **Final Adjudication:** See Remington's Digest, Dismissal, § 2; Somerville v. Johnson, 3 Wash. 140, 28 Pac. 373; Herriek v. Neisz, 16 Wash. 74, 47 Pac. 414.

See, also, Kosinski v. Hines, 110 Wash. 25, 187 Pac. 712.

Right to Withdraw, Dismiss or Take Nonsuit, in General: See Remington's Digest, Dismissal, § 3; Washington Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321, 64 Pac. 546; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

Consent of Parties: See Remington's Digest, Dismissal, § 3-1; Cline Piano Co. v. Sherwood, 57 Wash. 239, 106 Pac. 742; Jensen v. Schlenz, 89 Wash. 268, 154 Pac. 159.

Grounds for Objection—Rights of Defendants in General: See Remington's Digest, Dismissal, § 4; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

See, also, State ex rel. Hunter v. Ronald, 106 Wash. 413, 180 Pac. 125.

Rights as to Setoff, Counterclaim, or Other Affirmative Relief: See Remington's Digest, Dismissal, § 5; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81 (overruled in Washington Nat. Bldg. etc. Assn. v. Saunders, 24 Wash. 321, 64 Pac. 546); McKee v. McKee, 32 Wash. 247, 73 Pac. 358; Gray v. Granger, 48 Wash. 442, 93 Pac. 912; Curry v. Wilson, 57 Wash. 509, 107

Pac. 367; Herring-Hall-Marvin Safe Co. v. Purcell Safe Co., 91 Wash. 662, 158 Pac. 477; Craver v. Wehr, 98 Wash. 56, 167 Pac. 98.

Parties Entitled to Dismiss: See Remington's Digest, Dismissal, § 6; Simpson v. Brown Bros. & Co., 1 W. T. 247; Lowman v. West, 7 Wash. 407, 35 Pac. 130; Bellingham Bay etc. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; State ex rel. Bradway v. De Mattos, 88 Wash. 35, 152 Pac. 721.

Dismissal as to One or More Codefendants—In Actions for Tort: See Remington's Digest, Dismissal, § 7; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Ronald v. Pacific Traction Co., 65 Wash. 430, 118 Pac. 311.

Conditions—Payment of Costs: See Remington's Digest, Dismissal, § 8; Somerville v. Johnson, 3 Wash. 140, 28 Pac. 373; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

See, also, State ex rel. Hunter v. Ronald, 106 Wash. 413, 180 Pac. 125.

Order: See Remington's Digest, Dismissal, § 9; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

Operation and Effect: See Remington's Digest, Dismissal, § 10; Lowman v. West, 7 Wash. 407, 35 Pac. 130.

Setting Aside and Reinstatement of Cause: See Remington's Digest, Dismissal, § 11; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485.

INVOLUNTARY—Actions or Proceedings Which may be Dismissed: See Remington's Digest, Dismissal, § 12; Scoland v. Scoland, 4 Wash. 118, 29 Pac. 930; Cattell v. Fergusson, 3 Wash. 541, 28 Pac. 750; State v. Hyde, 22 Wash. 551, 61 Pac. 719.

Dismissal as to Part of Cause of Action: See Remington's Digest, Dismissal, § 13; Hays v. Hill, 23 Wash. 730, 63 Pac. 576.

Estoppel or Waiver of Right: See Remington's Digest, Dismissal, § 13-1; Hemrich Bros. Brewing Co. v. Kitsap County, 45 Wash. 454, 88 Pac. 838, 9 L. R. A. (N. S.) 910.

Right to Move: See Remington's Digest, Trial, § 57; Sayward v. Carlson, 1

Wash. 29, 23 Pac. 830; Easter v. Hall, 12 Wash. 160, 40 Pac. 728; Hoge v. Wilson, 5 Wash. 160, 31 Pac. 469; State v. Equitable etc. Assn., 18 Wash. 514, 52 Pac. 234; Crane Co. v. Aetna Indemnity Co., 43 Wash. 516, 86 Pac. 849.

Time for Motion: See Remington's Digest, Trial, § 57-1; Toutle Logging Co. v. Hammond Lumber Co., 78 Wash. 568, 139 Pac. 625.

This section does not give the plaintiff in an action for divorce the right to dismiss while in contempt of court in refusing to comply with an order as to the custody of a child: State ex rel. Hunter v. Ronald, 106 Wash. 413, 180 Pac. 125.

DISMISSAL OR NONSUIT—Nature and Grounds in General: See Remington's Digest, Trial, § 56; Ward v. Moorey, 1 W. T. 104; Swadling v. Barneson, 21 Wash. 699, 59 Pac. 506; Mace v. Gaddis, 3 W. T. 125, 13 Pac. 545; Northern Pac. R. Co. v. Holmes, 3 W. T. 202, 14 Pac. 688; Ladouceur v. Northern Pac. Ry., 4 Wash. 38, 29 Pac. 942; Burns v. Commencement Bay L. & I. Co., 4 Wash. 558, 30 Pac. 668, 709; Wolff v. Madden, 6 Wash. 514, 33 Pac. 975; Bunker v. Blair, 14 Wash. 106, 44 Pac. 122; State ex rel. Ledger Pub. Co. v. Gloyd, 14 Wash. 5, 44 Pac. 103; Latimer v. Baker, 25 Wash. 192, 64 Pac. 899; McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 Pac. 614; Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. Rep. 1079, 11 Ann. Cas. 54, 8 L. R. A. (N. S.) 783; Welch v. Fransioli, 46 Wash. 530, 90 Pac. 644; Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056, Ann. Cas. 1918E, 494.

See, also, Olsen v. Veness, 105 Wash. 599, 178 Pac. 822; Jordan v. Spokane, Portland & Seattle R. Co., 109 Wash. 476, 186 Pac. 875.

— **Motion for dismissal—Question of law—Probable cause:** Eberhart v. Murphy, 113 Wash. 449, 194 Pac. 415.

Grounds in General: See Remington's Digest, Dismissal, § 14; Brennan v. Front St. Cable R. Co., 8 Wash. 363, 36 Pac. 272; Sutton v. Snohomish, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847; Spokane & I. Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; Weir v. Seattle Elec. Co., 41 Wash. 657, 84 Pac. 597; Langley v. Devlin, 95 Wash. 171, 163 Pac. 395.

Error as to Nature or Form of Remedy: See Remington's Digest, Dismissal, § 15; Wilson Coal etc. Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Browder v. Phinney, 30 Wash. 74, 70 Pac. 264; Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721; Brown v. Calloway, 34 Wash. 175, 75 Pac. 630; McKay v. Calderwood, 37 Wash. 194, 79 Pac. 629.

Want of Jurisdiction: See Remington's Digest, Dismissal, § 16; Winsor v. Hanson, 40 Wash. 423, 82 Pac. 710.

Defects and Objections as to Parties: See Remington's Digest, Dismissal, § 17; Washburn v. Case, 1 W. T. 253; Harrington v. Miller, 4 Wash. 808, 31 Pac. 325; Dahl v. Tibbals, 5 Wash. 259, 31 Pac. 868; Dietz v. Winehill, 6 Wash. 109, 32 Pac. 1056; Hardin v. White Swan Min. etc. Co., 26 Wash. 583, 67 Pac. 236; State ex rel. Attorney Gen. v. Seattle Gas etc. Co., 28 Wash. 488, 38 Pac. 946, 70 Pac. 114.

Defects and Objections as to Process: See Remington's Digest, Dismissal, § 18; Neff v. Neff, 32 Wash. 82, 72 Pac. 1011; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Defects and Objections as to Pleadings: See Remington's Digest, Dismissal, § 19; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81; Murray v. Meade, 5 Wash. 693, 32 Pac. 780; Richardson v. Carbon Hill Coal Co., 6 Wash. 52, 32 Pac. 1012, 20 L. R. A. 338; Wilkison Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145; State ex rel. Jenkins v. Equitable Indemnity Assn., 18 Wash. 514, 52 Pac. 234; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73; Johnson v. Seattle Electric Co., 39 Wash. 211, 81 Pac. 705; Anustasakas v. International Contract Co., 51 Wash. 119, 98 Pac. 93, 130 Am. St. Rep. 1089, 21 L. R. A. (N. S.) 267; Williams v. Lindenberg Packing Co., 86 Wash. 292, 150 Pac. 432.

Discontinuance by Omission or Irregularity in Proceedings: See Remington's Digest, Dismissal, § 20; Bank of Commerce v. Warren, 8 Wash. 477, 36 Pac. 440; Spokane v. Vancouver etc. Co. v. Colfelt, 30 Wash. 628, 71 Pac. 196.

Want of Prosecution: See Remington's Digest, Dismissal, § 21; Bignold v. Carr, 24 Wash. 413, 64 Pac. 519; Langford v. Murphey, 30 Wash. 499, 70 Pac. 1112; Hoffmeister v. Renton Coal Co., 40 Wash. 48, 82 Pac. 127; Sullivan's Estate, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895; First Nat. Bank v. Hunt, 40 Wash. 190, 82 Pac. 285; Arthur v. Washington Water Power Co., 42 Wash. 431, 85 Pac. 28; Rehmke v. Fogarty, 57 Wash. 412, 107 Pac. 184; Loving v. Maltbie, 64 Wash. 336, 116 Pac. 1086.

See, also, Greenwood v. Puget Mill Co., 111 Wash. 464, 191 Pac. 393.

Disobedience to Order of Court: See Remington's Digest, Dismissal, § 22; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Carlson Bros. & Co. v. Van de Vanter, 19 Wash. 32, 52 Pac. 323; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 248, 77 Pac. 503; Washington Bank of Walla Walla v. Horn, 24 Wash. 299, 64 Pac. 534; Norris Safe & Lock Co. v. Clark, 34 Wash. 104, 74 Pac. 1019; Clerf, In re, 55 Wash. 465, 104 Pac. 622.

The court is warranted in dismissing an action upon the failure of the plaintiff to comply with an order directing an amended bill of particulars to be furnished: *Plummer v. Weil*, 15 Wash. 427, 46 Pac. 648.

Parties Entitled to Oppose Dismissal: See *Remington's Digest*, Dismissal, § 22-1; *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177.

Dismissal by Court on Its Own Motion: See *Remington's Digest*, Dismissal, § 23; *McDaniel v. Pressler*, 3 Wash. 636, 29 Pac. 209; *State ex rel. Hennessy v. Huston*, 32 Wash. 154, 72 Pac. 1015; *Kirby v. Pease*, 33 Wash. 511, 74 Pac. 665.

Hearing and Determination of Motion: See *Remington's Digest*, Trial, § 58; *Blue v. McCabe*, 5 Wash. 125, 31 Pac. 431; *Hull v. Seattle, Renton etc. R. Co.*, 60 Wash. 162, 110 Pac. 804; *Young v. Aloha Lumber Co.*, 63 Wash. 600, 116 Pac. 4; *King v. Page Lumber Co.*, 66 Wash. 123, 119 Pac. 180; *Morris v. Seattle, Renton & Southern R. Co.*, 66 Wash. 691, 120 Pac. 534; *State*

ex rel. Stone v. Superior Court, 97 Wash. 172, 166 Pac. 69.

What constitutes final submission of cause so as to preclude voluntary dismissal. 4 *Ann. Cas.* 510.

Dismissal of action by coplaintiff, 20 *Ann. Cas.* 1005.

Power of court to order nonsuit in libel or slander action where jury empowered to pass on law and facts. *Ann. Cas.* 1915D, 1269.

Right or duty of court on own motion to dismiss action based on illegal contract. *Ann. Cas.* 1912A, 1033; *Ann. Cas.* 1915B, 230.

Right of plaintiff to take voluntary dismissal or nonsuit after verdict or finding but before judgment. *Ann. Cas.* 1913D, 525.

Appropriateness of nonsuit in equity cause. 5 *Ann. Cas.* 211.

Right of plaintiff to dismiss an action brought in behalf of himself and other persons. 8 *A. L. R.* 950; 46 *L. R. A.* 839.

§ 409. All Other Judgments are on the Merits.

In every case other than those mentioned in the last section, the judgment shall be rendered on the merits. [L. '54, p. 171, § 224; Cd. '81, § 287; 2 H. C., § 410.]

Cited in 60 Wash. 534; 99 Wash. 383; 110 Wash. 27, 28, 35.

§ 410. Effect of Judgment of Nonsuit.

When a judgment of nonsuit is given, the action is dismissed; but such judgment shall not have the effect to bar another action for the same cause. [L. '69, p. 70, § 290; Cd. '81, § 288; 2 H. C., § 411.]

Cited in 46 Wash. 82; 60 Wash. 275, 535.

Dismissal Without Prejudice: See *Remington's Digest*, Dismissal, § 24; *Bates v. Drake*, 28 Wash. 447, 68 Pac. 961; *Hubenthal v. Spokane etc. R. Co.*, 43 Wash. 677, 86 Pac. 955; *Ilse v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787; *Cloukie v. Semple*, 88 Wash. 534, 153 Pac. 319.

Operation and Effect: See *Remington's Digest*, Dismissal, § 26; *Russell v. Blair*, 18 Wash. 339, 51 Pac. 477; *McGillivray v. Bremerton*, 90 Wash. 394, 156 Pac. 23;

Nance v. Valentine, 99 Wash. 323, 169 Pac. 862; *Lindblom v. Mayar*, 81 Wash. 350, 142 Pac. 695.

Demurrer to the Evidence—Operation and effect: See *Remington's Digest*, Trial, § 59; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264.

Dismissal of action by agreement as res judicata. 13 *Ann. Cas.* 655; *L. R. A.* 1918B, 525.

CHAPTER XI.

JUDGMENT BY DEFAULT.

§ 411. Judgment for Failure to Answer.

Judgment may be had if the defendant fail to answer to the complaint, as follows:—

1. In any action arising on contract for the recovery of money only, the plaintiff may file with the clerk proof of personal service of the summons and complaint on one or more of the defendants. The court shall

thereupon enter judgment for the amount claimed against the defendant or defendants, or against one or more of the several defendants, in the cases provided for in section 236. Where the defendant, by his answer, in any such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of said claim over the said counterclaim;

2. In other actions the plaintiff may, upon the like proof, apply to the court after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or of the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. Where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury; or if to determine the amount of damages the examination of a long account be necessary, by a reference as above provided. If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint;

3. In [an] action where the service of the summons was by publication, the plaintiff, upon the expiration of the time for answering, may, upon proof of service by publication, apply for judgment; and the court must thereupon require proof of the demand mentioned in the complaint, and must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to anyone for his use on account of such demand, and may render judgment for the amount which he is entitled to recover, or for such other relief as he may be entitled to. [Cf. L. '54, p. 171, § 225; L. '69, p. 70, § 291; L. '77, p. 59, § 293; Cd. '81, § 289; 2 H. C., § 412.]

See *supra*, § 278, judgment for failure to plead to new matter.

See *infra*, § 1230, judgment for failure to answer interrogatories.

Cited in 55 Wash. 403.

BY DEFAULT—Requisites and Validity.—Judgment upon failure to answer can be entered, as of course, without proof of the plaintiff's demand, under this section, subdivision 1, only where the summons and complaint have been served upon the defendant, and proof of such service filed with the clerk; and this section is in no way modified or repealed by the act of February 2, 1888: *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477.

Parties Against Whom Judgment by Default may be Rendered: See *Remington's Digest*, Judgm., § 22; *Glass v. Buttner*, 39 Wash. 296, 81 Pac. 699; *Sound Credits Co. v. Powers*, 100 Wash. 668, 171 Pac. 1031.

Discretion of Court: See *Remington's Digest*, Judgm., § 23; *Haynes v. Schwartz Co.*, 5 Wash. 433, 32 Pac. 220; *Douglas v. Badger State Mine*, 41 Wash. 266, 83 Pac. 178, 4 L. R. A. (N. S.) 196.

Appearance in General: See *Remington's Digest*, Judgm., § 24; *Walla Walla Printing etc. Co. v. Budd*, 2 W. T. 336, 5 Pac. 602; *Canada Settlers' Loan & Trust Co. v. Murray*, 20 Wash. 656, 56 Pac. 368; *Hayworth v. McDonald*, 67 Wash. 496, 121 Pac. 984; *Kline Brothers & Co. v. North Coast Fire Ins. Co.*, 80 Wash. 609, 142 Pac. 7; *Freeborn v. Chewelah Copper King Min. Co.*, 89 Wash. 519, 154 Pac. 1095.

Default in Pleading—Failure to Plead in General: See *Remington's Digest*, Judgm., § 25; *Mason v. McLean*, 6 Wash. 31, 32 Pac. 1006; *State ex rel. Puget Sound Nat. Bank v. Superior Court*, 14 Wash. 686, 45 Pac. 670; *Capps v. Frederick*, 44 Wash. 38, 86 Pac. 1128; *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120; *American Bonding Co. v. Dufur*, 49 Wash. 632, 96 Pac. 160; *Matson v. Kennecott Mines Co.*, 101 Wash. 12, 171 Pac. 1040; *Hastings v. Hastings*, 101 Wash. 653, 172 Pac. 833.

— **Pendency of Motion:** See Remington's Digest, Judgm., § 26; Richardson v. Richardson, 43 Wash. 634, 86 Pac. 1069; Washington Dredging & Imp. Co. v. Cannel Coal Co., 45 Wash. 462, 88 Pac. 836.

Operation and Effect of Default—In General: See Remington's Digest, Judgm., § 27; Main v. Johnson, 7 Wash. 321, 35 Pac. 67; General Lith. & Print. Co. v. American Trust Co., 55 Wash. 401, 104 Pac. 608.

— **Right to Notice of and Participation in Subsequent Proceedings:** See Remington's Digest, Judgm., § 28; Norris v. Campbell, 27 Wash. 654, 68 Pac. 339; General Lith. & Print. Co. v. American Trust Co., 55 Wash. 401, 104 Pac. 608; Sound Credits Co. v. Powers, 100 Wash. 668, 171 Pac. 1031; Richman v. Wenaha Co., 74 Wash. 370, 133 Pac. 467.

Waiver of Default: See Remington's Digest, Judgm., § 29; Cornell University v. Denny Hotel Co., 15 Wash. 433, 46 Pac. 654.

See, also, Mount Vernon Nat. Bank v. First Nat. Bank, 104 Wash. 107, 176 Pac. 13.

Relief Awarded on Judgment by Default—Conformity to Pleadings: See Remington's Digest, Judgm., §§ 30, 31; Bank of California v. Dyer, 14 Wash. 279, 44 Pac. 534; Sixth Avenue West, Seattle, In re, 59 Wash. 41, 109 Pac. 1052; Ann. Cas. 1912A, 1047; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777.

Time for Taking Default: See Remington's Digest, Judgm., § 31-1; Peirce v. National Bank of Germantown, 44 Wash. 404, 87 Pac. 488.

Taking or Entry of Default: See Remington's Digest, Judgm., § 32; Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Warner v. Miner, 41 Wash. 98, 82 Pac. 1033; Swasey v. Mikkelsen, 65 Wash. 411, 118 Pac. 308.

Proof of Jurisdictional Matters: See Remington's Digest, Judgm., § 33; Twigg v. James, 37 Wash. 434, 79 Pac. 959.

Proof of Cause of Action: See Remington's Digest, Judgm., § 34; Ferguson v. Hoshi, 25 Wash. 664, 66 Pac. 105; Citizens' Nat. Bank of Dayton v. Columbia County, 23 Wash. 441, 63 Pac. 209.

See, also, Cross v. Johnson, 20 Wash. 124, 54 Pac. 1000; Van Buren v. Peterson, 108 Wash. 697, 185 Pac. 572.

ON ADMISSION IN PLEADING—In General: See Remington's Digest, Judgm., § 18; Remington v. Price, 13 Wash. 76, 42 Pac. 537; Seattle Cedar Lumber Mfg. Co. v. Ballard, 50 Wash. 123, 96 Pac. 956; Helmer v. Title Guaranty & Surety Co., 50 Wash. 411, 97 Pac. 451; Gross v.

Bennington, 52 Wash. 417, 100 Pac. 846; Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 Pac. 21.

Parties Who may Make: See Remington's Digest, Judgm., § 19; Bank of Shelton v. Willey, 7 Wash. 535, 35 Pac. 411.

Part of Demand: See Remington's Digest, Judgm., § 20; Mace v. Gaddis, 3 W. T. 125, 13 Pac. 545.

Judgment on Pleadings—In General: See Remington's Digest, Plead., § 145; Dexter Horton & Co. v. Long, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867; Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Bethel v. Robinson, 4 Wash. 446, 30 Pac. 734; Lake v. Steinbach, 5 Wash. 659, 32 Pac. 767; Port Townsend Southern R. Co. v. Weir, 15 Wash. 507, 46 Pac. 1044; Townsend v. Price, 19 Wash. 415, 53 Pac. 668; Ach v. Carter, 21 Wash. 140, 57 Pac. 344; Levy v. Seattle, 61 Wash. 540, 112 Pac. 639; Pugsley v. Stebbins, 87 Wash. 187, 151 Pac. 501; State ex rel. Brown v. Superior Court, 87 Wash. 524, 151 Pac. 1126.

See, also, Olsen v. Bremerton, 110 Wash. 572, 188 Pac. 772.

— **Insufficient Cause of Action or Defense:** See Remington's Digest, Plead., §§ 146, 147; King v. Ilwaco R. & Nav. Co., 1 Wash. 127, 23 Pac. 924; Rourke v. Miller, 3 Wash. 73, 27 Pac. 1029; Port v. Parfit, 4 Wash. 369, 30 Pac. 328; Hanna v. Savage, 7 Wash. 414, 35 Pac. 127, 36 Pac. 269; Hoshor v. Kautz, 19 Wash. 258, 53 Pac. 51; Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 662; Hubenthal v. Spokane etc. R. Co., 43 Wash. 677, 86 Pac. 955; Mendenhall v. Davis, 52 Wash. 169, 100 Pac. 336, 17 Ann. Cas. 179, 21 L. R. A. (N. S.) 914; Gerard-Fillio Co. v. McNair, 68 Wash. 321, 123 Pac. 462; Metcalf v. Storey, 80 Wash. 119, 141 Pac. 315; Davis v. Ford, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

See, also, Western Farquhar Mach. Co. v. Pierce, 113 Wash. 141, 193 Pac. 708; Strang v. Person, 108 Wash. 503, 185 Pac. 944; Olsen v. Bremerton, 110 Wash. 572, 188 Pac. 772.

— **Defective Pleading:** See Remington's Digest, Plead., § 148; Cole v. Noerdlinger, 22 Wash. 51, 60 Pac. 57; Redding v. Puget Sound Iron etc. Works, 36 Wash. 642, 79 Pac. 308.

— **Admissions in Pleading:** See Remington's Digest, Plead., § 149; Hadlan v. Ott, 2 W. T. 165, 3 Pac. 826; Rockford Shoe Co. v. Jacob, 6 Wash. 421, 33 Pac. 1057; Griffith v. Maxwell, 25 Wash. 658, 66 Pac. 106; Peters v. McPherson, 62 Wash. 496, 114 Pac. 188.

— **Application and Proceedings Thereon:** See Remington's Digest, Plead., § 150; Seattle Nat. Bank v. Meer-

waltdt, 8 Wash. 630, 36 Pac. 763; Citizens' Nat. Bank of Dayton v. Columbia County, 23 Wash. 441, 63 Pac. 209; Ernst v. Fox, 26 Wash. 526, 67 Pac. 258; McAvoy v. Jennings, 39 Wash. 109, 81 Pac. 77; Fishburne v. Merchants' Bank, 42 Wash. 473, 85 Pac. 38, 7 Ann. Cas. 848; State ex rel. Brown v. Superior Court, 87 Wash. 524, 151 Pac. 1126; Depauw University v. Ankeny, 97 Wash. 451, 166 Pac. 1148.

Default judgment as to one or more parties to contract as bar to action against others. 1 A. L. R. 1606.

Right to take judgment by default while motion by defendant is pending. Ann. Cas. 1913E, 331.

Validity of statute authorizing entry of judgment by default for failure to produce documents. 15 Ann. Cas. 655.

Power of defendant's attorney to withdraw answer and permit default judgment. 33 L. R. A. 515.

Validity of default judgment awarding relief beyond prayer of complaint. 11 Ann. Cas. 353; 11 L. R. A. (N. S.) 803.

Necessity of jury to compute damages on default judgment. 15 L. R. A. 614; 20 L. R. A. (N. S.) 1.

Right to have default judgment opened on account of failure of person other than party or his attorney to attend to case. Ann. Cas. 1913E, 752.

Opening decree of divorce taken by default. L. R. A. 1917B, 472.

Right to open default as affected by character of defense. 61 L. R. A. 746; L. R. A. 1916F, 839.

§ 412. Setting Aside Default.

The court may, in its discretion, before final judgment, set aside any default, upon affidavit showing good and sufficient cause, and upon such terms as may be deemed reasonable. [L. '54, p. 171, § 225, subd. 4; L. '69, p. 72, § 292; Cd. '81, § 290; 2 H. C., § 413.]

Cited in 2 Wash. 543; 6 Wash. 35; 39 Wash. 375.

CHAPTER XII.

JUDGMENT BY CONFESSION.

§ 413. When Judgment may be Given on Confession.

On the confession of the defendant, with the assent of the plaintiff or his attorney, judgment may be given against the defendant in any action, before or after answer, for any amount or relief not exceeding or different from that demanded in the complaint. [Cf. L. '54, pp. 172, 173, §§ 226-228; L. '69, p. 72, § 293; Cd. '81, § 291; 2 H. C., § 414.]

Cited in 10 Wash. 501.

BY CONFESSION.—A confession of judgment must be made in strict compliance with the statutory provisions: Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

Nature of Confession of Judgment: See Remington's Digest, Judgm., § 14; Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; Proebstel v. State Ins. Co., 14 Wash. 669, 45 Pac. 308.

Statement of Facts Out of Which Indebtedness Arose: See Remington's Digest, Judgm., § 16; Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803.

Construction and Operation of Judgment: See Remington's Digest, Judgm.,

§ 17; Connolly v. Cunningham, 2 W. T. 242, 5 Pac. 473; Connolly v. Cunningham, 2 W. T. 251, 5 Pac. 477; Schloss v. State Bank, 4 Wash. 726, 31 Pac. 23.

Authority of attorney to confess judgment. Ann. Cas. 1914C, 548.

Power of married woman to confess judgment. 10 Ann. Cas. 714.

Husband's power, without joinder of wife, to consent to judgment binding homestead. Ann. Cas. 1915B, 247.

Necessity of proof on judgment pro confesso in divorce action. Ann. Cas. 1913B, 7.

Power of court to open or vacate confessed judgment. Ann. Cas. 1914D, 159.

§ 414. By Corporations and Minors.

When the action is against the state, a county or other public corporation therein, or a private corporation or a minor, the confession shall be made by the person who, at the time, sustains the relation to such state, corporation, county, or minor as would authorize the service of a notice [summons] upon him; or in the case of a minor, if a guardian for the action has been appointed, then by such guardian; in all other cases, the confession shall be made by the defendant in person. [L. '69, p. 72, § 294; Cd. '81, § 292; 2 H. C., § 415.]

A judgment by confession, made by an insolvent corporation in favor of one of its creditors, who has knowledge of its insolvent condition, and which confession is given and accepted for the purpose of making a preference in favor of such creditor over others, is void as against the other creditors: *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338; *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810.

A receiver for an insolvent corporation

is not estopped from assailing a confession of judgment by the corporation as fraudulent by reason of the fact that in a former receivership the receiver had treated the judgment as valid, and had been discharged by the court upon a false representation that all the debts of the corporation, except a balance on such judgment, had been paid: *Id.*

Power of president and cashier of bank to confess judgment against it. 1 A. L. B. 710.

§ 415. Against Persons Jointly Liable.

When the action is upon a contract, and against one or more defendants jointly liable, judgment may be given, on the confession of one or more defendants, against all the defendants thus jointly liable, whether such defendants have been served or not, to be enforced only against their joint property and against the joint and separate property of the defendant making the confession. [L. '69, p. 72, § 295; Cd. '81, § 293; 2 H. C., § 416.]

Cited in 7 Wash. 539; 12 Wash. 197; 54 Wash. 183.

Under this section, when one of the partners confesses judgment without the consent of the others, judgment is authorized against all the partners, to be enforced against the partnership property, and against the separate property of the party making confession: *Bank of Shelton v. Willey*, 7 Wash. 535, 35 Pac. 411.

This section, for the confession of judgments by a partner, is confined to actions on contract: *Hoffman v. Spokane*

Jobbers' Assn., 54 Wash. 179, 102 Pac. 1045.

Confession of judgment by one joint debtor on a joint contract as bar in action against the others. 1 A. L. B. 1606.

Validity of judgment by confession on warrant of attorney without antecedent process. *Ann. Cas.* 1914A, 645.

Necessity that warrant of attorney to confess judgment state amount. 7 A. L. B. 735.

§ 416. Confession, How Made.

The confession and assent thereto shall be in writing and subscribed by the parties making the same, and acknowledged by each before some officer authorized to take acknowledgments of deeds. [L. '69, p. 72, § 296; L. '77, p. 60, § 298; Cd. '81, § 294; 2 H. C., § 417.]

Cited in 10 Wash. 501.

§ 417. Judgment by Confession Without Action.

A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent

liability on behalf of the defendant, or both, in the manner prescribed by this chapter. [L. '69, p. 73, § 297; Cd. '81, § 295; 2 H. C., § 418.]

Cited in 10 Wash. 501; 13 Wash. 77.

§ 418. Requisites of Statement.

A statement in writing shall be made, signed by the defendant and verified by his oath, to the following effect:—

1. It shall authorize the entry of judgment for a specified sum;
2. If it be for money due or to become due, it shall state concisely the facts out of which the indebtedness arose, and shall show that the sum confessed to be due is justly due or to become due;
3. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and show that the sum confessed thereto does not exceed the same. [L. '69, p. 73, § 298; Cd. '81, § 296; 2 H. C., § 419.]

Cited in 10 Wash. 500, 504; 13 Wash. 77.

§ 419. Proceeding in Court on Presentation of Statement.

The statement must be presented to the superior court, or a judge thereof, and if the same be found sufficient, the court or judge shall indorse thereon an order that judgment be entered by the clerk, whereupon it may be filed in the office of the clerk, who shall enter a judgment for the amount confessed, with costs. Execution may be issued and enforced thereon in the same manner as upon judgments in other cases. [Cf. L. '69, p. 73, § 299; L. '77, p. 61, § 301; Cd. '81, § 297; 2 H. C., § 420.]

Cited in 10 Wash. 501.

CHAPTER XIII.

ARBITRATION AND JUDGMENT THEREON.

§ 420. Disputes may be Submitted to Arbitration.

All persons desirous to end, by arbitration, any controversy, suit, or quarrel, except such as respect the title to real estate, may submit their difference to the award or umpirage of any person or persons mutually selected. [L. '60, p. 324, § 1; L. '63, p. 81, § 231; Cd. '81, § 264; 2 H. C., § 424.]

Cited in 27 Wash. 39; 70 Wash. 348; 85 Wash. 367, 368; 92 Wash. 317; 93 Wash. 668.

Agreement a Condition Precedent to action: See Remington's Digest, Arb. & Aw., § 3; Lidgerwood Park Waterworks Co. v. Spokane, 19 Wash. 365, 53 Pac. 352; Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374; Hughes v. Bravinder, 9 Wash. 595, 38 Pac. 209; Herring-Hall-Marvin Safe Co. v. Purcell Safe Co., 81 Wash. 592, 142 Pac. 1153.

Effect on Pending or Subsequent Action: See Remington's Digest, Arb. & Aw., § 4; Zindorf Construction Co. v. Western American Co., 27 Wash. 31, 67 Pac. 374;

Winsor v. German Savings & Loan Society, 31 Wash. 365, 72 Pac. 66; Owen v. Casey, 48 Wash. 673, 94 Pac. 473; Baker v. Shaw, 78 Wash. 233, 138 Pac. 888.

Revocation: See Remington's Digest, Arb. & Aw., § 5; Glover v. Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380; Engvall v. Buchie, 73 Wash. 534, 132 Pac. 231; Dickie Mfg. Co. v. Sound Construction & Engineering Co., 92 Wash. 316, 159 Pac. 129; Martin v. Vansam, 99 Wash. 106, 168 Pac. 990; McCann v. Alaska Lumber Co., 71 Wash. 331, 128 Pac. 663, 43 L. R. A. (N. S.) 711.

For text treatment of "Arbitration and Award," see 2 B. C. L. 350.

§ 421. Agreement to be in Writing.

Said agreement to arbitrate shall be in writing, signed by the parties, and may be by bond in any sum, conditioned that the parties entering into said submission shall abide the award. [L. '60, p. 324, § 2; Cd. '81, § 265; 2 H. C., § 425.]

Cited in 93 Wash. 669.

Agreements to Arbitrate: See Remington's Digest, Arb. & Aw., § 1; Lidgerwood Park Waterworks Co. v. Spokane, 19 Wash. 365, 53 Pac. 352; Suksdorf v. Suksdorf, 93 Wash. 667, 161 Pac. 465.

Construction in General: See Remington's Digest, Arb. & Aw., § 2; Van Horne v. Watrous, 10 Wash. 525, 39 Pac. 136; Hart Lumber Co. v. Everett Land Co., 20 Wash. 71, 54 Pac. 767; Russell & Gallagher v. Yesler Estate, 89 Wash. 260, 154 Pac. 188; Klock Produce Co. v. Robertson, 90 Wash. 260, 155 Pac. 1044; Suksdorf v. Suksdorf, 93 Wash. 667, 161 Pac. 465.

See, also, Gile v. Tsutakawa, 109 Wash. 366, 187 Pac. 323.

Law governing agreement to arbitrate. **Ann. Cas.** 1915C, 854; **Ann. Cas.** 1918F, 494.

Right of arbitrators to rehear, or of a party to revoke submission, where award is not coextensive with submission. 18 **L. R. A. (N. S.)** 1247.

Revocability of agreement to submit to arbitration. **Ann. Cas.** 1914B, 293; **Ann. Cas.** 1918D, 1153; 47 **L. R. A. (N. S.)** 337.

Specific performance of agreement to arbitrate. 1 **Ann. Cas.** 31.

§ 422. How Arbitration Conducted.

The said arbitrators shall be duly sworn to try and determine the cause referred to them, and a just award make out, under the hands and seals of a majority of them, agreeably to the terms of the submission. Said award, together with the written agreement to submit, shall be sealed up by the arbitrators and delivered to the party in whose favor it shall be made, who shall deliver the same, without breaking the seal, to the clerk of the superior court of the county wherein said arbitration is held, who shall enter the same on record in his office. A copy of the award, signed by said arbitrators, or a majority of them, shall also be delivered to the party in whose favor it is rendered, who shall, if the matter be not settled, serve a copy of the same on the adverse party, and if no exceptions be filed against the same within twenty days after such service, judgment shall be entered as upon the verdict of a jury, and execution may issue thereon, and the same proceedings [may be had] upon said award, with like effect as though said award were a verdict in a civil action. [Cf. L. '63, p. 324, § 3; Cd. '81, § 266; L. '91, p. 104, § 1; 2 H. C., § 426.]

Cited in 5 Wash. 207, 208, 210, 211; 34 Wash. 48; 85 Wash. 367, 368; 92 Wash. 320.

Competency: See Remington's Digest, Arb. & Aw., § 7-1; State ex rel. Noble v. Bowlby, 74 Wash. 54, 132 Pac. 723.

Mode and Course of Proceedings and Conduct of Hearing: See Remington's Digest, Arb. & Aw., § 8; Van Hook v.

Burns, 10 Wash. 22, 38 Pac. 763; Brown's Executors v. Farnandis, 27 Wash. 232, 67 Pac. 574; McDonald v. Lewis, 18 Wash. 300, 51 Pac. 387.

An order setting aside an award of arbitrators made under this section is not appealable as final: Tacoma Ry. etc. Co., v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

§ 423. Compensation of Arbitrators—Penalty.

The arbitrators chosen under the provisions of this chapter shall each be allowed three dollars per day, to be taxed with other costs of suit, but if either party fail to appear on the day agreed upon for the arbitrators to meet, said party shall be liable for all costs accruing that

day, unless his absence was unavoidable, and shall be so established to the satisfaction of said arbitrators. And any arbitrator failing to attend on the day appointed, unless delayed by sickness or unavoidable accident, shall forfeit and pay the sum of five dollars to the school fund of the county, to be recovered by action before a justice of the peace, in the name of the county commissioners of the county. [Cf. L. '60, p. 324, § 4; L. '69, p. 65, § 269; Cd. '81, § 267; 2 H. C., § 427.]

§ 424. Exceptions to Award.

The party against whom an award may be made may except in writing thereto for either of the following causes:—

1. That the arbitrators or umpire misbehaved themselves in the case;
 2. That they committed an error in fact or law;
 3. That the award was procured by corruption or other undue means.
- [L. '60, p. 324, § 5; Cd. '81, § 268; 2 H. C., § 428.]

Cited in 5 Wash. 207—211; 13 Wash. 355, 356; 70 Wash. 349.

Objections and Exceptions: See Remington's Digest, Arb. & Aw., § 13; McDonald v. Lewis, 18 Wash. 300, 51 Pac. 387; Dickie Mfg. Co. v. Sound Construction & Eng. Co., 92 Wash. 316, 159 Pac. 129.

Impeachment of award for mistake of fact not involving exercise of judgment. *Ann. Cas.* 1918C, 974, 1001.

Influencing or attempting to influence decision as ground for avoidance of

award by arbitrators. 8 A. L. R. 1082.

Restriction of number of witnesses or refusal to receive material testimony as ground for setting aside an award of arbitrators. 8 *Ann. Cas.* 510.

Inadequacy of award as compared with actual loss as ground for setting it aside. *Ann. Cas.* 1913E, 1048.

Preparation of award by attorney for party as ground for setting it aside. *Ann. Cas.* 1912C, 1007.

§ 425. Proceedings of Court on Such Exceptions.

If upon exceptions filed it shall appear to the said superior court that the arbitrators have committed error in fact or law, the court may refer the cause back to said arbitrators, directing the amendment of said award forthwith, returnable to said court, and on the failure so to correct said proceedings, the court shall be possessed of the case and proceed to its determination. [Cf. L. '60, p. 325, § 6; Cd. '81, § 269; L. '91, p. 105, § 2; 2 H. C., 429.]

Cited in 5 Wash. 207—211; 13 Wash. 355, 356; 92 Wash. 320, 321.

Failure to Arbitrate: See Remington's Digest, Arb. & Aw., § 6; Tacoma R. & Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

Confirmation by Court: See Remington's Digest, Arb. & Aw., § 14; Tacoma R. & Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507; Suksdorf v. Suksdorf, 93 Wash. 667, 161 Pac. 465.

Recommittal to Arbitrators by Court: See Remington's Digest, Arb. & Aw., § 15; School District No. 5 v. Sage, 13 Wash. 352, 43 Pac. 341; Tacoma R. & Motor Co. v. Cummings, 5 Wash. 206, 31 Pac. 747, 33 Pac. 507.

Under this section the courts cannot review on the merits the decision of arbitrators except to refer it back for corrections of errors appearing on the face of the award: School Dist. No. 5 v. Sage, 13 Wash. 352, 43 Pac. 341.

§ 426. Powers of Arbitrators.

Arbitrators, or a majority of them, shall have power,—

1. To compel the attendance of witnesses duly notified by either party, and to enforce from either party the production of all such books, papers, and documents as they may deem material to the cause;

2. To administer oaths or affirmations to witnesses;
3. To adjourn their meetings from day to day, or for a longer time, and also from place to place, if they think proper;
4. To decide both the law and the fact that may be involved in the cause submitted to them. [L. '60, p. 325, § 7; Cd. '81, § 270; 2 H. C., § 430.]

Cited in 13 Wash. 355, 356.

Nature and Extent of Authority: See Remington's Digest, Arb. & Aw., § 7; School District No. 5 v. Sage, 13 Wash. 352, 43 Pac. 341.

AWARD—Making and Formal Requisites: See Remington's Digest, Arb. & Aw., § 9; Bachelder v. Wallace, 1 W. T. 107.

— **Time of Making:** See Remington's Digest, Arb. & Aw., § 10; Bachelder v.

Wallace, 1 W. T. 107; Jordan v. Lobe, 34 Wash. 42, 74 Pac. 817.

Mistake or Error: See Remington's Digest, Arb. & Aw., § 11; School District No. 5 v. Sage, 13 Wash. 352, 43 Pac. 341.

Fraud, Partiality or Misconduct: See Remington's Digest, Arb. & Aw., § 12; Glover v. Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380; McCann v. Alaska Lumber Co., 71 Wash. 331, 128 Pac. 663, 43 L. R. A. (N. S.) 711.

§ 427. Rules of Evidence.

The laws in force in this state relating to evidence and the manner of procuring the attendance of witnesses shall govern in arbitrations. [L. '60, p. 325, § 8; Cd. '81, § 271; 2 H. C., § 431.]

§ 428. Arbitrators may Punish Contempts.

The law governing proceedings for contempt, in the trial of cases before justices of the peace, so far as the same may be applicable, shall apply to the proceedings before arbitrators. [L. '60, p. 325, § 9; Cd. '81, § 272; 2 H. C., § 432.]

§ 429. Costs Taxed Against Losing Party.

The costs of witnesses, and other fees in the case, shall be taxed against the losing party; said fees shall be indorsed upon the award, and when said award is affirmed as the judgment of the superior court, execution shall issue therefor as for costs in civil actions. [L. '60, p. 325, § 10; Cd. '81, § 273; 2 H. C., § 436.]

§ 430. Award, When Affirmed, has Force of a Judgment.

Such award, when so affirmed, shall be in all respects like any other judgment of the superior court, and a transcript of such judgment, or execution issued thereon, recorded in the county auditor's [clerk's] office in the same manner as other judgments, shall be a lien upon real estate in said county. [L. '60, p. 325, § 11; Cd. '81, § 274; 2 H. C., § 434.]

Cited in 70 Wash. 349; 85 Wash. 367, 368.

Conclusiveness of Adjudication: See Remington's Digest, Arb. & Aw., § 16; Skagit County v. Trowbridge, 25 Wash. 140, 64 Pac. 901; McElroy v. Hooper, 70 Wash. 347, 126 Pac. 925; Dickie Mfg.

Co. v. Sound Construction & Eng. Co., 92 Wash. 316, 159 Pac. 129.

Finality of award. 47 L. R. A. (N. S.) 442.

Specific performance of award affecting personalty. 5 Ann. Cas. 272.

CHAPTER XIV.

MANNER OF TAKING AND ENTERING JUDGMENTS.

§ 431. Time of Entering Judgment—Signing and Filing—Motion Attacking Service and Filing.

In any action tried by jury in which a verdict is returned, judgment in conformity with the verdict may be entered by the court at any time after two days from the return of such verdict. Any motion for judgment notwithstanding the verdict, or any motion for a new trial, or any motion attacking the verdict for other causes, shall be served on the adverse party and filed with the clerk of the court within two days after the return of the verdict, and no judgment shall be entered in the cause until after the disposition of such motion. The judgment shall be in writing, signed by the judge of the court in which the action is pending, and shall be filed with the clerk and recorded in the journal of the court. [L. '21, p. 199, § 1. Cf. L. '03, p. 285, § 1; L. '54, p. 173, § 229; Cd. '81, § 301; L. '91, p. 76, § 1; 2 H. C., § 435.]

See *supra*, § 18, nonjudicial days.

See *supra*, § 363, verdict in actions for specific personal property.

See *supra*, § 365, and note, special findings.

See *supra*, § 402, motion for new trial.

See *supra*, §§ 404–407, judgments in general.

See *supra*, § 408, judgment of nonsuit.

See *supra*, § 412, judgment by default.

See *supra*, § 413 et seq., judgment by confession.

Cited in 11 Wash. 413; 26 Wash. 228; 35 Wash. 66, 537; 36 Wash. 324; 37 Wash. 485; 49 Wash. 303, 304; 55 Wash. 597; 65 Wash. 432; 70 Wash. 214, 215, 419; 81 Wash. 139, 140; 86 Wash. 384, 174; 89 Wash. 104; 90 Wash. 4; 95 Wash. 169; 112 Wash. 248.

ON MOTION OR SUMMARY PROCEEDING—Motion or Other Application: See Remington's Digest, Judgm., §§ 51, 52; State ex rel. Hennessy v. Huston, 32 Wash. 154, 72 Pac. 1015; Hennessy v. Tacoma Smelting & Refining Co., 33 Wash. 423, 74 Pac. 584; State ex rel. Dodge v. Langhorne, 12 Wash. 588, 41 Pac. 917; Griffith v. Maxwell, 19 Wash. 614, 54 Pac. 35.

ENTRY, RECORD AND DOCKETING—Entry and Necessity Therefor: See Remington's Digest, Judgm., § 69; Hays v. Dennis, 11 Wash. 360, 39 Pac. 658; Quarles v. Seattle, 26 Wash. 226, 66 Pac. 389; Sears v. Kilbourne, 28 Wash. 194, 68 Pac. 450; Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120; State ex rel. Brown v. Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974; Paich v. Northern Pac. R. Co., 86 Wash. 379, 150 Pac. 814.

The clerk's minute entry of the granting of a motion for a nonsuit is not a judgment within this section: Barth v. Harris, 95 Wash. 166, 163 Pac. 401.

Where a judgment was not immediately entered by the clerk in conformity to a verdict against joint tort-feasors, as re-

quired by this section, plaintiff's nolle prosequi as to one of the defendants, pending a motion for a new trial, does not operate as a satisfaction of judgment and release as to all the other joint tort-feasors: Ronald v. Pacific Traction Co., 65 Wash. 430, 118 Pac. 311.

Time of Rendition: See Remington's Digest, Judgm., § 2; Rauh v. Scholl, 19 Wash. 30, 52 Pac. 332; Demaris v. Barker, 33 Wash. 200, 74 Pac. 362; Moylan v. Moylan, 49 Wash. 341, 95 Pac. 271.

Time for Entry in General: See Remington's Digest, Judgm., § 70; Voorhies v. Hennessy, 7 Wash. 243, 34 Pac. 931; Brown v. Porter, 7 Wash. 327, 34 Pac. 1105; West Philadelphia Title & Trust Co. v. Olympia, 19 Wash. 150, 52 Pac. 1015; Quarles v. Seattle, 26 Wash. 226, 66 Pac. 389; State ex rel. Brown v. Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974; Harris v. Fidalgo Mill Co., 38 Wash. 169, 80 Pac. 289; Schultz v. Simmons Fur Co., 46 Wash. 555, 90 Pac. 917; State ex rel. Calhoun v. Superior Court, 86 Wash. 492, 150 Pac. 1168; Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490.

See, also, Rogers v. Savage, 112 Wash. 246, 192 Pac. 13.

— Effect of Premature Entry: See Remington's Digest, Judgm., § 71; Port Townsend Nat. Bank v. Weymouth, 11 Wash. 412, 39 Pac. 648; Kinkade v. Witherop, 29 Wash. 10, 69 Pac. 399;

Easterday v. Center, 65 Wash. 392, 118 Pac. 327.

Entry Nunc Pro Tunc—Power to Enter and Ground Therefor: See Remington's Digest, Judgm., §§ 72—74; Puget Sound Agr. Co. v. Pierce County, 1 W. T. 75; Hays v. Miller, 1 W. T. 143; Hale v. Finch, 1 W. T. 517; Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120; Aetna Ins. Co. v. Thompson, 34 Wash. 610, 76 Pac. 105; Furman v. Bon Marche, 71 Wash. 238, 128 Pac. 210.

Proceedings for Entry: See Remington's Digest, Judgm., § 75; Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759; Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061; Fisher v. Puget Sound Brick Co., 34 Wash. 578, 76 Pac. 107; Humphries v. Sorenson, 33 Wash. 563, 74 Pac. 690.

Defects and Objections: See Remington's Digest, Judgm., § 80; Tacoma Lumber etc. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755; Mitchell v. Mitchell, 39 Wash. 431, 81 Pac. 913; State ex rel. Walter v. Superior Court, 49 Wash. 1, 94 Pac. 665, 17 L. R. A. (N. S.) 257; Chilcott v. Globe Nav. Co., 49 Wash. 302, 95 Pac. 264.

Effect of Entry and Record as Between Parties: See Remington's Digest, Judgm., § 80-1; Schultz v. Schultz, 71 Wash. 327, 128 Pac. 660.

Conflict in Record: See Remington's Digest, Judgm., § 81; Sears v. Seattle Consol. St. R. Co., 7 Wash. 286, 34 Pac. 918; State ex rel. Jensen v. Bell, 34 Wash. 185, 75 Pac. 641; Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 Pac. 287; Buffalo Pitts Co. v. Dearing, 37 Wash. 591, 779 Pac. 1104; Gould v. Austin, 52 Wash. 457, 100 Pac. 1029; Michel v. White, 64 Wash. 341, 116 Pac. 860.

ON TRIAL OF ISSUES—RENDITION, FORM, AND REQUISITES IN GENERAL—Determination of All Issues: See Remington's Digest, Judgm., § 53; Seattle v. Turner, 29 Wash. 515, 69 Pac. 1083.

See, also, Daniel v. Daniel, 106 Wash. 659, 181 Pac. 215.

Notwithstanding Verdict: See Remington's Digest, Judgm., § 54; Roe v. Standard Furniture Co., 41 Wash. 546, 83 Pac. 1109; Fishburne v. Robinson, 49 Wash. 271, 95 Pac. 80; Wagner v. Northern Life Ins. Co., 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338; Wagner v. Northern Life Ins. Co., 75 Wash. 106, 134 Pac. 685; Auwarter v. Kroll, 79 Wash. 179, 140 Pac. 326; Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490; Boyce v. Chicago. Milwaukee & Puget Sound R. Co., 82 Wash. 204, 144 Pac. 27; Johnston v. Nichols, 83 Wash. 394, 145 Pac. 417; Kiebertz v. Seattle, 84 Wash. 196, 146 Pac. 400; Carkonen v. Columbia & Puget Sound R. Co., 86 Wash. 473, 150 Pac. 1162; Frank v. Switchmen's Union of North America, 87 Wash. 634, 152 Pac. 512; Hillis v. Kessinger, 88 Wash. 15, 152 Pac. 687, Ann. Cas. 1917D, 757; Carkonen v. Columbia & Puget Sound R. Co., 89 Wash. 104, 154 Pac. 123; Paich v. Northern Pac. R. Co., 86 Wash. 379, 150 Pac. 814; McDonnell v. Shine, 86 Wash. 393, 150 Pac. 817; Walling v. Elbert, 87 Wash. 489, 151 Pac. 1081; Frescoln v. Puget Sound Traction, Light & Power Co., 90 Wash. 59, 155 Pac. 395; Mattson v. Griffin Transfer Co., 90 Wash. 1, 155 Pac. 392.

Conformity to Verdict: See Remington's Digest, Judgm., § 66; Roberts v. Sabin, 14 Wash. 35, 44 Pac. 108; Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999, 2 Ann. Cas. 504.

What entry or record necessary to complete judgment. 28 L. R. A. 621.

Validity of judgment rendered or entered on holiday. Ann. Cas. 1916E, 852, 858; 19 L. R. A. 318.

Exclusion or inclusion of Sunday or holiday in computation of time for entry of judgment. Ann. Cas. 1917E, 939.

Power to enter judgment nunc pro tunc after death of party. 3 A. L. R. 1403.

Correcting clerical errors in judgment and time limit thereon. 10 A. L. R. 526, 556, 565.

§ 431-1. Entry of Verdict in Execution Docket—Effect—Lien.

The clerk on the return of a verdict shall forthwith enter the same in the execution docket, specifying the amount thereof, and the names of the parties to the action and the party or parties against whom the verdict is rendered; such entry shall be indexed in the record index and shall conform as near as may be to entries of judgments required to be made in such execution docket. On the entry of such verdict as herein provided, the same shall be notice to all the world of the rendition thereof, and any person subsequently acquiring title to or a lien upon the real property of the party or parties against whom the verdict is re-

turned shall be deemed to have acquired such title or lien with notice, and such title or lien shall be subject and inferior to any judgment afterwards entered on the verdict. [L. '21, p. 199, § 2.]

§ 431-2. Abstract of Verdict—Transmission to Other County—Cessation of Lien—Certificate.

The clerk shall, on request and at the expense of the party in whose favor the verdict is rendered, or his attorney, prepare an abstract of such verdict in substantially the same form as an abstract of a judgment and transmit such abstract to the clerk of any court in any county in the state as directed, and shall make a note on the execution docket of the name of the county to which each of such abstracts is sent. The clerk receiving such abstract shall, on payment of a fee of fifty cents therefor, enter and index the same in the execution docket in the same manner as an abstract of judgment. On the entry thereof the same shall have the same effect in such county as in the county where rendered.

Whenever the verdict, or any judgment rendered thereon, shall cease to be a lien in the county where rendered, the clerk of the court shall on request of anyone, and the payment of the cost and expense thereof, certify that the lien thereof has ceased, and transmit such certificate to the clerk of any court to which an abstract was forwarded, and such clerk receiving the certificate, on payment of a fee of fifty cents therefor, shall enter the same in the execution docket, and then and thereupon the lien of such verdict or judgment shall cease. Nothing in this act shall be construed as authorizing the issuance of an execution in any other county than that in which the judgment is rendered. [L. '21, p. 200, § 3.]

§ 433. Judgment in Case of Setoff.

If a setoff established at the trial exceed the plaintiff's demand so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any [other] affirmative relief, judgment shall be given accordingly. [L. '54, p. 173, § 231; Cd. '81, § 303; 2 H. C., § 437.]

See *supra*, §§ 269—272, judgment in case of setoff.

§ 434. Judgment in Actions to Recover Personal Property.

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same. [L. '54, p. 173, § 232; Cd. '81, § 304; 2 H. C., § 438.]

Cited in 8 Wash. 636; 10 Wash. 227; 22 Wash. 309; 73 Wash. 410; 92 Wash. 658; 98 Wash. 11; 108 Wash. 45.

Judgment—Form and Requisites in General: See Remington's Digest, Replev., § 44; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Dow v. Dempsey,

21 Wash. 86, 57 Pac. 355; Hall v. Law Guarantee & T. Soc., 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935; Eidson v. Woolery, 10 Wash. 225, 38 Pac. 1025.

See, also, Esmond v. Richards, 112 Wash. 641, 192 Pac. 917.

— **For Defendant:** See Remington's Digest, Replev., § 45; Liebmann v. McGraw, 3 Wash. 520, 28 Pac. 1107; Eidson v. Woolery, 10 Wash. 225, 38 Pac. 1025; Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 Pac. 1111; Kehoe v. McConaghy, 29 Wash. 175, 69 Pac. 742; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725.

— **Return of Property Belonging to Third Person:** See Remington's Digest, Replev., § 46; Bowman v. McGregor, 6 Wash. 118, 32 Pac. 1059.

— **Recovery of Value of Property:** See Remington's Digest, Replev., § 47; McGraw v. Franklin, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810; Hallidie Mach. Co. v. Widby Island Sand etc. Co., 62 Wash. 604, 114 Pac. 457.

See, also, Esmond v. Richards, 112 Wash. 641, 192 Pac. 917.

— **Alternative Judgment:** See Reming-

ton's Digest, Replev., § 48; Meeker v. Johnson, 3 Wash. 247, 28 Pac. 542; Springer v. Ayer, 50 Wash. 642, 97 Pac. 774; Standard Furniture House v. Burrows, 59 Wash. 455, 110 Pac. 13.

— **Operation and Effect:** See Remington's Digest, Replev., § 49; Sayward v. Thayer, 9 Wash. 22, 36 Pac. 966, 38 Pac. 137.

Satisfaction and Discharge of Judgment: See Remington's Digest, Replev., § 50; High v. Emerson, 23 Wash. 103, 62 Pac. 455; Standard Furniture Co. v. Van Alstine, 31 Wash. 499, 72 Pac. 119.

Enforcement of Judgment: See Remington's Digest, Replev., § 51; Bowman v. McGregor, 6 Wash. 118, 32 Pac. 1059.

Right to reject property because of depreciation, under alternative judgment for return of property or for its value. 45 L. R. A. (N. S.) 40.

§ 435. Entry of Judgment.

All judgments shall be entered by the clerk, subject to the direction of the court, in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action. [L. '69, p. 75, § 307; Cd. '81, § 305; 2 H. C., § 439.]

Cited in 26 Wash. 228; 31 Wash. 402; 65 Wash. 540; 94 Wash. 540.

Conflict in record and journal entries: See notes to § 431.

The existence of a judgment, though not entered in the court's journal as contemplated by statute, nor having the file-mark of the clerk, may be established by competent proof after the death of the judge rendering it: Eakin v. McCraith, 2 W. T. 112, 3 Pac. 838.

A clerical error of the county clerk in recording a judgment by filling up a blank for the date six days later than the filing date is immaterial, as the date of the judgment was the date of its fil-

ing: Warner v. Miner, 41 Wash. 98, 82 Pac. 1033.

An order does not become final until entered: See State ex rel. Brown v. Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974.

It is not necessary for the validity of a decree or judgment that it be served upon any party to a cause after it has been filed: See Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061; Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107.

An indorsement of "O. K." will be considered an assent as to form only where exceptions were taken: See Humphries v. Sorenson, 33 Wash. 563, 74 Pac. 690.

§ 436. Summons, After Judgment, to Joint Debtor not Originally Served.

When a judgment is recorded [entered] against one or more of several persons jointly indebted upon an obligation by proceeding as provided in section 236. such defendants who were not originally served with the summons, and did not appear to the action, may be summoned to show cause why they should not be bound by the judgment in the same manner as though they had been originally served with the summons. [L. '77, p. 64, § 318; Cd. '81, § 314; 2 H. C., § 440.]

Cited in 82 Wash. 587, 588.

A plaintiff who did not allege and prove that all its members were liable for the debt and who failed to take judgment against the joint property of all and the separate property of each, as

provided in section 236, cannot claim that the judgment is the joint obligation of all and obtain the benefit of this section: Nolan v. McNamee, 82 Wash. 585, 144 Pac. 904.

§ 437. Contents of Such Summons.

The summons as provided in the last section must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner and returnable within the same time as the original summons. It is not necessary to file a new complaint. [L. '77, p. 64, § 319; Cd. '81, § 315; 2 H. C., § 441.]

§ 438. Affidavit to Support Summons.

The summons must be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and must specify the amount due thereon. [L. '77, p. 65, § 320; Cd. '81, § 316; 2 H. C., § 442.]

§ 439. Defenses in Such Case.

Upon the service of such summons and affidavit, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently to the taking of the judgment, or he may deny his liability on the obligation upon which the judgment was rendered, except a discharge from such liability by the statute of limitations. [L. '77, p. 65, § 321; Cd. '81, § 317; 2 H. C., § 443.]

Cited in 82 Wash. 588.

§ 440. Pleadings in Such Case.

If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was rendered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer constitute such written allegations. [L. '77, p. 65, § 322; Cd. '81, § 318; 2 H. C., § 444.]

§ 441. Trial and Entry in Such Cases.

The issues formed may be tried as in other cases, but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must not exceed the amount remaining unsatisfied on such original judgment, with interest thereon. [L. '77, p. 65, § 323; Cd. '81, § 319; 2 H. C., § 445.]

Where plaintiff obtained a verdict for a certain sum, "with legal interest," and the court gave judgment for interest from date sixty days after the making of the contract, the judgment is erroneous: *Western Mill & Lumber Co. v. Blanchard*, 1 Wash. 230, 23 Pac. 839; *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837.

§ 442. Judgment-roll—What Constitutes.

Immediately after entering the judgment, the clerk shall attach the following papers in the case, which shall constitute the judgment-roll:—

1. If the complaint has not been answered by any defendant, and no pleading has been filed by an intervener, he shall attach together, in the order of their filing, issuing, and entry, the complaint, summons, and proof of service, and a copy of the entry of judgment;

2. In all other cases he shall attach together in like manner the summons and proof of service, the pleadings, bill of exceptions, all orders re-

lating to change of parties, together with a copy of the entry of judgment, and all other journal entries or orders in any way involving the merits and necessarily affecting the judgment. [Cf. L. '54, p. 173, § 233; Cd. '81, § 306; L. '91, p. 77, § 3; 2 H. C., § 446.]

Cited in 77 Wash. 630.

Judgment-roll or Record—Requisites and sufficiency in general: See Remington's Digest, Judgm., § 76; Nesqually Mill Co. v. Taylor, 1 W. T. 1; Huntington v. Blakeney, 1 W. T. 111; Forsyth v. Dow, 81 Wash. 137, 142 Pac. 490.

— **Presumptions**: See Remington's Digest, Judgm., § 77; Francioli v. Brue, 4 Wash. 124, 29 Pac. 928; Belles v. Miller, 10 Wash. 259, 38 Pac. 1050; Kalb v. German Sav. & L. Soc., 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757; Gay v. Havermale, 27 Wash. 390, 67 Pac. 804; Sellers v. Pacific Wrecking etc. Co., 34 Wash. 111, 74 Pac. 1056; Bock v. Sanders,

46 Wash. 462, 90 Pac. 597; Stewart v. State Board of Medical Examiners, 48 Wash. 655, 94 Pac. 472.

— **Date**: See Remington's Digest, Judgm., § 78; Warner v. Miner, 41 Wash. 98, 82 Pac. 1033.

— **Signature**: See Remington's Digest, Judgm., § 79; Ainsworth v. Territory, 3 W. T. 270, 14 Pac. 590; Ritchie v. Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877; Brooks v. James, 16 Wash. 335, 47 Pac. 751; Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107; White Crest Canning Co. v. Sims, 30 Wash. 374, 70 Pac. 1003.

§ 443. Judgment-roll—Indorsement and Preservation.

In all cases, the clerk shall attach upon the outside of the judgment-roll a blank sheet of paper, upon which he shall indorse the name of the court, the title of the action, for whom judgment was given, and the amount or nature thereof and the date of its entry. [L. '91, p. 77, § 4; 2 H. C., § 447.]

CHAPTER XV.

JUDGMENT LIENS.

§ 444. Execution Docket.

Every clerk shall keep in his office a well-bound book, to be called the execution docket, which shall be a public record, and open during the usual business hours to all persons desirous of inspecting it. [L. '54, p. 173, § 234; Cd. '81, § 307; 2 H. C., § 448.]

See supra, § 75, books to be kept by clerk.

§ 445. Judgment Lien.

The real estate of any judgment debtor and such as he may acquire, shall be held and bound to satisfy any judgment of the district or circuit court of the United States, if rendered in this state, or of the superior or supreme court, or any judgment of a justice of the peace for the period of five years from the day on which said judgment was rendered, and such judgments shall be a lien thereupon to commence as follows: Judgments of the superior court of the county in which real estate of the judgment debtor is situated, from the date of the entry thereof; judgments of the district or circuit courts of the United States, if rendered in this state; judgments of the supreme court; judgments of the superior court of any county other than the county in which said judgment was rendered, and judgments of a justice of the peace, from the time of the filing and indexing of a duly certified transcript or abstract of such judgments, as provided by this chapter, with the county clerk of the county in which said real estate is situated. [Cf. L. '54, p. 175, § 240; L. '57,

p. 11, § 15; L. '60, p. 51, § 234; L. '69, p. 78, § 317; Cd. '81, § 321; 2 H. C., § 460; L. '93, p. 65, § 1; see, also, 2 H. C., §§ 449, 450, 455, 456, 457, 460, and L. '93, p. 67, § 9.]

Cited in 20 Wash. 52; 21 Wash. 319; 22 Wash. 240; 23 Wash. 546; 26 Wash. 75; 28 Wash. 196; 29 Wash. 255, 665; 32 Wash. 88; 33 Wash. 570; 45 Wash. 4, 8; 50 Wash. 506; 59 Wash. 99; 64 Wash. 59; 78 Wash. 192; 94 Wash. 23.

LIEN.—Laws of 1877, page 66, section 326, providing that parties may continue the lien of a judgment before the expiration of the five-year period, was repealed by the code of 1881: Tacoma Nat. Bank v. Sprague, 33 Wash. 285, 74 Pac. 393.

This act is constitutional as to limiting the time for the commencement and duration of the lien of judgments upon contracts subsequently arising: Seattle Brewing & Malting Co. v. Donofrio, 59 Wash. 98, 109 Pac. 335.

This section providing that the lien of a judgment shall continue for five years from the date of rendition, and section 458, providing that in case of appeal to the supreme court the date of the final judgment in the supreme court shall be the time from which said five years shall commence to run, are impliedly repealed by sections 459—461: Seattle Brewing & Malting Co. v. Donofrio, 59 Wash. 98, 109 Pac. 335.

Judgments Which Create Liens: See Remington's Digest, Judgm., § 238; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; Clallam County v. Hall, 23 Wash. 85, 62 Pac. 443.

The possessory right which the locator of a mining claim has under Revised Statutes of the United States, section 2322, is not such an interest as will support the lien of a general judgment within the meaning of this section: Phoenix Min. & Mill Co. v. Scott, 20 Wash. 48, 54 Pac. 777.

Transcript or Abstract: See Remington's Digest, Judgm., § 240; Lamey v. Coffman, 11 Wash. 301, 39 Pac. 682; Fuller & Co. v. Hull, 19 Wash. 400, 53 Pac. 666; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765.

Commencement of Lien, in General: See Remington's Digest, Judgm., § 241; Hays v. Miller, 1 W. T. 143; Shumway v. Orchard, 12 Wash. 104, 40 Pac. 634; Fuller & Co. v. Hull, 19 Wash. 400, 53 Pac. 666; Quareles v. Seattle, 26 Wash. 226, 66 Pac. 389; State ex rel. Brown v. Brown, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

— **Judgment Nunc Pro Tunc:** See Remington's Digest, Judgm., § 242; Hays v. Miller, 1 W. T. 143.

Property or Interest Affected, and Extent of Lien—Nature of Property: See Remington's Digest, Judgm., § 243; Traders' Nat. Bank of Spokane v. Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17.

— **Estate or Interest of Judgment Debtor:** See Remington's Digest, Judgm., § 244; Book v. Willey, 8 Wash. 267, 35 Pac. 1098; Dawson v. McCarty, 21 Wash. 314, 57 Pac. 816, 75 Am. St. Rep. 841; Phoenix Min. etc. Co. v. Scott, 20 Wash. 48, 54 Pac. 777; Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501; Searle v. Bird, 94 Wash. 21, 161 Pac. 838.

Property Fraudulently Conveyed: See Remington's Digest, Judgm., § 245; Sawtelle v. Weymouth, 14 Wash. 21, 43 Pac. 1101; Preston-Parton Mill Co. v. Dexter Horton & Co., 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928; Ruuth v. Morse Hardware Co., 74 Wash. 361, 133 Pac. 587.

Priorities Between Judgments: See Remington's Digest, Judgm., § 246; Mayer v. Morgan, 26 Wash. 71, 66 Pac. 128; Danner v. Ritchie, 92 Wash. 344, 159 Pac. 87.

Priorities Between Judgment and Conveyances—Prior Deed or Mortgage not Recorded: See Remington's Digest, Judgm., § 247; Goetzinger v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257; Dawson v. McCarty, 21 Wash. 314, 57 Pac. 616, 75 Am. St. Rep. 841; Dow v. Ballard, 28 Wash. 87, 68 Pac. 176.

Proceedings for Determination of Priority: See Remington's Digest, Judgm., § 249; Howard v. Devol, 15 Wash. 270, 46 Pac. 235.

— **Evidence:** See Remington's Digest, Judgm., § 250; Book v. Willey, 8 Wash. 267, 35 Pac. 1098.

Transfers of Property Subject to Lien: See Remington's Digest, Judgm., § 250-1; Konnerup v. Milspaugh, 70 Wash. 415, 126 Pac. 939.

Fractions of day in computation of time for determination of priority of judgments. 2 Ann. Cas. 137.

Lien of judgment as extending to interest of judgment debtor in land existing by virtue of executory contract of purchase: Ann. Cas. 1914B, 978; L. R. A. 1915B, 340.

Interest in real property undisclosed by record as subject to lien of docketed judgment. Ann. Cas. 1912D, 988.

Money decree for permanent alimony or separate maintenance as

lien on real property. 25 **L. R. A.** (N. S.) 132; **L. R. A.** 1916B, 651; 9 **Ann. Cas.** 90; 18 **Ann. Cas.** 565; **Ann. Cas.** 1914D, 888.

Deficiency judgment on execution sale as lien on property after conveyance by judgment debtor during redemption period. 13 **Ann. Cas.** 320.

Judgment lien against property of municipality. 4 **Ann. Cas.** 102.

Priority to one of several equal judgments as acquired by issuance of execution. **Ann. Cas.** 1917D, 187; **L. R. A.** 1916D, 669.

Priority of judgment lien as against unrecorded conveyance. 21 **Ann. Cas.** 864; 16 **L. R. A.** 668.

Priority of judgment over conveyance made after beginning of term but prior to rendition of judgment. 5 **A. L. R.** 1072; 3S **L. R. A.** 243.

Priority as between purchase-money mortgage and pre-existing judgment against mortgagor. **Ann. Cas.** 1916C, 949.

Priority as between implied vendor's lien and judgment against purchaser. **Ann. Cas.** 1916D, 384.

Waiver of lien of judgment by filing claim against decedent's estate as an unsecured one. 2 **A. L. R.** 1132.

§ 446. Clerk's Record Index.

It shall be the duty of the county clerk to keep a proper record index, both direct and inverse, of any and all judgments, abstracts or transcripts of judgments in his office, and all renewals thereof, and such index shall refer to each party against whom the judgment is rendered or whose property is affected thereby, [which index] together with the records of said judgments, shall be open to public inspection during regular office hours. [Cf. 2 H. C., § 452; L. '93, p. 66, § 6.]

§ 447. Assignment or Satisfaction, Filing—Notice.

Any assignment or satisfaction of judgment, or any certified transcript of such assignment or satisfaction, may be recorded in any county auditor's office, or county clerk's office, in which the judgment is of record, and from the time of filing for record shall be notice of such assignment or satisfaction. [L. '97, p. 10, § 1.]

Cited in 34 **Wash.** 514.

ASSIGNMENT—Operation and Effect of Transfer in General: See *Remington's Digest*, Judgm., § 260; *Lewis v. Third St. & Suburban R. Co.*, 26 **Wash.** 28, 66 **Pac.** 150.

Rights of Assignee in General: See *Remington's Digest*, Judgm., § 261; *Stur-giss v. Dart*, 23 **Wash.** 244, 62 **Pac.** 858.

Rights passing to assignee incident to assignment of judgment: 7 **Ann. Cas.** 423; 1 **L. R. A.** (N. S.) 149.

Lien of judgment as affected by its assignment. **Ann. Cas.** 1917C, 557.

Validity and effect of partial assignment of judgment. **Ann. Cas.** 1913E, 843.

Effect of assignment of "interest" in judgment. **Ann. Cas.** 1912B, 525.

Agreement for contingent fee as assignment of interest in judgment. 2 **A. L. R.** 454.

Right of foreign executor or administrator to assign judgment. 10 **A. L. R.** 285.

§ 448. Entries in Execution Docket.

He shall leave space on the same page, if practicable, with each case, in which he shall enter, in the order in which they occur, all the proceedings subsequent to the judgment in said case until its final satisfaction, including the time when and to what county the execution is issued, and when returned, and the return or the substance thereof. When the execution is levied on personal property which is returned unsold, the entry shall be: "levied (noting the date) on property not sold." When any sheriff shall furnish the clerk with a copy of any levy upon real estate

on any judgment the minutes of which are entered in his execution docket, the entry shall be: "levied upon real estate," noting the date, and shall refer to the page upon the book of levies where the same is entered, as is hereinafter provided. When any execution issued to any other county is returned levied upon real estate in such county, the entry in the docket shall be, "levied on real estate of —, in — county," noting the date, county, and defendants whose estate is levied upon; and when the money is made, or any part thereof, the amount and time when made shall be entered; also, when a writ of error has been taken, or the judgment is appealed, modified, discharged, or in any manner satisfied, the facts in respect thereto shall be entered. The parties interested may also assign or discharge such judgment on such execution docket. When the judgment is fully satisfied in any way, the clerk shall write the word "satisfied," in large letters across the face of the entry of such judgment. [L. '54, p. 174, § 237; Cd. '81, § 310; 2 H. C., § 451.]

Cited in 112 Wash. 250.

§ 449. Book of Levies.

The clerk shall also keep in his office a well-bound book, to be called a book of levies, which shall be a public record, and open during the usual business hours to all persons desirous of inspecting the same, in which he shall enter all levies upon real estate in his county, when delivered to him by the sheriff, as provided by law. An alphabetical index shall be prefixed to the book of levies, containing the names of all persons upon whose real estate such levies have been made, and when such levies are discharged in any manner, an entry thereof shall be made in the margin of the book of levies where the levy is recorded. [L. '54, p. 174, § 239; Cd. '81, § 313; 2 H. C., § 454.]

§ 450. Transcripts from Justices' Courts.

Any judgment of any justice of the peace of any county in this state, shall become a lien upon any real estate of the judgment debtor, and such as he may acquire in that county wherein said judgment was rendered by the filing of a duly certified transcript from the docket of said justice in the county clerk's office of said county wherein said judgment was rendered, and upon such filing said judgment shall become to all intents and purposes a judgment of said superior court of said county, said judgment of said justice of the peace shall become a lien upon the real estate of the judgment debtor and such as he may acquire in any county other than that in which the same was rendered by the filing in the office of the county clerk of that county a duly certified abstract of the record of said judgment, from the office of the county clerk of that county in which the certified transcript of the said judgment of said justice of the peace was originally filed. [L. '93, p. 65, § 2.]

Cited in 23 Wash. 545; 31 Wash. 363; 69 Wash. 110.

Filing Transcript of Justice's Judgment in Court of Record.—Under this section, when the judgment of a justice of the peace is certified to the office of the

clerk of the superior court, it becomes, in effect, a judgment of the superior court, and subject to direct attack therein: *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73.

And an execution against personal property may be issued out of a superior

court, upon such a judgment: *Grant v. Judgment, or File Transcript:* See *Remington's Digest, Judgm., § 82-1; Douglas v. Teller, 53 Wash. 695, 102 Pac. 761.*

Effect of Failure to Record, Enter

§ 451. Abstract of Judgment, Contents of.

An abstract of a judgment as provided for in this chapter shall contain:—

1. The name of the party or parties in whose favor the judgment was rendered;

2. The name of the party or parties against whom the judgment was rendered;

3. The date of the rendition of the judgment;

4. The amount for which the judgment was rendered, and in the following manner, viz.: Principal, \$—; interest, \$—; costs, \$—; total, \$—. [L. '93, p. 66, § 3.]

Cited in 23 Wash. 545.

Recording and Docketing Judgment—In General.—The provision that the abstract of judgment shall set forth the names, at length, of all the parties, is merely a requirement that the names shall be stated as shown by the judgment entry, and has no other reference to the names of the parties: *Lamey v. Coffman, 11 Wash. 301, 39 Pac. 682.*

It is necessary to include only the names of parties against whom a money judgment is rendered: *Fuller & Co. v. Hull, 19 Wash. 400, 53 Pac. 666.*

The fact that the amount of costs to which a judgment creditor is entitled is not shown in the transcript filed in the county auditor's office will not defeat the lien of the principal judgment itself: *Lamey v. Coffman, 11 Wash. 301, 39 Pac. 682.*

§ 452. Transcript of Justice's Docket.

A transcript of a judgment of a justice of the peace provided for by this chapter shall contain an exact copy of the judgment from the justice's docket. [L. '93, p. 66, § 4.]

§ 453. Entry of Abstract or Transcript of Judgment.

It shall be the duty of the county clerk to enter in his execution docket any duly certified abstract or transcript of any judgment of any of the courts mentioned in this chapter, and he shall index the same in the same manner as judgments originally rendered in the superior court of the county of which he is clerk. [L. '93, p. 66, § 5.]

Cited in 23 Wash. 545.

§ 454. Satisfaction of Judgments.

When any judgment shall be paid and satisfied, the satisfaction shall be noted upon the records thereof in the execution docket as satisfied, giving the date of such satisfaction, and when the same shall be signed by the judgment creditor or his attorney the lien thereof against said real estate shall be satisfied and discharged. [L. '93, p. 66, § 7.]

See *infra*, § 889, satisfaction of judgment against the state.

Cited in 23 Wash. 545; 63 Wash. 232, 242; 112 Wash. 250.

PAYMENT, SATISFACTION AND DISCHARGE—Mode and Sufficiency of Payment: See *Remington's Digest, Judgm., § 268; Brown v. Kern, 21 Wash. 211, 57 Pac. 798; Standard Furniture Co. v. Van Alstine, 31 Wash. 499, 72 Pac. 119.*

Evidence as to Payment: See *Remington's Digest, Judgm., § 269; Edmunds v. Black, 15 Wash. 73, 45 Pac. 639; Gaffney v. Megrath, 23 Wash. 476, 63 Pac. 520.*

Operation and Effect of Satisfaction—Guarantors and Sureties. See *Remington's Digest, Judgm., § 270; Murray v. Meade, 5 Wash. 693, 32 Pac. 780; Hanna*

v. Savage, 21 Wash. 555, 58 Pac. 1069; Siegley v. Nakata, 101 Wash. 73, 172 Pac. 203.

See, also, Larson v. Anderson, 108 Wash. 157, 182 Pac. 957, 6 A. L. R. 621.

Proceedings to Compel Satisfaction of Record: See Remington's Digest, Judgm., § 271; Hawks v. Votaw, 1 Wash. 70, 23 Pac. 442.

Proceedings to Enforce Judgment: See

Remington's Digest, Judgm., § 263; Smith v. Smith, 18 Wash. 158, 51 Pac. 355; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; Lawrence v. Halverson, 41 Wash. 534, 83 Pac. 889.

Accepting note of third person by judgment creditor as extinguishing judgment. 19 Ann. Cas. 482.

Effect on judgment of tender of amount due. Ann. Cas. 1916C, 536.

§ 455. Satisfaction of Judgments of Federal Court—Penalty for Failure.

When the amount due on any judgment is paid off or satisfied in full, the plaintiff, or those legally acting for him, must acknowledge satisfaction thereof in the margin of the record of the judgment, or by the execution of an instrument in writing referring to the judgment, acknowledged and filed in the office of the auditor or recorder in every county where the judgment is a lien. If he fail to do so within sixty days after having been requested in writing so to do, he shall forfeit to the defendant the sum of fifty dollars. [L. '90, p. 98, § 3; 2 H. C., § 458.]

"Any judgment": This section can apply only to judgments of the United States courts.

§ 456. Existing Liens Continued.

All judgments which are liens upon real estate by reason of their having been filed in any county auditor's office, shall continue to be liens thereupon in the manner now provided by law. [L. '93, p. 67, § 8.]

§ 457. Interest on Judgments.

Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten per cent per annum: Provided, that said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof. [L. '99, p. 129, § 6. Cf. 2 H. C., § 459; L. '95, p. 350, § 4.]

Cited in 23 Wash. 417; 63 Wash. 290.

A decree of divorce, directing the husband to pay the wife a stated sum as her proportionate part of the community property and attorney's fees, is a judgment, within this section, which draws interest from date: Smith v. Smith, 63 Wash. 288, 115 Pac. 166.

Interest on judgments. 17 L. R. A. 612.

Liability of state to interest on judgment. Ann. Cas. 1914A, 363.

Modification of judgment on appeal as affecting right to interest. Ann. Cas. 1917C, 413.

§ 458. Appeal Does not Suspend Lien.

An appeal to the supreme court or stay of execution shall not affect any existing lien; and in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run. Personal property shall only be held from the time it is actually levied upon. [Cf. '54, p. 175, §§ 240, 241; L. '60, p. 79, § 319; Cd. '81, § 322; 2 H. C., § 461.]

Cited in 4 Wash. 762; 28 Wash. 196; 32 Wash. 88; 59 Wash. 100.

Suspension or Stay of Proceedings.—Upon a foreclosure of a mortgage upon

separate parcels of land, belonging to different persons, a suspension of the decree as to one tract, by vacation thereof and an appeal to the supreme court, does

not suspend it as to the other tract: *Dalgardno v. Barthrop*, 40 Wash. 191, 82 Pac. 285.

CHAPTER XVI.

REVIVAL OF JUDGMENTS.

§ 459. Judgment Lien Expires When.

After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor. [L. '97, p. 52, § 1.]

This and the next two sections are void as to existing contracts.

For former laws see: L. '54, pp. 175, 176, §§ 242, 243; L. '69, p. 79, §§ 318, 320; Cd. '81, § 323; 2 H. C., § 462.

Cited in 19 Wash. 207, 219; 21 Wash. 400; 23 Wash. 411; 24 Wash. 48, 485; 38 Wash. 627, 631; 39 Wash. 175, 219, 588; 44 Wash. 159, 516; 59 Wash. 100; 78 Wash. 190; 85 Wash. 17; 87 Wash. 325; 92 Wash. 315; 95 Wash. 629.

This act entitled "An act relating to the duration of judgments," is not invalid as embracing more than one subject which is not expressed in its title: *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815.

Unconstitutionality of This Act as to Judgments on Pre-existing Contracts: See *Remington's Digest*, Judgm., §§ 264, 272; *Bettman v. Cowley*, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; *Lilly-Brackett Co. v. Sonneman*, 50 Wash. 487, 97 Pac. 505; *Murne v. Schwabacher*, 2 W. T. 130, 3 Pac. 899; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216; *Denio v. Benham*, 24 Wash. 485, 61 Pac. 749; *Raught v. Lewis*, 24 Wash. 47, 63 Pac. 1104; *Howard v. Ross*, 38 Wash. 627, 80 Pac. 819, 3 Ann. Cas. 1146; *Fischer v. Kittinger*, 39 Wash. 174, 81 Pac. 551; *Williams v. Packard*, 39 Wash. 217, 81 Pac. 710; *Gaffney v. Jones*, 39 Wash. 587, 81 Pac. 1058; *Kelleher v. Wells*, 87 Wash. 323, 151 Pac. 823; *Foley v. Kelleher*, 92 Wash. 314, 158 Pac. 982.

Duration of Lien: See *Remington's Digest*, Judgm., § 251; *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831; *Hardin v. Day*, 29 Wash. 664, 70 Pac. 118; *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846; *Hewitt v. Root*, 31 Wash. 312, 71 Pac. 1021; *Dalgardno v. Barthrop*, 40 Wash. 191, 82 Pac. 285; *Meikle v. Cloquet*, 44 Wash. 513, 87 Pac. 841; *Hemen v. Rinehart*, 45 Wash. 1, 87 Pac. 953; *Kelleher v. Wells*, 87 Wash. 323, 151 Pac. 823.

ACTIONS ON JUDGMENTS—Persons Against Whom Action may be Brought: See *Remington's Digest*, Judgm., § 273; *Olson v. Veazie*, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855; *Bignold v.*

Carr, 24 Wash. 413, 64 Pac. 519; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405.

Time to Sue and Limitations: See *Remington's Digest*, Judgm., § 274; *Burns v. Conner*, 1 Wash. 6, 23 Pac. 836 (overruled); *Citizens' National Bank of Crawfordville v. Lucas*, 26 Wash. 417, 67 Pac. 252, 90 Am. St. Rep. 748, 56 L. R. A. 812; *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256; *Cathcart v. Bryant*, 28 Wash. 31, 68 Pac. 171; *Hinckley v. Seattle*, 37 Wash. 269, 79 Pac. 779; *State ex rel. Dyer v. Middle Kittitas Irr. Dist.*, 56 Wash. 488, 106 Pac. 203; *Burman v. Douglas*, 78 Wash. 394, 139 Pac. 41; *Johnson v. Great Northern Lumber Co.*, 85 Wash. 16, 147 Pac. 641.

Pleading—Issues, Proof and Variance: See *Remington's Digest*, Judgm., § 275; *Bignold v. Carr*, 24 Wash. 413, 64 Pac. 519; *Hotchkin v. Bussell*, 46 Wash. 7, 89 Pac. 183.

FOREIGN JUDGMENTS—Jurisdiction: See *Remington's Digest*, Judgm., § 276; *Aultman, Miller & Co. v. Mills*, 9 Wash. 68, 36 Pac. 1046.

Leave to Sue: See *Remington's Digest*, Judgm., § 277; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473.

Time to Sue and Limitations: See *Remington's Digest*, Judgm., § 278; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767; *Weber v. Yancy*, 7 Wash. 84, 34 Pac. 473; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405.

Pleading—Complaint: See *Remington's Digest*, Judgm., § 279; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

— **Answer:** See *Remington's Digest*, Judgm., § 280; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767; *Aultman, Miller & Co. v. Mills*, 9 Wash. 68, 36 Pac. 1046; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 608, 54 L. R. A. 204.

— **Issues, Proof and Variance:** See Remington's Digest, Judgm., § 281; Ritchie v. Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

Evidence—Presumptions and Burden of Proof: See Remington's Digest, Judgm., § 281-1; Kline Bros. & Co. v. North Coast Fire Ins. Co., 80 Wash. 609, 142 Pac. 7.

— **Admissibility:** See Remington's Digest, Judgm., § 282; Kentzler v. Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21; Cunningham v. Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235; Cunningham v. Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

— **Weight and Sufficiency:** See Remington's Digest, Judgm., § 283; Ritchie v.

Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877; Aultman, Miller & Co. v. Mills, 9 Wash. 68, 36 Pac. 1046; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

Trial: See Remington's Digest, Judgm., § 284; Clark v. Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.

Interest: See Remington's Digest, Judgm., § 285; Olson v. Veazie, 9 Wash. 481, 37 Pac. 677, 43 Am. St. Rep. 855.

New promise or part payment as effecting revival of judgment after bar of statute of limitations. 9 Ann. Cas. 254; 8 L. R. A. (N. S.) 440.

§ 460. Proceedings for Extension Denied.

No suit, action, or other proceedings shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment. [L. '97, p. 52, § 2.]

Cited in 37 Wash. 270; 39 Wash. 219; 50 Wash. 488, 489; 59 Wash. 100; 78 Wash. 190; 85 Wash. 17; 87 Wash. 325; 92 Wash. 315.

A street assessment lien being subject to the statute of limitations, a judgment therefor becomes inoperative for any purpose, under this section, after the lapse

of six years, as in the case of other judgment liens: Hinckley v. Seattle, 37 Wash. 269, 79 Pac. 779.

This section does not prohibit actions on domestic judgments, which may be commenced within six years: Lilly-Brackett Co. v. Sonnemann, 50 Wash. 487, 97 Pac. 505.

§ 461. Exceptions.

When the lien of any judgment, as specified in section 459, has run six years, or its duration will be less than one year by reason of this act, then the lien of such judgment shall continue for one year from and after the taking effect of this act. [L. '97, p. 52, § 3.]

"This act" took effect June 9, 1897.

Cited in 21 Wash. 400; 37 Wash. 270; 59 Wash. 100; 85 Wash. 17.

§ 462. Revival—Procedure.

If any judgment shall remain unsatisfied in whole or in part, at the end of five years after the date of its rendition, the lien thereof may be revived and continued, as in this section provided:

(1) The judgment creditor, his assignee, or the party to whom said judgment is due and payable, shall file a motion with the clerk of the court where judgment is entered, to revive and continue the lien of the same, with leave to issue an execution. The motion shall state the names of the parties to the judgment, the date of its entry, the amount claimed to be due thereon, or the particular property, of which the possession was thereby adjudged to such party, remaining undelivered. The motion shall be subscribed and verified in the same manner as an original complaint.

(2) At any time after filing such motion, the party may cause notice to be served on the judgment debtor in like manner and with like effect

as a summons; said notice shall be attached to a copy of said motion, by the clerk of the court, and be served by the sheriff or other officer as an original summons. It shall cite the judgment debtor to appear and show cause why the said motion should not be allowed. The time in which the judgment debtor shall be required to appear, shall be the same as is prescribed for answer to a complaint, and the law applicable to service of a summons, shall apply to the service of such notice. In case the judgment debtor be dead, the notice may be served upon his legal representatives.

(3) The judgment debtor, or in case of his death, his representatives, may file an answer or demurrer to such motion within the time allowed by law to answer a complaint, alleging any defense to such motion which may exist. If no answer be filed within the time prescribed, the motion shall be allowed as of course. The moving party may demur or reply to the answer. The pleadings shall be subscribed and verified, and the proceedings concluded as in original actions.

(4) The word "representatives," in this section shall be deemed to include any or all of the persons in whose possession property of the judgment debtor may be which is liable to be taken and sold or delivered in satisfaction of the execution, and not otherwise.

(5) The order shall specify the amount due upon such unsatisfied judgment for which execution is to issue, or the particular property, possession of which is to be delivered; it shall be entered in the journal and docket as a judgment, and a final record shall be made of the proceedings in the same manner as a judgment. [Cd. '81, § 323; 2 H. C., § 462.]

This and the next section were repealed by L. '97, p. 53, § 4, but are retained, as the repeal did not affect any existing contract obligations or judgments recovered thereon.

Motions to Revive Judgment: See Remington's Digest, Judgm., § 266; Denio v. Benham, 24 Wash. 485, 64 Pac. 794; Burns v. Conner, 1 Wash. 6, 23 Pac. 836; State ex rel. Quincy v. Collins, 31 Wash. 564, 72 Pac. 98; Tacoma Nat. Bank v. Sprague, 33 Wash. 285, 74 Pac. 393.

Defenses or Grounds for Opposition to Revival: See Remington's Digest, Judgm., § 266-1; Waterman v. Bash, 46 Wash. 212, 89 Pac. 556.

Actions to Revive Judgment: See Remington's Digest, Judgm., § 266-2; Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841.

Operation and Effect of Revival: See Remington's Digest, Judgm., § 267; Palmer v. Laberee, 23 Wash. 409, 63 Pac. 216; Brier v. Traders' Nat. Bank, 24 Wash. 695, 64 Pac. 831.

Effect upon existing judgment lien of proceedings to renew, revise or extend the judgment. 53 L. R. A. 702.

Service of notice in proceedings for revival of judgment. 37 L. R. A. (N. S.) 1162.

§ 463. Proof for Revival—No Revival After Six Years.

Such motion shall not be granted unless it be established by oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied. The order of the court granting such leave shall operate as a revival of the judgment for the amount found due at the time of such revival, and the same shall be and continue a lien upon real estate of the judgment debtor for a period of five years from and after the date of such order, in like manner with the original judgment: Provided, that a transcript thereof shall, within twenty days, be filed in the office of the county auditor of the county where the lands lie of such judgment debtor, or said lien shall be suspended till such transcript be

filed. Revived judgments shall bear the same interest and be in all respects similar to original judgments as to lien and enforcement of collection: Provided, however, That no judgment shall be revived or continued unless proceedings for such revival or continuance shall be commenced within six years after the date of its rendition: Provided further, that this act shall not apply to any judgment now in existence until one year from the time this act takes effect. [L. '91, p. 165, § 1; 2 H. C., § 463.]

See notes to last section.

Time for Revival and Limitations: See Remington's Digest, Judgm., § 265; Sears v. Kilbourne, 28 Wash. 194, 68 Pac. 450; Barthrop v. Tucker, 29 Wash. 666, 70 Pac. 120; Hayton v. Beason, 31 Wash. 317, 71 Pac. 1018; Tacoma Nat. Bank v. Sprague, 33 Wash. 285, 74 Pac. 393; Gaffney v. Jones, 44 Wash. 158, 87 Pac. 114.

CHAPTER XVII.

VACATION AND MODIFICATION OF JUDGMENTS.

§ 464. Causes for Vacation or Modification of Judgments.

The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term [time] at which such judgment or order was made, to vacate or modify such judgment or order:—

1. By granting a new trial for the cause, within the time and in the manner, and for any of the causes prescribed by the sections relating to new trials;

2. By a new trial granted in proceedings against defendant, served by publication only as prescribed in section 235;

3. For mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order;

4. For fraud practiced by the successful party in obtaining the judgment or order;

5. For erroneous proceedings against a minor [or] person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings;

6. For the death of one of the parties before the judgment in the action;

7. For unavoidable casualty or misfortune preventing the party from prosecuting or defending;

8. For error in a judgment shown by a minor, within twelve months after arriving at full age. [L. '75, p. 20, § 1; Cd. '81, § 436; 2 H. C., § 1393.]

See supra, § 235, relief in cases where personal service not had.

See supra, § 303, relief from judgments, etc.

See supra, § 398 et seq., new trials.

Cited in 5 Wash. 302; 7 Wash. 482; 8 Wash. 594; 10 Wash. 271, 311, 646, 675; 13 Wash. 675; 17 Wash. 357, 566; 21 Wash. 161, 433, 482, 639, 675; 22 Wash. 251, 499; 23 Wash. 247; 24 Wash. 98; 25 Wash. 470, 573, 655, 659, 670; 28 Wash. 128, 301; 31 Wash. 59; 32 Wash. 160, 174; 34 Wash. 307; 35 Wash. 115; 37 Wash. 437; 39 Wash. 680, 681; 43 Wash. 511; 45 Wash. 264; 48 Wash. 430; 50 Wash. 477; 52 Wash. 39; 53 Wash. 419; 55 Wash.

43, 44; 56 Wash. 151; 57 Wash. 177; 58 Wash. 582; 59 Wash. 200; 67 Wash. 472; 68 Wash. 348; 70 Wash. 348, 349; 74 Wash. 643; 79 Wash. 489; 81 Wash. 140; 83 Wash. 63, 86, 87; 84 Wash. 399, 400; 87 Wash. 550, 551, 552, 556; 101 Wash. 138, 139, 141; 107 Wash. 33; 109 Wash. 129, 163, 234, 235.

OPENING OR SETTING ASIDE DEFAULT—Nature and Scope of Remedy: See Remington's Digest, Judgm., § 35;

Belles v. Carroll, 6 Wash. 131, 32 Pac. 1060; *Barker v. Seattle*, 97 Wash. 511, 166 Pac. 1143.

Discretion of Court: See *Remington's Digest*, Judgm., § 36; *Spokane Falls v. Curry*, 2 Wash. 541, 27 Pac. 477; *Haynes v. Schwartz Co.*, 5 Wash. 433, 32 Pac. 220; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905, 111 Am. St. Rep. 979, 5 Ann. Cas. 798, 2 L. R. A. (N. S.) 331; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Starr v. Long Jim*, 52 Wash. 138, 100 Pac. 194; *Spoar v. Spokane Turn-Verein*, 64 Wash. 208, 116 Pac. 627; *Swasey v. Mikkelsen*, 65 Wash. 411, 18 Pac. 308; *Hays v. Mercantile Investment Co.*, 73 Wash. 586, 132 Pac. 406; *Richman v. Wenaha Co.*, 74 Wash. 370, 133 Pac. 467; *Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690; *Hazeltine v. Rockey*, 90 Wash. 248, 155 Pac. 1056; *Cammarano v. Longmire*, 99 Wash. 360, 169 Pac. 806.

See, also, *State ex rel. Kiggins v. Hadley*, 104 Wash. 648, 177 Pac. 655.

Judgments Which may be Opened or Set Aside: See *Remington's Digest*, Judgm., § 37; *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959; *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867.

The remedy of the grantee of a judgment debtor, whose land has been sold under a void judgment against his grantor, is not by bringing proceedings to vacate the judgment under section 464 et seq., but is governed by section 785 et seq., which authorize actions to recover possession of real estate and to quiet title thereto: *Krutz v. Isaacs*, 25 Wash. 566, 66 Pac. 141.

Invalidity of Judgment: See *Remington's Digest*, Judgm., § 38; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123; *Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Macario v. Alaska Gastineau Min. Co.*, 96 Wash. 458, 165 Pac. 73, L. R. A. 1917E, 1152.

See, also, *Rowe v. Silbaugh*, 107 Wash. 518, 182 Pac. 576.

Excuses for Default—In General: See *Remington's Digest*, Judgm., § 40; *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867; *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033; *Moody v. Reichow*, 38 Wash. 303, 80 Pac. 461.

Mistake, Excusable Neglect or Inadvertence: See *Remington's Digest*, Judgm., § 41; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Bast v. Hysom*, 6 Wash. 170, 32 Pac. 997; *Hull v. Vining*, 17 Wash. 352, 49 Pac. 537; *Titus v. Larsen*, 18 Wash. 145, 51 Pac. 351; *Kain v. Sylvester*, 62 Wash. 151, 113 Pac. 573; *Swasey v. Mikkelsen*, 65 Wash. 411, 118

Pac. 308; *Paltro v. Gavenas*, 97 Wash. 327, 166 Pac. 1156.

See, also, *Mount Vernon Nat. Bank v. First Nat. Bank*, 104 Wash. 107, 176 Pac. 13.

Mistake or Negligence of Counsel as to Time of Appearance: See *Remington's Digest*, Judgm., § 42; *Reitmeir v. Siegmund*, 13 Wash. 624, 43 Pac. 878; *Dalgardno v. Trumbull*, 25 Wash. 362, 65 Pac. 528; *Coleman v. Security Sav. Soc.*, 57 Wash. 675, 107 Pac. 842.

Failure to Reach Courthouse in Time: See *Remington's Digest*, Judgm., § 43; *Bank of Commerce v. Warren*, 8 Wash. 477, 36 Pac. 440.

Absence of Party or Counsel: See *Remington's Digest*, Judgm., § 44; *Sanborn v. Centralia Furniture Mfg. Co.*, 5 Wash. 150, 31 Pac. 466; *Ramey v. Smith*, 56 Wash. 604, 106 Pac. 160.

Agreement or Settlement With Plaintiff or Counsel: See *Remington's Digest*, Judgm., § 45; *McBride v. McGinley*, 31 Wash. 573, 72 Pac. 105; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959.

Irregularities or Defects in Proceedings on Default: See *Remington's Digest*, Judgm., § 45-1; *Stark Brothers v. Royce*, 44 Wash. 287, 87 Pac. 340.

AMENDMENT, CORRECTION AND REVIEW IN SAME COURT—Authority of Court: See *Remington's Digest*, Judgm., § 84; *Hawks v. Votaw*, 1 Wash. 70, 23 Pac. 442; *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363; *Coyle v. Seattle Elec. Co.*, 31 Wash. 181, 71 Pac. 733; *Sivyer v. Lawyer*, 25 Wash. 360, 65 Pac. 529; *O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 Pac. 241; *State ex rel. McConihe v. Steiner*, 58 Wash. 578, 109 Pac. 57; *Okazaki v. Sussman*, 79 Wash. 622, 140 Pac. 904; *Forsyth v. Dow*, 81 Wash. 137, 142 Pac. 490; *State ex rel. Lundin v. Superior Court*, 90 Wash. 299, 155 Pac. 1041; *Shaughnessy v. Northland Steamship Co.*, 94 Wash. 325, 162 Pac. 546, Ann. Cas. 1918B, 655; *McCaffrey v. Snapp*, 95 Wash. 202, 163 Pac. 406; *Litzell v. Hart*, 96 Wash. 471, 165 Pac. 393; *State ex rel. Northern Pac. R. Co. v. Superior Court*, 101 Wash. 144, 172 Pac. 336.

Judgments Which may be Amended or Corrected: See *Remington's Digest*, Judgm., § 85; *Bell v. Waudby*, 7 Wash. 203, 34 Pac. 917; *State ex rel. Wolferman v. Superior Court*, 8 Wash. 591, 36 Pac. 443; *State ex rel. Rucker v. Superior Court*, 18 Wash. 227, 51 Pac. 365; *State ex rel. Brown v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974; *Stark Brothers v. Royce*, 44 Wash. 287, 87 Pac. 340; *O'Bryan v. American Inv. & Imp. Co.*, 50 Wash. 371, 97 Pac. 241; *Wiggins v. Shaw*, 99 Wash. 408, 169 Pac. 553.

Nature of Errors or Defects—Provisions of Judgment not Conforming to Decision:

See Remington's Digest, Judgm., §§ 86—89; Hale v. Finch, 1 W. T. 517; Seattle & M. R. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567; Tacoma Lumber & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755; McCaffrey v. Snapp, 95 Wash. 202, 163 Pac. 406; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393.

Persons Entitled to Apply: See Remington's Digest, Judgm., § 90; State ex rel. Dodge v. Langhorne, 12 Wash. 588, 41 Pac. 917; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393.

Notice of Application and Proceedings: See Remington's Digest, Judgm., §§ 91, 91-1; Griffith v. Maxwell, 19 Wash. 614, 54 Pac. 35; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393.

Allowing Amendment Nunc Pro Tunc: See Remington's Digest, Judgm., § 92; Hays v. Miller, 1 W. T. 143; Schulze v. Oregon R. & Nav. Co., 41 Wash. 614, 84 Pac. 587.

Writ of Error Coram Nobis: See Remington's Digest, Judgm., § 93; State ex rel. Davis v. Superior Court, 15 Wash. 339, 46 Pac. 399.

OPENING OR VACATING—Nature and Scope of Remedy: See Remington's Digest, Judgm., § 94; Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

Existence of or Resort to Other Remedy: See Remington's Digest, Judgm., § 95; Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141; Griffith v. Maxwell, 25 Wash. 658, 66 Pac. 106; State ex rel. Twigg v. Superior Court, 34 Wash. 643, 76 Pac. 282; Ellis v. Moon, 40 Wash. 114, 82 Pac. 186.

Authority of Court—In General: See Remington's Digest, Judgm., § 96; State ex rel. Coughill v. Sachs, 3 Wash. 691, 29 Pac. 446; State ex rel. Rucker v. Superior Court, 18 Wash. 227, 51 Pac. 365; Shepard v. Gove, 26 Wash. 452, 67 Pac. 256; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107.

—After the Term: See Remington's Digest, Judgm., § 97; Hancock v. Stewart, 1 W. T. 323; State ex rel. Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724.

Discretion of Court: See Remington's Digest, Judgm., § 99; Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134; McDougall v. Walling, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; McCord v. McCord, 24 Wash. 529, 64 Pac. 748; Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042; Klein v. Wandschneider, 14 Wash. 257, 44 Pac. 272; State ex rel. Rucker v. Superior Court, 18 Wash. 227, 51 Pac. 365; Wilson v. Seattle Dry Dock etc. Co., 26 Wash.

297, 66 Pac. 384; Anderson v. Shields, 51 Wash. 463, 99 Pac. 24; Molloy v. Union Transfer, Moving & Storage Co., 60 Wash. 331, 111 Pac. 160.

See, also, Mount Vernon Nat. Bank v. First Nat. Bank, 104 Wash. 107, 176 Pac. 13.

Judgments Which may be Opened or Vacated: See Remington's Digest, Judgm., §§ 100, 100-1; Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370; Winstone v. Winstone, 40 Wash. 272, 82 Pac. 268; Stark Brothers v. Royce, 44 Wash. 287, 87 Pac. 340; McKeever's Estate, In re, 48 Wash. 429, 93 Pac. 916.

Order approving account: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

Order appointing guardian: Mayer v. Rice, 113 Wash. 144, 193 Pac. 723.

Operation and Effect—In General: See Remington's Digest, Judgm., § 131; Benney v. Clein, 15 Wash. 281, 46 Pac. 1037; Molloy v. Union Transfer Moving & Storage Co., 60 Wash. 331, 111 Pac. 160.

—As Bar to Subsequent Proceedings: See Remington's Digest, Judgm., § 132; Burnham v. Spokane Mercantile Co., 18 Wash. 207, 51 Pac. 363; Wilson v. Seattle Dry Dock etc. Co., 26 Wash. 297, 66 Pac. 384; Chezum v. Claypool, 22 Wash. 498, 61 Pac. 157; McCord v. McCord, 24 Wash. 529, 64 Pac. 748; In re Lamona's Estate, 29 Wash. 394, 69 Pac. 1093; Clein v. Wandschneider, 14 Wash. 257, 44 Pac. 272; Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Pierce County v. Bunch, 49 Wash. 599, 96 Pac. 164; Bunch v. Pierce County, 53 Wash. 298, 101 Pac. 874; Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005; Flueck v. Pedigo, 55 Wash. 646, 104 Pac. 1119; Newell v. Young, 59 Wash. 286, 109 Pac. 801; Boylan v. Bock, 60 Wash. 423, 111 Pac. 454; Wagner v. Northern Life Ins. Co., 70 Wash. 210, 126 Pac. 434, 44 L. R. A. (N. S.) 338; Kelley v. Sakai, 72 Wash. 364, 130 Pac. 503; State ex rel. Northern Pac. R. Co. v. Superior Court, 101 Wash. 133, 172 Pac. 336.

See, also, Stolze v. Stolze, 111 Wash. 398, 191 Pac. 641.

Vacation of Order or Reinstatement of Judgment: See Remington's Digest, Judgm., § 133; Mason v. McLean, 6 Wash. 31, 32 Pac. 1006; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485.

SUBDIVISION 1—Want of Jurisdiction—In General: See Remington's Digest, Judgm., § 101; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; State v. Washington Dredging etc. Co., 43 Wash. 504, 86 Pac. 936.

—Want of or Defects in Process, Service or Notice: See Remington's Digest, Judgm., § 102; Wheeler v. Moore, 10

Wash. 309, 38 Pac. 1053; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Sellers v. Pacific Wrecking etc. Co., 34 Wash. 111, 34 Pac. 1056; Snider v. Bedere, 39 Wash. 130, 81 Pac. 302; Peterson v. Lara, 46 Wash. 448, 90 Pac. 596; Stevens v. Doohen, 50 Wash. 145, 96 Pac. 1032; State ex rel. Pacific Loan & Investment Co. v. Superior Court, 84 Wash. 392, 146 Pac. 834.

See, also, State ex rel. Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481; Burns v. Stolze, 111 Wash. 392, 191 Pac. 642.

— **Falsity of Return or Proof of Service:** See Remington's Digest, Judgm., § 103; State ex rel. Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; Sturgiss v. Dart, 23 Wash. 234, 62 Pac. 858.

— **Unauthorized Appearance:** See Remington's Digest, Judgm., § 104; Ashcraft v. Powers, 22 Wash. 440, 61 Pac. 161.

Errors and Irregularities—In General: See Remington's Digest, Judgm., § 105; Sears v. Seattle Consol. St. R. Co., 7 Wash. 286, 34 Pac. 918; State ex rel. Hennessy v. Huston, 32 Wash. 154, 72 Pac. 1015.

— **Errors of Law:** See Remington's Digest, Judgm., § 106; Dickson v. Matheson, 12 Wash. 196, 40 Pac. 725; Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182; Barker's Estate, In re, 33 Wash. 79, 73 Pac. 796; Snohomish Land Co. v. Blood, 40 Wash. 626, 82 Pac. 933; Little Bill v. Dyslin, 51 Wash. 675, 99 Pac. 1026; Warren v. Hershberg, 52 Wash. 38, 100 Pac. 149; McElroy v. Hooper, 70 Wash. 347, 126 Pac. 925; Morgan v. Williams, 77 Wash. 343, 137 Pac. 476; Paich v. Northern Pac. R. Co., 82 Wash. 581, 144 Pac. 919.

— **Irregularities in Proceedings Before Judgment:** See Remington's Digest, Judgm., § 108; State ex rel. Grady v. Lockhart, 18 Wash. 531, 52 Pac. 315; Lamona v. Cowley, 31 Wash. 297, 71 Pac. 1040.

— **Irregularities in Entry of Judgment:** See Remington's Digest, Judgm., § 109; Tacoma Lumber etc. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115; Port Townsend Nat. Bank v. Weymouth, 11 Wash. 412, 39 Pac. 648; Fisher v. Puget Sound Brick etc. Co., 34 Wash. 578, 76 Pac. 107.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209; Rogers v. Savage, 112 Wash. 246, 192 Pac. 13.

Absence of Counsel: See Remington's Digest, Judgm., § 111; Bozzio v. Vaglio, 10 Wash. 277, 38 Pac. 1042.

Disability of Party: See Remington's Digest, Judgm., § 111-1; Morrison v. Steenstra, 45 Wash. 175, 88 Pac. 104.

See, also, Gordon v. Hillman, 109 Wash. 223, 186 Pac. 651.

Surprise and Inadvertence: See Remington's Digest, Judgm., § 112; O'Toole v. Phoenix Ins. Co., 39 Wash. 688, 82 Pac. 175; Little Bill v. Dyslin, 51 Wash. 675, 99 Pac. 1026; Green v. Russell, 71 Wash. 379, 128 Pac. 645.

— **Newly Discovered Evidence:** See Remington's Digest, Judgm., § 112-1; Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088.

SUBDIVISION 3—Mistake: See Remington's Digest, Judgm., § 110; Northern Pac. etc. R. Co. v. Black, 3 Wash. 327, 28 Pac. 538; Land Mortgage Bank v. Nicholson, 24 Wash. 258, 64 Pac. 156; National Bank of Commerce v. Kilsheimer & Co., 59 Wash. 460, 110 Pac. 15; Hartford v. Stout, 102 Wash. 241, 172 Pac. 1168.

SUBDIVISION 4—Fraud, Perjury, Collusion or Other Misconduct—Misconduct of Party or Counsel in General: See Remington's Digest, Judgm., § 113; State ex rel. Wolferman v. Superior Court, 8 Wash. 591, 36 Pac. 443; Snohomish Land Co. v. Blood, 40 Wash. 626, 82 Pac. 933; Meisenheimer v. Meisenheimer, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005; State ex rel. Bradway v. De Mattos, 88 Wash. 35, 152 Pac. 721; Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158.

The fact that an order approving an administrator's final account and decree of distribution is appealable as a final order to correct error of law does not limit the force of this section, subdivision 4, authorizing its vacation or modification for irregularities in obtaining it in reciting the approval of claims and payment thereof not then disclosed by the record: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

Where a garnishee allowed a judgment of default to be obtained by fraud and without notice to him of an assignment or opportunity to defend, his only remedy was to proceed within one year to set aside the judgment of garnishment, under sections 464, 467: Benjamin v. Ernst, 83 Wash. 59, 145 Pac. 79.

An order vacating a judgment and granting a new trial, for fraud, made upon petition filed within one year, under this section, must be treated as a proceeding in the original cause, and is not appealable as a final order: State ex rel. Post v. Superior Court, 31 Wash. 53, 71 Pac. 740; Post v. Spokane, 35 Wash. 114, 76 Pac. 510.

Under subdivision 4, the superior court has jurisdiction to vacate a decree of divorce procured by fraud, regardless of whether the service was personal or by

publication; although section 235, *supra*, authorizing the opening of default judgments for the purpose of defending the action within one year, when secured on service by publication, expressly excepts judgments for divorce: *Chaney v. Chaney*, 56 Wash. 145, 105 Pac. 229.

— **Fraud in Preventing Defense:** See *Remington's Digest*, Judgm., § 114; *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849.

— **Perjury or False Testimony:** See *Remington's Digest*, Judgm., § 115; *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669, 75 Am. St. Rep. 849; *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5, L. R. A. 1916B, 883; *Burke v. Bladine*, 99 Wash. 383, 169 Pac. 811.

See, also, *Bennington County Sav. Bank v. France*, 111 Wash. 483, 191 Pac. 616.

SUBDIVISION 6.—Under this section, subdivision 6, a judgment may be vacated by a direct attack in the court where the judgment was rendered, on the ground of death of one of the parties before the judgment: *Gordon v. Hillman*, 109 Wash. 223, 186 Pac. 651.

SUBDIVISION 8—Judgment—Opening and Vacating After Attaining Majority: See *Remington's Digest*, Infants, §§ 27—29; *Hill v. Lowman*, 15 Wash. 503, 46 Pac. 1042; *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779; *Burke v. Northern Pac. R. Co.*, 86 Wash. 37, 149 Pac. 335, Ann. Cas. 1917B, 919; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154.

Under this section, subdivision 8, and section 468, it is not required that the petitioner shall file his motion or petition in the original case, nor is any statutory form of procedure prescribed by such sections which must be strictly pursued: *Morrison v. Morrison*, 25 Wash. 466, 65 Pac. 779.

A judgment entered against infants upon proper service is not void, but voidable only, and cannot be attacked for fraud or error under this section, unless the proceeding is commenced within one year after the infants attain majority: *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154.

This section has no application, where an order discharging a guardian and settling the final account was entered without notice to, or knowledge of, his ward, there was no actual settlement and he continued to hold himself out as guardian; since the order is *ex parte* and void for want of jurisdiction, and may be vacated at any time: *Sroufe's Estates*, In re, 74 Wash. 639, 134 Pac. 471.

— **Collateral Attack:** *Kalb v. German Sav. & L. Soc.*, 25 Wash. 349, 65 Pac. 559, 87 Am. St. Rep. 757.

— **Operation and Effect:** *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

PROCEEDINGS AND RELIEF—Jurisdiction of Application: See *Remington's Digest*, Judgm., § 120; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *State v. Washington Dredging etc. Co.*, 43 Wash. 508, 86 Pac. 936.

EQUITABLE RELIEF—Right to Relief in General: See *Remington's Digest*, Judgm., § 134; *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061; *Connor v. Seattle*, 82 Wash. 296, 144 Pac. 52; *Robertson v. Freebury*, 87 Wash. 558, 152 Pac. 5, L. R. A. 1916B, 883; *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 Pac. 1158.

Existence of or Resort to Other Remedy: See *Remington's Digest*, Judgm., § 135; *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Spokane Co-operative Min. Co. v. Pearson*, 28 Wash. 118, 68 Pac. 165; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740; *Denny-Renton Clay & Coal Co. v. Sartori*, 87 Wash. 545, 151 Pac. 1088.

Equitable Nature of Grounds for Relief: See *Remington's Digest*, Judgm., § 136; *Sparks v. Brown*, 2 W. T. 426, 7 Pac. 864.

Want of Jurisdiction—Falsity of Return or Proof of Service: See *Remington's Digest*, Judgm., § 137; *Johnson v. Gregory*, 4 Wash. 109, 29 Pac. 831, 31 Am. St. Rep. 907; *Northwestern & P. H. Bank v. Ridpath*, 29 Wash. 687, 70 Pac. 139.

— **Want of or Defects in Process, Service or Notice:** See *Remington's Digest*, Judgm., § 137-1; *Silverstone v. Totten*, 50 Wash. 447, 97 Pac. 491.

See, also, *Rowe v. Silbaugh*, 107 Wash. 518, 182 Pac. 576.

— **Defects and Objections as to Parties:** See *Remington's Digest*, Judgm., § 137-2; *Hotchkin v. Bussell*, 46 Wash. 7, 89 Pac. 183.

— **Unauthorized Appearance:** See *Remington's Digest*, Judgm., § 138; *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922; *Turner v. Turner*, 33 Wash. 118, 74 Pac. 55.

Errors and Irregularities—Errors of Law: See *Remington's Digest*, Judgm., § 139; *Davis v. Fields*, 9 Wash. 78, 37 Pac. 281; *Long v. Eisenbeis*, 18 Wash. 423, 51 Pac. 1061.

Excuses for Failure to Interpose Defenses—Negligence of Counsel: See *Rem-*

ington's Digest, Judgm., § 140; Winstone v. Winstone, 40 Wash. 272, 82 Pac. 268.

Meritorious Cause of Action or Defense: See Remington's Digest, Judgm., § 141; Wingard v. Jameson, 2 W. T. 402, 7 Pac. 863; Hill v. Lowman, 15 Wash. 503, 46 Pac. 1042; Brandt v. Little, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213.

Limitations and Laches: See Remington's Digest, Judgm., § 142; Hill v. Lowman, 15 Wash. 503, 46 Pac. 1042; Long v. Eisenbeis, 18 Wash. 423, 51 Pac. 1061; West Phila. Title & Trust Co. v. Olympia, 19 Wash. 150, 52 Pac. 1015; Boston Nat. Bank of Seattle v. Hammond, 21 Wash. 158, 57 Pac. 365; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; State ex rel. American Freehold-L. M. Co. v. Tanner, 45 Wash. 348, 88 Pac. 321; Bunch v. Pierce County, 53 Wash. 298, 101 Pac. 874; Washington Dredg. & Imp. Co. v. State, 53 Wash. 346, 101 Pac. 884; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777; State ex rel. Prentice v. Superior Court, 86 Wash. 99, 149 Pac. 321; Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088; Rowe v. Silbaugh, 96 Wash. 138, 164 Pac. 923; Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158.

Complaint—Sufficiency: See Remington's Digest, Judgm., § 142-1; Godfrey v. Camp, 95 Wash. 674, 164 Pac. 210, 168 Pac. 519; Burke v. Biadine, 99 Wash. 383, 169 Pac. 811.

Absolute right of defendant not personally served to have judgment

opened and to defend. 12 *Ann. Cas.* 992; *Ann. Cas.* 1912A, 1164; *Ann. Cas.* 1916B, 565.

Vacation of judgment affecting infant duly represented. *Ann. Cas.* 1917B, 922.

Power of court to set aside as to part of joint tort-feasors judgment against all. 19 *Ann. Cas.* 797.

Vacation of divorce decree after death of party in direct proceedings brought by surviving party. 5 *Ann. Cas.* 892; *Ann. Cas.* 1913B, 369; *Ann. Cas.* 1917A, 595.

Reliance upon clerk or judge for information as to time of trial or hearing as ground for relief from judgment. *L. R. A.* 1917C, 1193.

Fraud or collusion as ground for relief from judgment obtained on unauthorized appearance of attorney. 21 *L. R. A.* 854.

Fraud as ground of attack on judgment entered on stipulation or compromise. 45 *L. R. A.* (N. S.) 1159.

Neglect of counsel as imputable to party under statute providing for relief from judgment for mistake, surprise, inadvertence or excusable neglect. 27 *L. R. A.* (N. S.) 858.

Knowledge of pendency of action as affecting right to equitable relief from judgment rendered without personal jurisdiction. 9 *L. R. A.* (N. S.) 1062.

Vacation of judgment after its satisfaction. 3 *Ann. Cas.* 19.

§ 465. Petition for New Trial.

When the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term [time] when the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases, not later than after the discovery, on which notice shall be served and returned, and the defendant held to appear as in an original action. The facts stated in the petition [complaint] shall be considered as denied without answer. The case shall be tried as other cases by ordinary proceedings, but no motion shall be filed more than one year after the final judgment was rendered. [L. '75, p. 21, § 2; Cd. '81, § 437.]

Cited in 25 Wash. 470, 573; 56 Wash. 151, 573; 87 Wash. 551, 552, 556; 92 Wash. 88; 99 Wash. 217.

Necessity of Diligence Within the Statutory Period: See Remington's Digest, Judgm., § 122; Bozzio v. Vaglio, 10 Wash. 270, 38 Pac. 1042; Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182; Dane v. Daniel, 28 Wash. 155, 68 Pac. 440; Nelson v.

Nelson, 56 Wash. 571, 106 Pac. 138, 107 Pac. 195.

Objections to Jurisdiction: See Remington's Digest, Judgm., § 123; Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 376.

Pendency of Appeal: See Remington's Digest, Judgm., § 123-1; Shilshole Avenue, In re, 101 Wash. 136, 172 Pac. 338.

§ 466. Petition to Vacate, etc., to be by Motion, When.

The proceedings to vacate or modify a judgment or order for mistakes or omissions of the clerk, or irregularity in obtaining the judgment or order, shall be by motion served on the adverse party, or on his attorney in the action, and within one year. [Cf. L. '75, p. 21, § 3; Cd. '81, § 438; L. '91, p. 44, § 1; 2 H. C., § 1394.]

Cited in 3 Wash. 720; 13 Wash. 675; 23 Wash. 251; 25 Wash. 470, 573, 659; 44 Wash. 295; 53 Wash. 419, 420; 56 Wash. 151, 572; 57 Wash. 177; 59 Wash. 200; 68 Wash. 348, 350; 83 Wash. 87; 95 Wash. 62; 99 Wash. 558; 101 Wash. 138.

PROCEEDINGS AND RELIEF—Waiver of Right to Relief: See Remington's Digest, Judgm., § 117-1; Molloy v. Union Transfer Moving & Storage Co., 60 Wash. 331, 111 Pac. 160.

Vacating Judgment on Court's Own Motion: See Remington's Digest, Judgm., § 117-2; State ex rel. McConihe v. Steiner, 58 Wash. 578, 109 Pac. 57.

Limitations: See Remington's Digest,

Judgm., § 39-1; Bruhn v. Pasco Land Co., 67 Wash. 490, 121 Pac. 981; Smith v. Stiles, 68 Wash. 345, 123 Pac. 448.

Under this section, a petition for the vacation of an order of court cannot be entertained, when the application is not made within one year from date of the order: Greene v. Williams, 13 Wash. 674, 43 Pac. 938.

A sale made by a receiver to his business associate, confirmed by the court, will not be vacated for fraud and inadequacy of price where the applicants did not file their petition within one year as required by this section: Dibble v. Washington Food Co., 57 Wash. 176, 106 Pac. 760.

§ 467. Petition to be Verified, When.

The proceedings to obtain the benefit of subdivisions 2, 3, 4, 5, 6, and 7 of section 464 shall be by petition verified by affidavit, setting forth the judgment or order, the facts or errors constituting a cause to vacate or modify it, and if the party is a defendant, the facts constituting a defense to the action; and such proceedings must be commenced within one year after the judgment or order was made, unless the party entitled thereto be a minor or person of unsound mind, and then within one year from the removal of such disability. [Cf. L. '75, p. 21, § 4; Cd. '81, § 439; L. '91, p. 45, § 2; 2 H. C., § 1395.]

Cited in 7 Wash. 482; 10 Wash. 272; 17 Wash. 601; 21 Wash. 161; 23 Wash. 247; 24 Wash. 100; 25 Wash. 270, 573, 655, 659; 28 Wash. 301; 31 Wash. 59; 34 Wash. 307; 37 Wash. 437; 39 Wash. 680; 43 Wash. 25; 45 Wash. 22; 50 Wash. 477; 53 Wash. 420; 55 Wash. 43; 56 Wash. 151, 152; 68 Wash. 349, 350; 83 Wash. 63, 88; 87 Wash. 551; 96 Wash. 478; 98 Wash. 98; 104 Wash. 109.

Notice and Application to Open Default Judgment: See Remington's Digest, Judgm., § 46; Morrison v. Berlin, 37 Wash. 600, 79 Pac. 1114; Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

The vacation of a default judgment for mistake and inadvertence in properly noting the return day may be had on motion, and need not be by petition as provided in this section: Mount Vernon National Bank v. First National Bank, 104 Wash. 107, 176 Pac. 13.

Counter-affidavits and Other Evidence, in Defaults: See Remington's Digest, Judgm., § 48; Conover v. Hull, 10 Wash. 673, 39

Pac. 166, 45 Am. St. Rep. 810; Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785.

Conditions on Granting Application to Open Default—Securing Payment of Judgment in General: See Remington's Digest, Judgm., § 50; Halter v. Spokane Soap Works Co., 12 Wash. 662, 42 Pac. 126.

Affidavits on Application—In General: See Remington's Digest, Judgm., § 127; Whidby Land etc. Co. v. Nye, 5 Wash. 301, 31 Pac. 752; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

Affidavit of Merits: See Remington's Digest, Judgm., § 128; Hoefer v. Sawtelle, 43 Wash. 23, 85 Pac. 853; Sakai v. Keeley, 66 Wash. 172, 119 Pac. 190.

Counter-affidavits and Other Evidence: See Remington's Digest, Judgm., § 129; Tacoma Lumber etc. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755.

Nature and Form of Proceedings: See Remington's Digest, Judgm., § 118; Whid-

by Land & Develop. Co. v. Nye, 5 Wash. 301, 31 Pac. 752; Williams v. Breen, 25 Wash. 666, 66 Pac. 103; Greene v. Williams, 13 Wash. 674, 43 Pac. 938; Roberts v. Shelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576; Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653, 66 Pac. 92.

See, also, Mount Vernon Nat. Bank v. First Nat. Bank, 104 Wash. 107, 176 Pac. 13.

Form and Requisites of Application in General: See Remington's Digest, Judgm., § 119; Kuhn v. Mason, 24 Wash. 94, 64 Pac. 182; State ex rel. Hennessy v. Huston, 32 Wash. 54, 72 Pac. 1015; Nolan v. Arnot, 36 Wash. 101, 78 Pac. 463; Hoefer v. Sawtelle, 43 Wash. 23, 85 Pac. 853; Kelley v. Sakai, 72 Wash. 364, 130 Pac. 503; Dawson v. Carstens, 98 Wash. 96, 167 Pac. 86.

Time for Application—In General: See Remington's Digest, Judgm., § 121; Hancock v. Stewart, 1 W. T. 323; Hawks v. Votaw, 1 Wash. 70, 23 Pac. 442; Wolferman v. Bell, 8 Wash. 140, 35 Pac. 603; Green v. Williams, 13 Wash. 674, 43 Pac. 938; Denton v. Merchants' Nat. Bank, 18 Wash. 387, 51 Pac. 473; Boston

Nat. Bank of Seattle v. Hammond, 21 Wash. 158, 57 Pac. 365; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; State ex rel. Post v. Superior Court, 31 Wash. 53, 71 Pac. 742; Scott v. Hanford, 37 Wash. 5, 79 Pac. 481; Twigg v. James, 37 Wash. 434, 79 Pac. 959; Warren v. Hershberg, 52 Wash. 38, 100 Pac. 149; Nelson v. Nelson, 56 Wash. 571, 106 Pac. 138, 107 Pac. 195; Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785; Kath v. Brown, 69 Wash. 306, 124 Pac. 900; Seattle v. Krutz, 78 Wash. 553, 139 Pac. 498; State ex rel. Pacific Loan & Investment Co. v. Superior Court, 84 Wash. 392, 146 Pac. 834; Denny-Renton Clay & Coal Co. v. Sartori, 87 Wash. 545, 151 Pac. 1088; Davis v. Seavey, 95 Wash. 57, 163 Pac. 35, Ann. Cas. 1918D, 314; Spokane Valley Power Co. v. Northern Pac. R. Co., 99 Wash. 557, 169 Pac. 991; Shilshole Avenue, In re, 101 Wash. 136, 172 Pac. 338.

An action by a guardian ad litem for relief from a void judgment against an insane ward is not barred, under this section until "within one year from the removal of the disability," and hence not while the ward is hopelessly insane; Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065.

§ 468. Proceedings.

In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried. [Cf. L. '75, p. 22, § 5; Cd. '81, § 440; L. '91, p. 45, § 3; 2 H. C., § 1396.]

Cited in 7 Wash. 482, 21 Wash. 639; 23 Wash. 247; 25 Wash. 470, 573, 655; 31 Wash. 59; 32 Wash. 178, 437; 34 Wash. 307; 43 Wash. 512; 53 Wash. 419; 59 Wash. 581; 68 Wash. 349, 350; 83 Wash. 88; 96 Wash. 478; 102 Wash. 245, 246.

Matters Available and Questions Presented Before Judgment: See Remington's Digest, Judgm., § 116; Roberts v. Shelton Southwestern R. Co., 21 Wash. 427, 58 Pac. 576; Friedman v. Manley, 21 Wash. 675, 59 Pac. 490.

Permitting the defendant to file an answer to the petition would not be prejudicial error, where no other proof was offered by defendant than such as was admissible without an answer; Swanson v. Hoyle, 32 Wash. 169, 72 Pac. 1011.

Parties on Application: See Remington's Digest, Judgm., § 124; Kuhn v. Mason, 24

Wash. 94, 64 Pac. 182; Morrison v. Morrison, 25 Wash. 466, 65 Pac. 779; Collins v. Kinnear, 37 Wash. 453, 79 Pac. 995; Peterson v. Wheeler, 66 Wash. 519, 120 Pac. 83.

Notice of Application: See Remington's Digest, Judgm., § 125; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485 (overruled); Spokane & Idaho Lumber Co. v. Stanley, 25 Wash. 653, 66 Pac. 92; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 111 Am. St. Rep. 919, 5 Ann. Cas. 890, 1 L. R. A. (N. S.) 551; Stark Brothers v. Royce, 44 Wash. 287, 87 Pac. 340; Garvey v. Skamser, 69 Wash. 259, 124 Pac. 688.

— **Notice to Attorney:** See Remington's Digest, Judgm., § 126; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Sturgiss v. Dart, 23 Wash. 244, 62 Pac.

858; Keith v. Rose, 59 Wash. 197, 109 Pac. 810.

See, also, Force, In re, 113 Wash. 151, 193 Pac. 698.

Hearing and Determination — Appearance: See Remington's Digest, Judgm., § 130; Bennett v. Supreme Tent etc.

Maccabees, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; Hartford v. Stout, 102 Wash. 241, 172 Pac. 1168.

Condition on Opening or Vacating Judgment: See Remington's Digest, Judgm., § 130-1; Redding v. Puget Sound Iron & Steel Works, 44 Wash. 200, 87 Pac. 119.

§ 469. Valid Defense.

The judgment shall not be vacated on motion or petition until it is adjudged that there is a valid defense to the action in which the judgment is rendered; or if the plaintiff seeks its vacation, that there is a valid cause of action; and when judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. [L. '75, p. 22, § 6; Cd. '81, § 441; 2 H. C., § 1397.]

Cited in 11 Wash. 388; 25 Wash. 671; 43 Wash. 25; 79 Wash. 489; 96 Wash. 478; 97 Wash. 331, 332, 431, 432.

Meritorious Cause of Action or Defense on Motion to Vacate Default: See Remington's Digest, Judgm., § 45-2; Strunz v. Hood, 44 Wash. 99, 87 Pac. 45; General Lith. & Print. Co. v. American Trust Co., 55 Wash. 401, 104 Pac. 608.

Affidavit of Merits on Application to Vacate Default: See Remington's Digest, Judgm., § 47; Walla Walla Print. etc. Co. v. Budd, 2 W. T. 336, 5 Pac. 602; Wheeler v. Moore, 10 Wash. 309, 38 Pac. 1053; Hole v. Page, 20 Wash. 208, 54 Pac. 1123; Bennett v. Supreme Tent etc. Maccabees, 40 Wash. 431, 82 Pac. 744, 2 L. R. A. (N. S.) 389; Lushington v. Seattle Auto & Driving Club, 60 Wash. 546, 111 Pac. 785; Frieze v. Powell, 79 Wash. 483, 140 Pac. 690; State ex rel. Pacific Loan & Investment Co. v. Superior Court, 84 Wash. 392, 146 Pac. 834; Spokane Merchants' Assn. v. Acord, 99 Wash. 674, 170 Pac. 329.

Meritorious Cause of Action or Defense, in General: See Remington's Digest, Judgm., § 117; Northern Pac. etc. R. Co. v. Black, 3 Wash. 327, 28 Pac. 538; Tacoma Lum. & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755; Western Security Co. v. Lafleur, 17 Wash. 406, 49 Pac. 1061; Williams v. Breen, 25 Wash. 666, 66 Pac. 103; Chehalis Coal Co. v. Laisure, 97 Wash. 422, 166 Pac. 1158; Russell v. Union Machinery & Supply Co., 100 Wash. 208, 170 Pac. 565.

Postponement of Lien—Effect of Modification of Judgment.—The fact that a judgment has in form been set aside and vacated and a new one entered will not destroy the lien of the former judgment, where it is in truth a modification of the original judgment: Smith v. Delanty, 11 Wash. 386, 39 Pac. 638.

This section applies as well to judgment liens upon personalty as upon realty: Smith v. Delanty, 11 Wash. 386, 39 Pac. 638.

A sale on execution to the judgment creditor of property which was exempt as a homestead, and satisfaction of the judgment thereby, does not preclude a reinstatement of the judgment, after the debtor had the sale set aside: Calhoun, Denny & Ewing v. Quinlan, 86 Wash. 547, 150 Pac. 1132.

Necessity that plaintiff in equitable action to set aside judgment should plead meritorious defense. **Ann. Cas.** 1913E, 124.

Statute of limitations as meritorious defense on opening default judgment. 21 **Ann. Cas.** 1282.

Necessity of showing meritorious defense as prerequisite to relief from divorce decree. **L. R. A.** 1917B, 427.

Necessity of affidavit of meritorious defense, and necessity of showing such defense, in order to vacate a judgment rendered without jurisdiction of the person of defendant. 18 **L. R. A. (N. S.)** 405.

§ 470. Grounds to Vacate must First be Tried.

The court may first try and decide upon the grounds to vacate or modify a judgment or order, before trying or deciding upon the validity of the defense or cause of action. [L. '75, p. 22, § 7; Cd. '81, § 442; 2 H. C., § 1398.]

Cited in 10 Wash. 311; 55 Wash. 97; 79 Wash. 493.

§ 471. Injunction to Suspend Proceedings.

The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge, upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. [L. '75, p. 22, § 8; Cd. '81, § 443; 2 H. C., § 1399.]

§ 472. Construction of Act.

The provisions of this chapter shall not be so construed as to affect the power of the court to vacate or modify judgments or orders as elsewhere in this code provided; nor shall any judgment of acquittal in a criminal action be vacated under the provisions of this chapter. [L. '91, p. 45, § 4; 2 H. C., § 1400.]

Cited in 10 Wash. 36; 25 Wash. 655.

§ 473. Judgment upon Denial of Application.

In all cases in which an application under this chapter to vacate or modify a judgment or order for the recovery of money is denied, if proceedings on the judgment or order shall have been suspended, judgment shall be rendered against the plaintiff [in this proceeding] for the amount of the former judgment or order, interest, and costs, together with damages at the discretion of the court, not exceeding ten per cent on the amount of the judgment or order. [Cf. L. '75, p. 22, § 9; Cd. '81, § 444; L. '91, p. 45, § 5; 2 H. C., § 1041.]

Cited in 55 Wash. 44; 109 Wash. 129.

CHAPTER XVIII.**COSTS AND DISBURSEMENTS.****§ 474. Compensation of Attorneys—Costs.**

The measure and mode of compensation of attorneys and counselors shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for his expenses in the action, which allowances are termed costs. [L. '54, p. 201, § 367; Cd. '81, § 505; 2 H. C., § 823.]

Cited in 9 Wash. 465; 26 Wash. 136; 34 Wash. 138; 35 Wash. 294; 42 Wash. 596; 52 Wash. 164; 58 Wash. 99, 678; 66 Wash. 421; 75 Wash. 273; 86 Wash. 670; 104 Wash. 26.

Compensation of Attorneys in General: See Remington's Digest, Atty. & C., §§ 35—44-1, and cases cited.

Under this section an agreement whereby the attorney agrees to pay the costs and to prosecute a case for a percentage of the recovery is legal: *Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390, 1 Ann. Cas. 297.

This section applies to actions for divorce; hence, in fixing the attorney's

fee in divorce, the court considers the circumstances and conditions of the defendant, irrespective of the wife's agreement with her counsel: *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876.

A contract for the employment of an attorney is void as against public policy and sound morals, when: *Delbridge v. Beach*, 66 Wash. 416, 119 Pac. 856.

In the absence of a provision in the decree for attorney's fees, the plaintiff would be entitled to only the statutory fee authorized by this section, as costs to the prevailing party: *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124.

A reinstatement or re-employment of attorneys is sufficiently shown by evidence of the attorneys to that effect, corroborated by disinterested witnesses and the records, as against the testimony

alone of one of the parties: *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

For text treatment of "Costs," see 7 R. C. L. 779.

§ 475. Amount, How Fixed.

In all cases of foreclosure of mortgages and in all other cases in which attorneys' fees are allowed, the amount thereof shall be fixed by the court at such sum as the court shall deem reasonable, any stipulations in the note, mortgage or other instrument to the contrary notwithstanding; but in no case shall said fee be fixed above contract price stated in said note or contract. [Cf. L. '85, p. 176, § 1; L. '88, p. 9, § 1; L. '91, p. 83, § 1; 2 H. C., § 803; L. '95, p. 81, § 1.]

Cited in 7 Wash. 323; 11 Wash. 110; 15 Wash. 207; 18 Wash. 463, 508, 556; 19 Wash. 84, 192, 612, 630; 70 Wash. 284; 86 Wash. 670; 100 Wash. 104; 104 Wash. 18; 105 Wash. 541.

Value of Services—In general: See Remington's Digest, Atty. & C., § 37; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835; *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Howe v. Kenyon*, 4 Wash. 677, 30 Pac. 1058; *Baldwin v. Mills*, 66 Wash. 302, 119 Pac. 816; *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625; *Atwood v. Sicade*, 73 Wash. 219, 131 Pac. 850; *Whitham v. Hilton*, 78 Wash. 446, 139 Pac. 209, Ann. Cas. 1916B, 260.

See, also, *Sullivan v. Sullivan*, 52 Wash. 160, 100 Pac. 321.

Specific Services and Particular Cases: See Remington's Digest, Atty. & C., § 38; *Bates v. School Dist. No. 10*, 45 Wash. 498, 88 Pac. 944; *McMillan v. Northport Smelting & Ref. Co.*, 49 Wash. 76, 94 Pac. 761; *Donworth & Todd v. Benton County*, 103 Wash. 382, 174 Pac. 441.

Services of attorneys are not inconsequential and trivial, where pleadings were filed, the causes extensively briefed, and defaults set aside, requiring several trips to another state: *Roche v. Madar*, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

In an action to recover the reasonable value of services of attorneys in a trial, the files and records in the cause are competent, whether they were sole attorneys in the cause or not: *Clark v. Schwaegler*, 104 Wash. 12, 175 Pac. 300.

In Actions on Notes: See Remington's Digest, Bills & N., § 144, and cases cited.

See, also, *Kienbaun v. Rathfon Reduction Works*, 107 Wash. 115, 181 Pac. 10.

In an action to foreclose a junior mortgage providing for an attorney's fee of \$50, and for personal judgment on the mortgage note, which provided for a reasonable attorney's fee, the foreclosure can include only the \$50 fee, but personal judgment may be entered upon the

judgment for a reasonable fee, in view of this section: *Watson v. Barnard*, 105 Wash. 536, 181 Pac. 10.

Prior to the enactment of this section attorneys' fees were fixed by the contract of the parties: *McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530.

Contracts for Compensation: See Remington's Digest, Atty. & C., § 39; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835; *Kelsey v. Mackay*, 65 Wash. 116, 117 Pac. 714; *Gust v. Judd*, 88 Wash. 536, 153 Pac. 309.

See, also, *Duteau v. Dresbach*, 113 Wash. 545, 194 Pac. 547.

In an action to recover attorney's fees agreed to be paid in the sum allowed by the court for the foreclosure of mortgages, evidence to the effect that the mortgagee was to be given a little time in case he was compelled to bid in the property, does not warrant denial of recovery for the full amount: *Langford v. Pringle*, 105 Wash. 277, 177 Pac. 731.

Construction and Operation: See Remington's Digest, Atty. & C., § 40; *Isham v. Parker*, 3 Wash. 755, 29 Pac. 835; *Niagara Fire Ins. Co. v. Hart*, 13 Wash. 561, 43 Pac. 937; *Cain v. Moore*, 54 Wash. 627, 103 Pac. 1130; *Abel v. Hansen*, 62 Wash. 492, 114 Pac. 182; *Hart v. Bogle*, 88 Wash. 125, 152 Pac. 1010; *Gabrielson v. Gorin*, 92 Wash. 408, 159 Pac. 387; *Crane v. Washington Water Power Co.*, 97 Wash. 7, 165 Pac. 892.

Under this section the amount of attorney's fee specially contracted for in the instrument to be paid in case of suit must be construed as stipulated damages to which sum plaintiff is entitled, although greatly in excess of the value of the services rendered: *Exchange Nat. Bank v. Wolverton*, 11 Wash. 108, 39 Pac. 248; *Scholey v. De Mattos*, 18 Wash. 504, 52 Pac. 242.

Contingent Fees: See Remington's Digest, Atty. & C., § 41; *Carson v. Fogg*, 34 Wash. 448, 76 Pac. 112; *Plummer v. Great Northern R. Co.*, 60 Wash. 214, 110

Pac. 989, 31 L. R. A. (N. S.) 1215; Eaton v. King County, 75 Wash. 101, 134 Pac. 682.

Actions for Compensation — Defenses: See Remington's Digest, Atty. & C., § 43; Dodds v. Gregson, 35 Wash. 402, 77 Pac. 791; Sessions v. Warwick, 46 Wash. 165, 89 Pac. 482; Conover v. Carpenter, 57 Wash. 146, 106 Pac. 620.

See, also, Martin v. Nichols, 110 Wash. 451, 188 Pac. 519.

— **Evidence:** See Remington's Digest, Atty. & C., § 44; Isham v. Parker, 3 Wash. 755, 29 Pac. 835; Parker v. Esch, 5 Wash. 296, 31 Pac. 754; Wallace v. Town, 8 Wash. 244, 35 Pac. 1080; Ramage v. Littlejohn, 17 Wash. 386, 49 Pac. 486; Bates v. School District No. 10, 45 Wash. 498, 88 Pac. 944; Sessions v. Warwick, 46 Wash. 165, 89 Pac. 482; Thorp v. Ramsey, 51 Wash. 530, 99 Pac. 584; McKay v. Atkinson & Co., 55 Wash.

591, 104 Pac. 806; Kiefer v. Lara, 56 Wash. 43, 104 Pac. 1102; Hillman v. Stanley, 56 Wash. 320, 105 Pac. 816; Murray v. Trumbull & Trumbull, 62 Wash. 336, 113 Pac. 769; Whitham v. Hilton, 78 Wash. 446, 139 Pac. 209, Ann. Cas. 1916B, 260; Hart v. Bogle, 88 Wash. 125, 152 Pac. 1010; Gust v. Judd, 88 Wash. 536, 163 Pac. 309; Thomas v. Scougale, 90 Wash. 162, 155 Pac. 847; Griggs v. Wayne, 100 Wash. 459, 171 Pac. 230; Schulze v. Jones & Riddell, 103 Wash. 664, 175 Pac. 311.

See, also, Clark v. Schwaegler, 104 Wash. 12, 175 Pac. 300; Roche v. Madar, 104 Wash. 21, 175 Pac. 314, 181 Pac. 857.

— **Trial, Instructions:** See Remington's Digest, Atty. & C., § 44-1; Thorp v. Ramsey, 51 Wash. 530, 99 Pac. 584; Kiefer v. Lara, 56 Wash. 43, 104 Pac. 1102.

§ 476. Prevailing Party Entitled to Costs and Disbursements.

In any action in the superior court of Washington, the prevailing party shall be entitled to his costs and disbursements; but the plaintiff shall in no case be entitled to costs taxed as attorneys' fees in actions within the jurisdiction of a justice of the peace, when commenced in the superior court. [Cf. L. '54, p. 201, §§ 368, 369; Cd. '81, §§ 506, 507; L. '83, p. 42, § 1; L. '90, p. 337, § 1; 2 H. C., § 824.]

Cited in 4 Wash. 14; 7 Wash. 96; 39 Wash. 345; 71 Wash. 180; 82 Wash. 363; 100 Wash. 541; 108 Wash. 460.

NATURE, GROUNDS AND EXTENT OF RIGHT IN GENERAL: See Remington's Digest, Costs, § 1; Meade v. French, 4 Wash. 11, 29 Pac. 833; Pierce County v. Magnuson, 70 Wash. 639, 127 Pac. 302, Ann. Cas. 1914B, 889.

Separate Issues of Fact: See Remington's Digest, Costs, § 9; Koyukuk Min. Co. v. Van de Vanter, 30 Wash. 385, 70 Pac. 966.

Where the interests of defendants are not identical and they made separate appearances, they are entitled to separate costs of suit: McAllister v. Harper & Son, 106 Wash. 373, 180 Pac. 412.

Necessity and Effect of Demand Before Suit: See Remington's Digest, Costs, § 10; Seward v. Spurgeon, 9 Wash. 74, 37 Pac. 303; Frazer v. Rutherford, 26 Wash. 658, 67 Pac. 366.

Dismissal or Nonsuit: See Remington's Digest, Costs, § 14; Thorndike v. Thorndike, 1 W. T. 175; Somerville v. Johnson, 3 Wash. 140, 28 Pac. 373; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81; Thurston County v. Scammell, 7 Wash. 94, 34 Pac. 470; Van Alstine v. Gray, 71 Wash. 607, 129 Pac. 106.

In Special Proceedings: See Remington's Digest, Costs, §§ 15, 16; State ex

rel. Cummings v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771; State ex rel. Nolte v. Superior Court, 15 Wash. 500, 46 Pac. 1031; State ex rel. Middlebrook v. Reid, 17 Wash. 267, 49 Pac. 517; State ex rel. Spokane Terminal Co. v. Superior Court, 40 Wash. 453, 82 Pac. 878.

PERSONS ENTITLED AND FUNDS LIABLE—Prevailing or Successful Party: See Remington's Digest, Costs, §§ 8, 8-1; Romine v. State, 7 Wash. 215, 34 Pac. 924; Empire State Surety Co. v. Moran Brothers Co., 71 Wash. 171, 127 Pac. 1104.

Where plaintiff, in an equitable case, filed an outrageously excessive and fraudulent claim for extras and falsely testified that it was correct, and the amount allowed him was never disputed, costs are properly awarded in favor of the defendants: Wiffenbach v. Puget Sound Bridge & Dredging Co., 108 Wash. 455, 184 Pac. 321.

Parties of Record—Assignees: See Remington's Digest, Costs, § 19; Mansfield v. First Nat. Bank, 6 Wash. 603, 34 Pac. 143.

Interveners: See Remington's Digest, Costs, § 19-1; Springer v. Ayer, 50 Wash. 642, 97 Pac. 774.

Persons not Parties: See Remington's Digest, Costs, § 20; Hillman v. Hillman,

42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135.

Validity of statute allowing taxation of attorneys' fees as costs in action for personal services. 17 Ann. Cas. 282.

Allowance of attorney fees in action to enjoin execution sale. Ann. Cas. 1918C, 306.

Imposition of costs and counsel fees in contempt proceedings. Ann. Cas. 1913B, 565.

Allowance of attorneys' fees in partition proceedings. 12 Ann. Cas. 854.

Validity of statute authorizing allowance of attorneys' fees in special assessment actions. 11 Ann. Cas. 811; Ann. Cas. 1912A, 692; 28 L. R. A. (N. S.) 1062.

Recovery of counsel fees in taxpayer's action. Ann. Cas. 1913C, 915.

Allowance of counsel fees to unsuccessful party in action to construe will. Ann. Cas. 1915C, 716.

Validity of statutory provision for attorneys' fees. 11 A. L. R. 884; L. R. A. 1915E, 943.

Constitutionality of statute giving attorney's fee in suit to foreclose mechanic's lien. 20 L. R. A. 565; L. R. A. 1915E, 947.

Allowance of attorneys' fees out of fund where attorneys of creditors sue in behalf of themselves and other creditors. 54 L. R. A. 817.

Claims against state for attorneys' fees. 42 L. R. A. 51.

Right of executor to allowance for attorneys' fees for services rendered in attempt to establish, or resist attack upon will. 26 L. R. A. (N. S.) 757.

Recovery on injunction bond of attorneys' fees necessarily expended in dissolving the injunction. 16 L. R. A. (N. S.) 49.

Attorney's fees as part of compensatory damages recoverable in action for tort. 28 L. R. A. (N. S.) 761.

Right to attorney's fee in action on replevin bond. 30 L. R. A. (N. S.) 372.

Right to tax as costs amount paid to surety company for undertaking. 48 L. R. A. 591.

§ 477. Limitations.

In an action for an assault and battery, or for false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction, if the plaintiff recover less than ten dollars, he shall be entitled to no more costs or disbursements than the damage recovered. [L. '54, p. 202, § 370; L. '69, p. 123, § 460; Cd. '81, § 508; 2 H. C., § 825.]

Cited in 4 Wash. 12, 16.

This section being a special enactment relating to costs in particular cases, is not repealed by implication by section 476: Meade v. French, 4 Wash. 11, 29 Pac. 833.

This section cannot be construed as giving additional costs to defendant in case of a recovery by the plaintiff, of less than \$10 damage: Meade v. French, 4 Wash. 11, 29 Pac. 833.

§ 478. Limited to One of Several Actions.

When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action against several parties, who might have been joined as defendants in the same action, no costs or disbursements shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within this state. [L. '54, p. 202, § 371; Cd. '81, § 509; 2 H. C., § 826.]

Cited in 108 Wash. 159.

Where a widow brought suit against a county in her own name for the wrongful death of her husband, and upon submitting to a voluntary nonsuit, judgment for \$264 costs was entered against her, it is an abuse of discretion, upon the

commencement of a suit by her as administratrix for the benefit of the widow and children, to stay proceedings as to the widow's claim until the costs of the former action were paid, where it appears that she is without means, has three small children to support; that

she and the children had been ill, dependent upon charity, and inmates of the county poor farm, and no additional costs would accrue to the county by reason of the inclusion of the widow's claim: *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831.

Under this section, where joint tortfeasors are sued in separate actions when they might have been joined in one, the

plaintiff makes an election by accepting costs in one action, and cannot recover costs in the other: *Larson v. Anderson*, 108 Wash. 157, 182 Pac. 957, 6 A. L. R. 621.

Right to costs in both actions where parties who might have been sued jointly are sued separately. 6 A. L. R. 623.

§ 479. Costs to Defendant.

In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his favor for the same. [L. '54, p. 202, § 372; Cd. '81, § 510; 2 H. C., § 827.]

Cited in 7 Wash. 96; 82 Wash. 363.

This section does not apply to cases where neither party is entitled to costs: *Thurston County v. Scammell*, 7 Wash. 94, 34 Pac. 470.

Consolidation of Actions: See Remington's Digest, Costs, § 7; Grays Harbor

Boom Co. v. McAmment, 21 Wash. 465, 58 Pac. 573.

Abatement of Action: See Remington's Digest, Costs, § 12; *Thurston County v. Scammell*, 7 Wash. 94, 34 Pac. 470.

Disclaimer: See Remington's Digest, Costs, § 13; *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 303.

§ 480. Costs to Defendants Defending Separately.

In all actions where there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such defendants as recover judgments in their favor, or either of them. [L. '54, p. 202, § 373; Cd. '81, § 511; 2 H. C., § 828.]

Cited in 30 Wash. 391; 106 Wash. 377.

Joint Defendants: See Remington's Digest, Costs, §§ 21, 22; *Grays Harbor Boom Co. v. McAmment*, 21 Wash. 465, 58 Pac. 573; *Koyukuk Min. Co. v. Van De Vanter*, 30 Wash. 385, 70 Pac. 966; *Wittler-Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629; *Lisle v. Quinlan*, 72 Wash. 493, 130 Pac. 902.

See, also, *Larson v. Anderson*, 108 Wash. 157, 182 Pac. 957, 6 A. L. R. 621.

In an action to reform a deed without prior demand on defendant for correc-

tion, the costs upon a decree of reformation should be assessed against the plaintiff: *Seward v. Spurgeon*, 9 Wash. 74, 37 Pac. 303.

As the same rule is applicable to a claim secured by lien: See *Fraser v. Rutherford*, 26 Wash. 658, 67 Pac. 366.

As to costs to persons defending separately, see *Koyukuk Min. Co. v. Van De Vanter*, 30 Wash. 385, 70 Pac. 966; *Wittler-Corbin Mach. Co. v. Martin*, 47 Wash. 123, 91 Pac. 629; *Springer v. Ayer*, 50 Wash. 642, 97 Pac. 774.

§ 481. Costs as Attorney Fee—Amount Taxable.

When allowed to either party, costs to be called the attorney fee, shall be as follows:—

1. In all actions settled before issue is joined, five dollars;
2. In all actions where judgment is rendered without a jury, ten dollars;
3. In all actions where judgment is rendered after impaneling a jury, fifteen dollars;
4. In all actions removed to the supreme court and settled before argument, ten dollars;
5. In all actions where judgment is rendered in the supreme court after argument, fifteen dollars. [L. '54, p. 202, § 374; L. '69, p. 124, § 464; Cd. '81, § 512; 2 H. C., § 829.]

Cited in 26 Wash. 136; 34 Wash. 434; 40 Wash. 453, 454; 56 Wash. 412; 58 Wash. 202; 81 Wash. 399.

Attorneys' Fees—In General: See Remington's Digest, Costs, §§ 40, 41; Montezano v. Blair, 12 Wash. 188, 40 Pac. 731; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710; Kimble v. Kimble, 14 Wash. 369, 44 Pac. 866; Larson v. Winder, 14 Wash. 647, 45 Pac. 315; Trumble v. Trumble, 26 Wash. 133, 66 Pac. 124; Koyukuk Min. Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966; Legg v. Legg, 34 Wash. 132, 75 Pac. 130; Criswell v. Directors School Dist. No. 24, 34 Wash. 420, 75 Pac. 984; Spencer v. Commercial Co., 36 Wash.

374, 78 Pac. 914; McGill v. Fuller & Co., 45 Wash. 615, 88 Pac. 1038; State ex rel. Maltbie v. Will, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797; Bennett v. Seattle Elec. Co., 56 Wash. 407, 105 Pac. 825.

Costs and attorney's fees for contesting the probate of a will are not confined to the costs allowed by section 481; but are governed by the special statute, Rem. 1915 Code, section 1313, in which no limitation is fixed: Statler's Estate, In re, 58 Wash. 199, 108 Pac. 433.

Under subdivision 5 of this section, the fee may be taxed in an original proceeding for a writ of review: State ex rel. Spokane Terminal Co. v. Superior Court, 40 Wash. 453, 82 Pac. 878.

§ 482. Disbursements, etc.—Cost Bill.

The prevailing party, in addition to allowance for costs, as provided in the last section, shall also be allowed for all necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the necessary expenses of taking depositions, by commission or otherwise, and the compensation of referees. The disbursements shall be stated in detail and verified by affidavit, and shall be served on the opposite party or his attorney, and filed with the clerk of the court, within ten days after the judgment; Provided, the clerk of the court shall keep a record of all witnesses in attendance upon any civil action, for whom fees are to be claimed, with the number of days in attendance and their mileage, and no fees or mileage for any witness shall be taxed in the cost bill unless they shall have reported their attendance at the close of each day's session to the clerk in attendance at such trial. [L. '05, p. 32, § 1. Cf. L. '54, p. 202, § 375; L. '69, p. 124, § 465; L. '77, p. 109, § 517; Cd. '81, § 513; 2 H. C., § 830.]

Cited in 24 Wash. 412; 58 Wash. 660; 59 Wash. 264; 65 Wash. 128, 129; 67 Wash. 539; 76 Wash. 118; 81 Wash. 399; 87 Wash. 437; 94 Wash. 540; 100 Wash. 337.

AMOUNT, RATE AND ITEMS—Nature and Amount of Items, in General: See Remington's Digest, Costs, § 33; Owsley v. Oregon R. & Nav. Co., 1 Wash. 491, 20 Pac. 782; Creighton v. Cole, 10 Wash. 472, 38 Pac. 1007; Stilwell Brothers v. Union Machinery & Supply Co., 94 Wash. 61, 161 Pac. 1048; Perlus v. Market Investment Co., 95 Wash. 484, 164 Pac. 65.

Continuances: See Remington's Digest, Costs, § 34; Tacoma Nat. Bank v. Peet, 9 Wash. 222, 37 Pac. 426.

Depositions and Affidavits: See Remington's Digest, Costs, § 35; Roebbing's Sons Co. v. Washington Alaska Bank, 56 Wash. 162, 105 Pac. 174; Pillsbury v. Beresford, 58 Wash. 656, 109 Pac. 193.

Jury Fees: See Remington's Digest, Costs, § 36; Nelson v. Nelson Bennett Co., 31 Wash. 116, 71 Pac. 749; Lilly

v. Lilly, Bogardus & Co., 39 Wash. 337, 81 Pac. 852.

Interest on Recovery: See Remington's Digest, Costs, § 37; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Entry and Docketing of Judgment: See Remington's Digest, Costs, § 38; Huntington v. Blakeney, 1 W. T. 111.

Proceedings After Judgment: See Remington's Digest, Costs, § 39; Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710.

Officer's Fees: See Remington's Digest, Costs, § 42; Howard v. Gemming, 10 Wash. 1, 38 Pac. 748; Park v. Newell, 87 Wash. 431, 151 Pac. 783; Low v. McDonald, 90 Wash. 122, 155 Pac. 748.

Service of Process: See Remington's Digest, Costs, § 43; Creighton v. Cole, 10 Wash. 472, 38 Pac. 1007; McQuesten v. Morrill, 12 Wash. 335, 41 Pac. 56.

Documentary Evidence—Copies: See Remington's Digest, Costs, § 44; New Whatcom v. Bellingham Bay etc. Co., 16 Wash. 137, 47 Pac. 237; McCleary v.

Willis, 35 Wash. 676, 77 Pac. 1073; Hamilton v. Witner, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. Rep. 921.

Witnesses' Fees—In General: See Remington's Digest, Costs, § 45; Christenson v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018; Ivall v. Willis, 17 Wash. 645, 50 Pac. 467; McCleary v. Willis, 35 Wash. 676, 77 Pac. 1073; Grays Harbor Boom Co. v. McAmman, 21 Wash. 465, 58 Pac. 573; Noon v. Mironski, 58 Wash. 453, 108 Pac. 1069; Dolan v. Cain, 59 Wash. 259, 109 Pac. 1009; Daniels v. Spear, 65 Wash. 121, 117 Pac. 737; Hofstetter v. Sound Trustee Co., 67 Wash. 537, 122 Pac. 6; Frair v. Caswell, 79 Wash. 470, 140 Pac. 564; Low v. McDonald, 90 Wash. 122, 155 Pac. 748; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393.

In the absence of statute, extra compensation cannot be taxed as costs for expert witnesses where there was no showing that such evidence could not be procured by subpoena without paying extra compensation: Spokane v. Fisher, 106 Wash. 378, 180 Pac. 139.

It is an abuse of discretion to refuse to tax costs for witnesses who were present and competent to testify although, because of the manner in which the case was tried, they were not called upon to testify: Ham, Yearsley & Ryrie v. Northern Pac. R. Co., 107 Wash. 378, 181 Pac. 898.

— **Mileage:** See Remington's Digest, Costs, § 46; United States v. Small, 3 W. T. 478, 17 Pac. 739; Kimble v. Kimble, 14 Wash. 369, 44 Pac. 866; Carlson Bros. & Co. v. Van de Vanter, 19 Wash. 32, 52 Pac. 323; State v. Lorenz, 22 Wash. 289, 60 Pac. 644; Hall v. Northwest Lumber Co., 61 Wash. 351, 112 Pac. 363; Aldredge v. Oregon-Washington R. & Nav. Co., 79 Wash. 349, 140 Pac. 550; Pearson v. Gullans, 81 Wash. 57, 142 Pac. 456; Henry v. Chicago, Mil. & P. S. R. Co., 84 Wash. 633, 147 Pac. 425;

Fryar v. Hazelwood Holstein Farms, 97 Wash. 78, 165 Pac. 1084.

Interpreters' Fees: See Remington's Digest, Costs, § 46-1; Hall v. Northwest Lumber Co., 61 Wash. 351, 112 Pac. 369.

Stenographers' Fees: See Remington's Digest, Costs, § 47; State ex rel. Rochford v. Superior Court, 4 Wash. 30, 29 Pac. 764; Bringgold v. Spokane, 19 Wash. 333, 53 Pac. 368.

Expense Incurred but not Disbursed: See Remington's Digest, Costs, § 49; Creighton v. Cole, 10 Wash. 472, 38 Pac. 1007; Anderson v. Provident Life & T. Co., 26 Wash. 192, 66 Pac. 415.

TAXATION—Bill of Costs—Service and Filing: See Remington's Digest, Costs, § 50; Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955; Kane v. Kane, 35 Wash. 517, 77 Pac. 842; Clarke v. Eltinge, 39 Wash. 696, 83 Pac. 901; Clark v. Baker, 76 Wash. 110, 135 Pac. 1025; Hayes v. Hutchinson & Shields, 81 Wash. 394, 142 Pac. 865; Thompson v. Seattle Park Co., 94 Wash. 539, 162 Pac. 994.

See, also, Snider v. Wright, 112 Wash. 536, 192 Pac. 923.

— **Form and Requisites:** See Remington's Digest, Costs, § 51; Potwin v. Blasher, 9 Wash. 460, 37 Pac. 710; Nowogroski v. Southworth, 100 Wash. 336, 170 Pac. 1011.

— **Affidavit:** See Remington's Digest, Costs, § 52; Clarke v. Eltinge, 39 Wash. 696, 83 Pac. 901.

Evidence as to Items: See Remington's Digest, Costs, § 53; Lambert v. La Connor Trad. & Transp. Co., 37 Wash. 113, 79 Pac. 608.

Duties and Proceedings of Taxing Officer: See Remington's Digest, Costs, § 54; Huntington v. Blakeney, 1 W. T. 111.

Constitutionality of statute requiring payment of court fees. L. R. A. 1918B, 150.

§ 483. Fees of Referees.

The fees of referees shall be five dollars to each for every day necessarily spent in the business of the reference, and twenty cents per folio for writing testimony; but the parties may agree in writing upon any rate of compensation, and thereupon such rate shall be allowed. [Cf. L. '54, p. 202, § 376; L. '77, p. 109, § 518; Cd. '81, § 514; 2 H. C., § 831.]

Cited in 3 Wash. 741.

A referee cannot recover as costs more than twenty cents per folio for writing

the testimony, although he employs a stenographer to assist him: Park v. Mighell, 3 Wash. 737, 29 Pac. 556.

§ 484. Costs on Postponement of Trial.

When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condi-

tion of granting the postponement. [L. '54, p. 203, § 377; Cd. '81, § 515; 2. H. C., § 832.]

Cited in 9 Wash. 225; 90 Wash. 297.

Conditions on Granting Continuance: See Remington's Digest, Contin., § 25; Tacoma Nat. Bank v. Peet, 9 Wash. 222, 37 Pac.

426; Casady v. Anderson, 90 Wash. 296, 155 Pac. 1067.

Continuance conditioned on payment of costs. *Ann. Cas.* 1913A, 308.

§ 485. Costs Where Tender is Made.

When, in an action for the recovery of money, the defendant alleges in his answer that, before the commencement of the action, he tendered to the plaintiff the full amount to which he is entitled, in such money as by agreement ought to be tendered, and thereupon brings into court, for the plaintiff, the amount tendered, and the allegation be found true, the plaintiff shall not recover costs, but shall pay them to the defendant. [Cf. L. '54, p. 203, § 378; Cd. '81, § 516; 2 H. C., § 833.]

Cited in 51 Wash. 665; 56 Wash. 377.

Effect of Tender or Payment into Court: See Remington's Digest, Costs, § 11; Lyons v. Bain, 1 W. T. 482; Fares v. Gleason, 14 Wash. 657, 45 Pac. 314; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.

A tender of money paid into court by a defendant in an action to foreclose a lien may, in the discretion of the court, be made liable for the payment of costs taxed in favor of the plaintiff: Kruegel v. Kitchen, 33 Wash. 214, 74 Pac. 373.

The rule at law that a tender must be kept good or paid into court does not apply in equity, as a willingness to pay may alone be sufficient; irrespective of this and the next section: Murray v.

O'Brien, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 99S.

A tender by defendant of a sum admitted to be due on a contract involving items that can be segregated does not bar a counterclaim for a larger sum arising out of the same transaction, this section only requiring a tender of the amount admitted to be due: LaRault v. Palmer, 51 Wash. 664, 99 Pac. 1036, 21 L. R. A. (N. S.) 354.

Pleading: See Remington's Digest, Tender, § 12; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760.

Necessity of keeping tender good in equity to stop costs. 12 *A. L. R.* 953.

§ 486. Deposit With Clerk by Defendant of Tender, Effect of.

If the defendant, in any action pending, shall at any time deposit with the clerk of the court, for the plaintiff, the amount which he admits to be due, together with all costs that have accrued, and notify the plaintiff thereof, and such plaintiff shall refuse to accept the same in discharge of the action, and shall not afterwards recover a larger amount than that deposited with the clerk, exclusive of interest and cost, he shall pay all costs that may accrue from the time such money was so deposited. [L. '54, p. 203, § 379; Cd. '81, § 517; 2 H. C., § 834.]

Cited in 4 Wash. 671; 56 Wash. 377.

Deposit in Court: See Remington's Digest, Costs, § 23; Dane v. Daniel, 28 Wash. 155, 68 Pac. 446; Kruegel v. Kitchen, 33 Wash. 214, 74 Pac. 373; Braeger v. Bolster & Barnes, 60 Wash. 579, 111 Pac. 797.

Payment into Court of Amount Ten-

dered or Admitted to be Due—Operation and Effect: See Remington's Digest, Tender, § 13; Kruegel v. Kitchen, 33 Wash. 214, 74 Pac. 373; Sanborn v. Dentler, 97 Wash. 149, 166 Pac. 62.

See, also, Larsen v. Russell, 113 Wash. 474, 194 Pac. 535.

§ 487. Costs in Appeals from Justice's Court.

In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the superior court, and the party appellant shall not recover a more favorable judgment in the superior court than before

the justice of the peace, such appellant shall pay all costs. [L. '54, p. 203, § 380; Cd. '81, § 518; 2 H. C., § 835.]

This section does not require that the judgment should have been in his favor in the court below, and whether it is more favorable or not does not depend on the amount, within a few dollars, but is to be left to the discretion of the court under a liberal construction of the

code: *Baxter v. Scoland*, 2 W. T. 86, 3 Pac. 638.

Where plaintiff claims more than \$100 and recovers less than that sum in such action, defendant is entitled to costs: *Bagley v. Carpenter*, 2 W. T. 19, 3 Pac. 193; overruling in part, *Ebey v. Engle*, 1 W. T. 72.

§ 488. Costs Against Guardian of Infant Plaintiff.

When costs are adjudged against an infant plaintiff, the guardian or person by whom he appeared in the action shall be responsible therefor, and payment may be enforced by execution. [L. '54, p. 203, § 381; Cd. '81, § 519; 2 H. C., § 836.]

Liability of guardian or next friend of infant for costs as affected by

latter's attaining majority: *Ann. Cas.* 1914A, 606.

§ 489. Costs in Cases of Executors, etc.

In [an] action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs shall be recovered as in an action by or against a person prosecuting [or defending] in his own right, but such costs shall be chargeable only upon or collected of the estate of the party represented, unless the court shall direct the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in such action or defense. [L. '54, p. 203, § 382; Cd. '81, § 520; 2 H. C., § 837.]

§ 490. Assignee Liable for Costs, When.

When the cause of action, after the commencement of the action, by assignment, or in any other manner, becomes the property of a person not a party thereto, and the prosecution or defense is thereafter continued, such person shall be liable to the costs in the same manner as if he were a party, and payment thereof may be enforced by execution. [Cf. L. '54, p. 203, § 383; L. '69, p. 125, § 473; Cd. '81, § 521; 2 H. C., § 838.]

§ 491. Costs Against State or County.

In all actions prosecuted in the name and for the use of the state, or in the name and for the use of any county, the state or county shall be liable for costs in the same case and to the same extent as private parties. [L. '54, p. 203, § 384; Cd. '81, § 522; 2 H. C., § 839.]

Cited in 40 Wash. 10; 70 Wash. 643.

Liabilities of State: See *Remington's Digest*, Costs, § 93; *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 Pac. 361; *State v. Rutledge*, 40 Wash. 9, 82 Pac. 126.

Liabilities of County: See *Remington's Digest*, Costs, § 94; *Stowe v. State*, 2 Wash. 124, 25 Pac. 1085; *State ex rel. Langhorne v. Superior Court*, 32 Wash. 80, 72 Pac. 1027; *State ex rel. Coeller*

v. Fenimore, 2 Wash. 370, 26 Pac. 807; *State ex rel. News Pub. Co. v. Milligan*, 4 Wash. 29, 29 Pac. 763; *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876.

Liabilities of City: See *Remington's Digest*, Costs, § 95; *Spokane v. Smith*, 37 Wash. 583, 79 Pac. 1125.

Criminal Prosecutions Under Laws for Protection of Children.—Costs cannot be allowed in a proceeding against a delin-

quent child and her parent contributing to the delinquency, as they are not authorized by this section nor by section 2225: *Pierce County v. Magnuson*, 70 Wash. 639, 127 Pac. 302, Ann. Cas. 1914B, 889.

Liability of county for costs. Ann. Cas. 1914B, 892.

Claims against state for costs. 42 L. R. A. 41.

§ 492. Costs in Revisory Proceedings.

When the decision of a court of inferior jurisdiction, in an action or special proceeding, is brought before the supreme court or a superior court for review, such proceedings shall, for purpose of costs, be deemed an action at issue upon a question of law from the time the same is brought into the supreme court or superior court, and costs thereon may be awarded and collected in such manner as the court shall direct, according to the nature of the case. [L. '54, p. 204, § 385; Cd. '81, § 523; 2 H. C., § 840.]

On Appeal: See notes to § 1744, *infra*.

In Certiorari Proceedings: See Remington's Digest, Certiorari, § 33; *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453, 82 Pac. 878.

Upon a writ of certiorari, where the lower tribunal has no jurisdiction to adjudge costs, the superior court would be without jurisdiction to enter judgment for the costs incurred before such lower tribunal: *Bringgold v. Spokane*, 19 Wash. 333, 53 Pac. 368.

Upon reversing a judgment in disbarment proceedings for costs in a substantial amount, the defendant is entitled to his costs on appeal, to be taxed against

the state, and not against the relators: *State ex rel. Dill v. Martin*, 45 Wash. 76, 87 Pac. 1054.

Power of appellate court to award costs on dismissal of appeal for want of jurisdiction. 13 Ann. Cas. 1048.

Costs where appellant dismisses appeal. L. R. A. 1917A, 120.

Liability for costs on appeal from award in condemnation proceedings. 36 L. R. A. (N. S.) 624.

Liability of indemnitor for costs of successful appeal by party indemnified. L. R. A. 1915F, 598.

§ 493. Costs in Discretion of Court.

In all actions and proceedings other than those mentioned in this chapter, where no provision is made for the recovery of costs, they may be allowed or not; and if allowed, may be apportioned between the parties, in the discretion of the court. [L. '54, p. 204, § 387; Cd. '81, § 525; 2 H. C., § 842.]

Cited in 79 Wash. 38; 108 Wash. 460.

Discretion of Court: See Remington's Digest, Costs, §§ 3, 4; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28; *Kruegel v. Kitchen*, 33 Wash. 214, 74 Pac. 373; *Loeper v. Loeper*, 51 Wash. 682, 99 Pac. 1029; *Croup v. Demoss*, 78 Wash. 128, 138 Pac. 671; *Brown v. Anacortes*, 79 Wash. 33, 139 Pac. 652.

Apportionment: See Remington's Digest, Costs, § 17; *Churchill v. Stephenson*, 14 Wash. 620, 45 Pac. 28; *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45; *Cornett's Estate, In re*, 102 Wash. 254, 173 Pac. 44.

The apportionment of costs in an equitable suit rests in the discretion of the court: *Wiffenbach v. Puget Sound Bridge & Dredging Co.*, 108 Wash. 455, 184 Pac. 321.

A subcontractor's action on a contract for a county building is an equitable one, in which costs may be apportioned, where it seeks a restraining order against the county and involved a long accounting between the parties, and the complaint on its face was in the nature of a lien foreclosure: *Wiffenbach v. Puget Sound Bridge & Dredging Co.*, 108 Wash. 455, 184 Pac. 321.

§ 494. Retaxation of Costs.

Any party aggrieved by the taxation of costs by the clerk of the court may, upon application, have the same retaxed by the court in which

the action or proceeding is had. [L. '54, p. 204, § 388; Cd. '81, § 526; 2 H. C., § 843.]

Cited in 35 Wash. 137.

Remedies for Erroneous Taxation—In General: See Remington's Digest, Costs, § 55; Tacoma Lumber etc. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755; Perlus v. Silver, 71 Wash. 338, 128 Pac. 661.

Motion for Retaxation: See Remington's Digest, Costs, § 56; Newberg v. Farmer, 1 W. T. 182; Bringgold v. Spokane, 19 Wash. 333, 53 Pac. 368.

— **Retaxation by Court on Motion or Appeal:** See Remington's Digest, Costs, § 57; Miskel v. Stone, 1 W. T. 229; Bur-

richter v. Cline, 3 Wash. 135, 28 Pac. 367; Main v. Johnson, 7 Wash. 321, 35 Pac. 67; Jenkins v. Powe, 19 Wash. 113, 52 Pac. 520; Bringgold v. Spokane, 19 Wash. 333, 53 Pac. 368; Moritz v. Herskovitz, 46 Wash. 192, 89 Pac. 560.

— **Presumption That Costs Were Properly Taxed:** See Remington's Digest, Costs, § 58; Newberg v. Farmer, 1 W. T. 182; Shearer v. Buckley, 31 Wash. 370, 72 Pac. 76; Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; McCleary v. Willis, 35 Wash. 676, 77 Pac. 1073.

§ 495. Security for Costs—Demand—Bond—Deposit.

When a plaintiff in an action resides out of the county, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff may be required by the defendant. When required, all proceedings in the action shall be stayed until a bond, executed by two or more persons, be filed with the clerk, conditioned that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of two hundred dollars. A new or additional bond may be ordered by the court or judge, upon proof that the original bond is insufficient security, and proceedings in the action stayed until such new or additional bond be executed and filed. The plaintiff may deposit with the clerk the sum of two hundred dollars in lieu of a bond. [L. '54, p. 204, § 389; Cd. '81, § 527; 2 H. C., § 844.]

Cited in 8 Wash. 310; 16 Wash. 337; 17 Wash. 565; 28 Wash. 168; 34 Wash. 156; 39 Wash. 259; 48 Wash. 427; 60 Wash. 666; 82 Wash. 362; 91 Wash. 610; 93 Wash. 234, 236.

SECURITY FOR PAYMENT—Stipulations and Agreements—Character of Parties: See Remington's Digest, Costs, § 24; State ex rel. Hanna v. Superior Court, 17 Wash. 564, 50 Pac. 482.

Time for Application and Laches: See Remington's Digest, Costs, § 25; Swift v. Stine, 3 W. T. 518, 19 Pac. 63.

Hearing and Determination of Application: See Remington's Digest, Costs, § 26; State ex rel. Hanna v. Superior Court, 17 Wash. 564, 50 Pac. 482.

Bond—In General: See Remington's Digest, Costs, § 27; Robinson v. Haller, 8 Wash. 309, 36 Pac. 134.

— **Sufficiency and Justification of Sureties:** See Remington's Digest, Costs, § 28; Brooks v. James, 16 Wash. 335, 47 Pac. 751.

The fact that defendants had demanded a cost bond from a nonresident plaintiff, under this section, would not operate as a stay against a voluntary dismissal by plaintiff of the action, where she had

failed to file the bond: Dane v. Daniel, 28 Wash. 155, 68 Pac. 446.

Additional or New Security: See Remington's Digest, Costs, § 29; Robinson v. Haller, 8 Wash. 309, 36 Pac. 134; Morris v. Warwick, 48 Wash. 426, 93 Pac. 905.

Objections: See Remington's Digest, Costs, § 30; Robinson v. Haller, 8 Wash. 309, 36 Pac. 134.

Effect of Failure to Give Security—Delay: See Remington's Digest, Costs, § 31; Carlson Bros. & Co. v. Van de Vanter, 19 Wash. 32, 52 Pac. 323; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Morris v. Warwick, 48 Wash. 426, 93 Pac. 905.

Sufficiency of bond for costs with respect to form and contents. **Ann. Cas.** 1913D, 575.

Right of defendant to demand security for costs after answer. **8 Ann. Cas.** 944.

Waiver of statute or court rule requiring nonresident plaintiff to give security for costs. **8 A. L. R.** 510.

Effect of insertion of unauthorized provision in cost bond. **L. R. A.** 1917B, 1008.

§ 496. Judgment Against Surety on Cost Bond.

Whenever any bond or undertaking for the payment of any costs to any party shall be filed in any action or other legal proceeding in any court in this state and judgment should be rendered for any such costs against the principal on any such bonds or against the party primarily liable therefor in whose behalf any such bond or undertaking has been filed, such judgment for costs shall be rendered against the principal on such bond or the party primarily liable therefor and at the same time also against his surety or sureties on any or all such bonds or undertakings filed in any such action or other legal proceeding. [L. '09, p. 633, § 1.]

Cited in 91 Wash. 611, 612; 93 Wash. 234, 237.

Summary Remedies Against Sureties: See Remington's Digest, Costs, § 32; Trumbull v. Jefferson County, 37 Wash. 604, 79 Pac. 1105.

Liability of Sureties: State ex rel. Illinois Surety Co. v. Superior Court, 82 Wash. 361, 144 Pac. 292.

Where the surety on the cost bond of

a nonresident plaintiff was not served with notice of appeal from a judgment in favor of his principal, the appeal should be dismissed, in view of this section: Shippen v. Shippen, 91 Wash. 610, 158 Pac. 247.

Judgment against principal as evidence against surety on cost bond. Ann. Cas. 1915D, 410; 40 L. R. A. (N. S.) 747; L. R. A. 1918E, 821.

§ 497. Schedule of Fees of Officers, Witnesses, etc.

The several officers herein named shall collect the fees herein prescribed for their official services:

CLERK OF THE SUPREME COURT.

Upon filing his first paper or record and making an appearance in the supreme court, the appellant shall pay to the clerk of said court a docket fee of \$5.

Upon making his appearance in the supreme court, the respondent in any appealed case shall pay to the clerk a fee of \$2.

The applicant or petitioner in any special proceeding in the supreme court, upon making his appearance, shall pay to the clerk thereof a fee of \$3.

The respondent in a special proceeding, and each respondent appearing separately therein, at the time of his appearance, shall pay to the clerk a fee of \$1.

The foregoing fees shall be all the fees connected with the appeal or special proceeding: Provided, that no fees shall be required to be advanced by the state, or any municipal corporation, or any public officer prosecuting or defending on behalf of such state or municipal corporation.

For filing application, entering admission and issuing certificate to an attorney upon admission to practice, \$20.

For all services for which no fee is hereinbefore prescribed, the clerk of the supreme court shall receive the same fees as are prescribed for clerks of the superior courts for like services.

CLERKS OF THE SUPERIOR COURT.

The plaintiff, or other party instituting any civil action or proceeding shall pay, when the case is entered in the court or when the first paper on his part is filed therein, a fee of \$4.

The defendant or other adverse party or any one or more of several defendants or other adverse parties, or interveners, appearing separately from the others, shall pay when his or their appearance is entered in the case, or when his or their first appearance is filed therein, a fee of \$2.

When no issue of fact is joined in the case and no judgment other than a dismissal or discontinuance, without trial of an issue of fact is rendered, no further fee need be paid.

Where, after an issue of fact has been joined, the cause is dismissed or discontinued without trial of such issue, the party causing such dismissal or discontinuance to be entered shall pay, at the time of the entry thereof, a further fee of \$1.

If a judgment other than a dismissal or discontinuance is rendered, the party obtaining the same shall pay, at the time of the entry thereof, a further fee as follows:

1. Where the judgment is rendered without the taking of proof of any fact pleaded:

(a) If no adverse party has appeared in the case, \$2.

(b) Or if an adverse party has appeared, \$3.

2. Where the judgment is rendered upon proof taken, but without the assessment of damages by a jury, and in a case other than the foreclosure of a lien or mortgage or partition of real estate:

(a) If no adverse party has appeared in the case, \$3.

(b) If an adverse party has appeared, \$5.

3. Where the judgment is rendered upon an assessment of damages by a jury, no adverse party having appeared in the case, \$5.

4. Where the judgment is rendered after an appearance by an adverse party, and a trial by jury, or by the court or a judge, referee or commissioner, in a cause other than the foreclosure of a lien or mortgage, or partition of real estate, \$6.

5. Where the judgment is rendered in an action for the foreclosure of a lien or mortgage or partition of real estate:

(a) If no adverse party has appeared in the case, \$6.

(b) If an adverse party has appeared, \$8.

6. For making a transcript on appeal to the supreme court, or for transcribing the records in any action for any purpose, 10 cents per folio.

7. For comparing a transcript on appeal, or transcript of the record in any action where the party has prepared it himself, 5 cents per folio.

The appellant in appeals from judgments of a justice of the peace, shall at the time of docketing his appeal, pay a docket fee of \$4.

The adverse party in appeals from judgment of a justice of the peace at the time of his appearance in the superior court shall pay a fee of \$2.

Other fees shall be charged as are charged in actions originally begun in the superior court.

For filing an abstract of a judgment entered in the supreme court or of any other superior court of the state or of any United States court held in this state, or a transcript of a judgment of a justice court, a fee of \$1.

For taking an affidavit with or without seal, 50 cents.

For certificate with or without seal, 50 cents.

For entering a declaration to become a citizen of the United States, \$1.50.

For entering the final admission of an alien to citizenship and for a certified copy thereof under seal, \$3.

For filing all instruments required by law to be filed in his office, where no other fee is provided, 10 cents.

For filing and recording marriage certificates, the same to be collected as provided by law, \$1.

For approving bond, including justification thereon, in other than civil actions and probate proceedings, 50 cents.

In probate proceedings the party instituting such proceedings shall pay, at the time of the filing of the first paper therein, a fee of \$5.

Upon the filing of a petition for the sale of real estate, there shall be paid at the time of filing such petition a fee of \$3.

Upon the filing of a final account in the settlement of the decedent's estate, there shall be paid a fee of \$5.

For issuing commission to take deposition, there shall be paid a fee of \$1.

For filing any petition to contest a will admitted to probate, or to prove a will which has been rejected and for all other services in connection with such petition, subsequent to its filing and up to final settlement of the issues raised by such petition, to be paid at the time of filing such petition, a fee of \$25.

SHERIFF'S FEES.

For service of each summons and complaint, and return thereon, on each defendant, besides mileage, 60 cents.

For making a return of not found in the county upon a summons, besides mileage actually traveled, 30 cents.

For levying each writ of attachment or writ of execution upon real or personal property, besides mileage, 60 cents.

For serving writ of possession or restitution without aid of the county, besides mileage, \$1.50.

For serving writ of possession or restitution with aid of the county, besides mileage, \$2.

For service and return of subpoena, upon each person served, besides mileage, 25 cents.

For summoning each juror, in a justice of the peace court, besides mileage, 25 cents.

For serving an arrest warrant in a civil action or proceeding, besides mileage, 80 cents.

For serving or executing any other writ or process in a civil action or proceeding, besides mileage, 60 cents.

For taking and approving any bond, in a civil action or proceeding, required by law to be taken or approved by him, except indemnity bonds, 50 cents.

For posting each notice, besides mileage, 25 cents.

For each mile actually and necessarily traveled by him in going to or returning from any place of service, 10 cents.

For making a deed to lands sold upon execution or order of sale, or other decree of court, to be paid by the purchaser, \$3.

For making copy of any complaint, notice, writ or process, necessary to complete service, per folio, 10 cents:

Provided, that he shall not be required to make any certified copies for a fee less than \$1.

WITNESS FEES.

Witnesses shall receive for each day's attendance in all courts of this state, besides mileage at ten cents per mile each way, \$2. [L. '07, p. 88, § 1. See pp. 88-94. Cf. L. '54, pp. 368-376; L. '61, pp. 34-42; L. '63, pp. 391-399; L. '66, pp. 94-99; Cd. '81, § 2086; 1 H. C., § 3017; L. '93, pp. 421, 425, §§ 1, 2; L. '03, pp. 290-298.]

Former laws cited in 7 Wash. 446, 450; 8 Wash. 233, 537; 9 Wash. 108, 109, 110, 694; 17 Wash. 488; 25 Wash. 280; 29 Wash. 60; 31 Wash. 121, 565; 39 Wash. 184.

Cited in 8 Wash. 489, 537; 31 Wash. 121; 42 Wash. 659; 79 Wash. 228, 233.

Compensation and Fees of Clerks: See Remington's Digest, Clerks of C., § 3; Soules v. McLean, 7 Wash. 451, 35 Pac. 364, 1082; State ex rel. Bittencouer v. Gordon, 8 Wash. 488, 36 Pac. 498; Kelly v. Ryan, 8 Wash. 536, 36 Pac. 478; Denny v. Holloway, 17 Wash. 487, 49 Pac. 1073; State ex rel. Quincy v. Collins, 31 Wash. 564, 72 Pac. 98; State ex rel. Nettleson v. Case, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L. R. A. (N. S.) 152.

A garnishment proceeding being auxiliary to the principal action does not fall within the provision requiring the plaintiff to pay the clerk's fee of four dollars for instituting an action: Kelly v. Ryan, 8 Wash. 536, 36 Pac. 478.

As the federal constitution gives congress power to establish a uniform rule of naturalization, the act of June 29, 1906, fixing the fees to be charged by all clerks of courts exercising jurisdiction in naturalization cases, applies to state courts where the state constitution confers such jurisdiction; and the fee authorized by a state statute cannot be collected: State ex rel. Newman v. Libby, 47 Wash. 481, 92 Pac. 350.

Failure to collect clerk's fees does not affect the finality of the judgment for the purposes of an appeal: Chilcott v.

Globe Nav. Co., 49 Wash. 302, 95 Pac. 264.

Under this section, jurors are not entitled to compensation for Saturdays, where the court has excused them from Friday evening until Monday morning, for the purpose of hearing motions, although such jurors were unable to reach home and return during the time for which they were excused: State ex rel. Hastie v. Lamping, 25 Wash. 278, 65 Pac. 537.

Filing a transcript of a judgment from a justice court with the clerk of the superior court is not the commencement of an action for which the county clerk can collect a four dollar appearance fee, under this section: State ex rel. Bittencouer v. Gordon, 8 Wash. 488, 36 Pac. 498.

Under this section, prior to amendment, a sheriff was not entitled to commissions upon the sale of mortgaged premises under decree of foreclosure, where the property is bid in by the plaintiff for the amount of the mortgage debt, and no moneys pass through the sheriff's hands: State ex rel. Thompson v. Prince, 9 Wash. 107, 37 Pac. 291; State ex rel. Sutter v. O'Loughlin, 9 Wash. 529, 37 Pac. 669; State ex rel. Cannon v. Pugh, 9 Wash. 694, 38 Pac. 79; Spinning v. Pierce County, 20 Wash. 126, 54 Pac. 1006.

§ 498. Witnesses and Jurors in Criminal Cases.

No fees shall be allowed to witnesses in criminal causes unless they shall have reported their attendance at the close of each day's session to the clerk in attendance thereon. No allowance of mileage shall be made to a juror or witness who has not verified his claim of mileage under oath before the clerk of the court on which he is in attendance. [L. '95, p. 15, §§ 1, 2.]

Cited in 14 Wash. 373.

§ 499. Salaried Officers not to Receive Fees.

No state, county, municipal or other public officer within the state of Washington, who receives from the state, or from any county or municipality therein, a fixed and stated salary as compensation for services rendered as such public officer, shall be allowed or paid any per diem for attending or testifying on behalf of the state of Washington, or any county or municipality therein, at any trial or other judicial proceeding, in any state, county or municipal court within this state; nor shall such officer, in any case, be allowed nor paid any per diem for attending or testifying in any state or municipal court of this state, in regard to matters and information that have come to his knowledge in connection with and as a result of the performance of his duties as a public officer as aforesaid: Provided, this act shall not apply when any deduction shall be made from the regular salary of such officer by reason of his being in attendance upon the superior court, but in such cases regular witness fees shall be paid; and further, that if a public officer be subpoenaed and required to appear or testify in judicial proceedings in a county other than that in which he resides, then said public officer shall be entitled to receive per diem and mileage as provided by statute in other cases; and, provided further, that this act shall not apply to police officers when called as witnesses in the superior courts during hours when they are off duty as such officers. [L. '01, p. 212, § 1; L. '03, p. 10, § 1.]

§ 500. "Folio" Defined, and Matters Concerning.

The term "folio" when used as a measure for computing fees or compensation, shall be construed to mean one hundred words, counting every two figures necessarily used as a word. Any portion of a folio, when in the whole draft or paper there should not be a complete folio, and when there shall be an excess over the last folio exceeding a quarter, it shall be computed as a folio. The filing of a paper shall be construed to include the certificate of the same. [L. '69, p. 373, § 5; Cd. '81, § 2093; 1 H. C., § 3022.]

§ 501. Mileage in Certain Cases.

When any sheriff, constable, or coroner serves more than one process in the same cause, or on the same person, not requiring more than one journey from his office, he shall receive mileage only for the most distant service. [L. '69, p. 373, § 16; Cd. '81, § 2094; 1 H. C., § 3023.]

§ 502. Witness Fee not Allowed to Attorney.

No attorney in any case shall be allowed any fees as a witness in such case. [L. '69, p. 374, § 17; Cd. '81, § 2095; 1 H. C., § 3024.]

§ 504. Costs of Publication to be Paid in Advance.

When, by law, any publication is required to be made by an officer of any suit, process, notice, order, or other papers, the costs of such publication shall, if demanded, be tendered by the party procuring such publication before such officer shall be compelled to make publication thereof. [L. '69, p. 373, § 14; Cd. '81, § 2092; 1 H. C., § 3021.]

§ 505. Fees Payable in Advance.

All fees are invariably due in advance where demanded by the officer required to perform any official act, and no officer shall be required to perform any official act unless his fees are paid when he demands the same: Provided, this section shall not apply when the officer performs any official act for his county, or for the state. [L. '69, p. § 374, § 21; Cd. '81, § 2099; 1 H. C., § 3028.]

Cited in 1 Wash. 96.

Under section 4172, *infra*, and this section, it is no defense for the sheriff against an action for damages for failure to levy an execution to allege that his

fees were not tendered him, where he has made no demand therefor in advance of service: *Haas v. Gaddis*, 1 Wash. 89, 23 Pac. 1010.

§ 506. Officers not to Serve Until Fees are Paid—Liability Afterwards.

The officers mentioned in this act shall not, in any case except for the state or county, perform any official services unless the fees prescribed for such service are paid in advance, and on such payment the officer must perform the services required. For every failure or refusal to perform official duty when the fees are tendered, the officer is liable on his official bond. [L. '90, p. 315, § 39; 1 H. C., § 3009.]

Cited in 8 Wash. 260.

§ 507. Fees of Witness are to be Paid in Advance—Waiver.

Witnesses in civil cases shall be entitled to receive upon demand their fees for one day's attendance, together with mileage going to the place where they are required to attend, if such demand is made to the officer or person serving the subpoena at the time of service. [L. '69, p. 374, § 22; Cd. '81, § 2100; 1 H. C., § 3029.]

§ 508. County to Pay Certain Costs.

Each county shall be liable to pay the per diem and mileage, or other compensation in lieu thereof, to jurors of the county attending the district court; the fees of the sheriff for maintaining prisoners, charged with crimes, and his costs in conveying them to and from the district court, as well as their board while there; the per diem and mileage, or such other compensation as is allowed in lieu thereof, of the sheriff of the county, when in criminal cases he is required to attend or travel to the superior court out of the limits of his own county; the costs in criminal cases taken from the county to the district court: Provided, that none shall be so paid by the treasurer unless the particular items shall be approved by the judge and certified by the clerk under the seal of the court: And provided further, that for the time or travel which may be paid by the parties or United States, no payment from the county fund shall be allowed, and no officer, juror, or witness shall receive from the county double pay as a per diem for the same time, or as traveling expenses or mileage for the same travel, in how many different capacities or in however many different causes they may be summoned, notified, or called upon to testify or attend in. [Cf. L. '57, p. 22, § 10; L. '63, p. 425, § 10; L. '69, p. 420, § 9; Cd. '81, § 2103; 1 H. C., § 3050.]

See *supra*, § 491, costs against state or county.

This and the next following section are for the most part incompatible with the organization of the courts under the state constitution. There being a doubt as to what portions thereof survive, they are given as they appeared in the code of 1881.

Cited in 70 Wash. 643.

§ 509. Expenses in Lieu of Mileage.

Whenever a juror, witness, or officer is required to attend a court, or travel on official business out of the limits of his own county, and entitled to mileage, in lieu thereof he may at his option receive his actual and necessary traveling expenses by the usually traveled route in going to and returning from the place where the court is held, or where the business is discharged. [Cf. L. '63, p. 424, §§ 6, 8; L. '69, p. 419, § 7; Cd. '81, § 2109; 1 H. C., § 3049.]

This is only a part of Bal. Code, § 1625; see § 4230, *infra*.

THE ENFORCEMENT OF JUDGMENTS.

TITLE IV.

THE ENFORCEMENT OF JUDGMENTS.

CHAPTER I.—EXECUTIONS.

- | | |
|--|--|
| 510. Execution to enforce judgment. | 518. What property subject to execution. |
| 511. Four kinds of execution. | 519. Execution in name of assignee, executor, etc. |
| 512. Enforcement in particular cases. | 520. Franchises liable to sale under execution or foreclosure. |
| 513. Form and contents of writ. | 521. Manner of levy and sale of franchises. |
| 514. To what county execution may issue. | |
| 515. Sheriff's duty on receiving execution. | |
| 516. Execution against the person. | |
| 517. Imprisonment of defendant upon execution. | |

CHAPTER II.—THE STAY OF EXECUTIONS.

- | | |
|--|---|
| 522. Stay, in what cases allowed. | 525. Qualification and justification of sureties. |
| 523. Bond required for stay. | 526. Stay for part of period. |
| 524. Judgment may be entered against sureties. | 527. Bond lodged with clerk. |

CHAPTER III.—HOMESTEADS AND EXEMPTIONS.

- | | |
|--|---|
| 528. Homestead, of what consists. | 551. Costs. |
| 529. Exemption of homestead—Time for selection. | 552. Selection and value of homestead. |
| 530. From what may be selected. | 553. Head of a family defined. |
| 531. Selection from wife's separate estate. | 554. Alienation in case of insanity. |
| 532. Exempt from forced sale. | 555. Notice of application. |
| 533. Homestead subject to execution. | 556. Petition. |
| 534. Conveyance or encumbrance. | 557. Order and effect. |
| 535. Abandonment. | 558. Mode of selection. |
| 536. Declaration, when effectual. | 559. Declaration of homestead—Contents. |
| 537. Proceedings on execution against homestead. | 560. Recording declaration. |
| 538. Verified petition. | 561. Tenure by which homestead is held. |
| 539. Petition, where filed. | 562. Subsequent homestead acquired by proceeds of former. |
| 540. Notice. | 563. Specification of exempt property. |
| 541. Hearing and appointment of appraisers. | 564. No exemption against wages. |
| 542. Oath of appraisers. | 565. Householder defined. |
| 543. View of premises. | 566. Pension money exempt. |
| 544. Report of appraisers. | 567. Pension money exempt to family. |
| 545. Division of property. | 568. Fire insurance money exempt. |
| 546. Sale, if not divisible. | 569. Proceeds of life insurance exempt. |
| 547. Bids. | 570. Separate property of wife exempt. |
| 548. Application of proceeds. | 571. Waiver of exemption — Absconding debtors. |
| 549. Money from sale protected. | 572. Claim of exemption and proceedings thereon. |
| 550. Compensation of appraisers. | |

CHAPTER IV.—ADVERSE CLAIMS TO PROPERTY LEVIED UPON.

- | | |
|---|-------------------------------|
| 573. Claim by third person to property levied on or attached. | 575. Return of officer—Trial. |
| 574. Justification of sureties. | 576. Parties. |
| | 577. Judgment and costs. |

CHAPTER V.—SALE OF PROPERTY UNDER EXECUTION AND REDEMPTION.

- | | |
|--|----------------------------------|
| 578. Writ, how executed. | 582. Notice of sale. |
| 579. Levy on joint realty. | 583. Sale, how conducted. |
| 580. Levy on joint personalty. | 584. Sale of leasehold absolute. |
| 581. Retention of property by judgment debtor. | 585. Postponement of sale. |
| | 586. Bill of sale by sheriff. |

- 587. Manner of selling real estate.
- 588. Allotment when sold by acre.
- 589. Sale by acre not to be measured.
- 590. Striking off, return and payment.
- 591. Confirmation of sale of land—Disposition of proceeds.
- 592. Eviction of purchaser—Recovery.
- 593. Contribution and subrogation.
- 594. Redemption from sale.
- 595. Time for redemption.
- 596. Successive redemptions.

- 597. Certificate of redemption.
- 598. Payment on successive redemptions.
- 599. Notice of redemption—Certificate.
- 600. Rents and profits during period of redemption.
- 601. Restraining waste during redemption period.
- 602. Possession during period of redemption.
- 603. Sheriff's deed.
- 604. Entry of deed.

CHAPTER VI.—COMMISSIONERS TO CONVEY REAL ESTATE.

- 605. Court may appoint, when.
- 606. Contents of deed.
- 607. Conveyance made in pursuance of judgment—Effect of.
- 608. Conveyance made in pursuance of a sale—Effect of.

- 609. Approval by court necessary.
- 610. Execution of conveyance.
- 611. Recording.
- 612. Conveyance, how enforced.

CHAPTER VII.—PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

- 613. Order to examine judgment debtor.
- 614. Warrant, how vacated, etc.
- 615. Order to discover property, etc., of judgment debtor.
- 616. Before whom examined—Referee to certify evidence.
- 617. Proceedings upon examination—Adjournment.
- 618. Referee to be sworn.
- 619. Order authorizing payment to sheriff.
- 620. Order requiring delivery of money, etc., to sheriff or receiver.
- 621. Duty of sheriff.
- 622. How money or property applied.
- 623. Balance, how disposed of.
- 624. Transfer of property may be enjoined, etc.
- 625. Mode of service of certain orders.
- 626. Service of warrant.
- 627. Discontinuance or dismissal of proceedings.
- 628. Costs to judgment creditor.
- 629. Costs to judgment debtor.

- 630. Disobedience of order, how punished.
- 631. Attendance of judgment debtor—Corporations.
- 632. Not excused from answering.
- 633. Proceedings in case of joint debtors.
- 634. Continuance.
- 635. Proceedings applicable to judgments of justices' courts.
- 636. Proceedings, before whom instituted.
- 637. Property exempt from seizure.
- 638. Proceedings are special—To be heard without jury.
- 639. Fees of referee.
- 640. Receiver—Appointment—Notice.
- 641. Notice to other creditors.
- 642. Only one receiver appointed—Extending receivership.
- 643. Order to be filed.
- 644. Property vests in receiver.
- 645. Receiver's title, how extended by relation.
- 646. Records to be kept by clerk.

CHAPTER I.

EXECUTIONS.

§ 510. Execution to Enforce Judgment.

The party in whose favor judgment has been given or may hereafter be given or entered in any court of record in this state or the territory of Washington may have an execution issued at any time for the collection or enforcement of the same: [Providing, that if a period of five years shall have elapsed without an execution being issued on such judgment, then execution shall not issue thereafter until such judgment shall be revived in the manner provided by law.] [Cf. L. '54, p. 175, § 242; L. '69, p. 79, § 320; Cd. '81, § 325; L. '88, p. 94, § 1; 2 H. C., § 464.]

Superseded and modified as to the part in brackets by §§ 445, 458, supra.

See supra, § 445, duration of judgment lien.

See supra, § 459, revival of judgments.

Cited in 12 Wash. 518; 23 Wash. 546;
32 Wash. 90; 78 Wash. 190, 192.

sed by §§ 458, 459, supra. Catton v.
Reehling. 78 Wash. 187, 138 Pac. 669.

The last part of this section is super-

Nature and Essentials of Execution in General: See Remington's Digest, Execution, §§ 1—3; Murray v. Meade, 5 Wash. 693, 32 Pac. 780; Marks v. Pence, 31 Wash. 426, 71 Pac. 1096; State ex rel. Jefferson County v. Hatch, 36 Wash. 164, 78 Pac. 796; Grant v. Cole, 23 Wash. 542, 63 Pac. 263; Clifford v. Pateros Transfer Co., 71 Wash. 665, 129 Pac. 369.

Time for Issuance: See Remington's Digest, Execution, § 19; Hamilton v. Carter, 12 Wash. 510, 41 Pac. 911; Hewitt v. Root, 31 Wash. 312, 71 Pac.

1021; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046; Dalgardno v. Barthrop, 40 Wash. 191, 82 Pac. 285.

Duration of Lien: See Remington's Digest, Execution, § 23; Tipton v. Martzell, 21 Wash. 273, 67 Pac. 806, 75 Am. St. Rep. 838; Catton v. Reehling, 78 Wash. 187, 138 Pac. 669.

Issuance on Transcript of Judgment of Justice of the Peace: See Remington's Digest, Execution, § 16; Grant v. Cole, 23 Wash. 542, 63 Pac. 263.

For text treatment of "executions," see 10 B. C. L. 1211.

§ 511. Four Kinds of Executions.

There shall be four kinds of executions; one against the property of the judgment debtor; another against his person; the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same; and the fourth, commanding the enforcement of or obedience to any special order of the court. And in all cases there shall be an order to collect the costs. [L. '54, p. 176, § 245; Cd. '81, § 327; 2 H. C., § 465.]

Cited in 22 Wash. 309; 88 Wash. 268.

§ 512. Enforcement in Particular Cases.

When a judgment requires the payment of money, or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter. When it requires the performance of any other act, a certified copy of the judgment may be served on the party against whom it is given, or the person or officer who is required thereby, or by law, to obey the same, and a writ shall be issued commanding him to obey or enforce the same. If he refuses, he may be punished by the court as for a contempt. [L. '54, p. 176, § 244; Cd. '81, § 326; 2 H. C., § 466.]

Cited in 71 Wash. 497.

§ 513. Form and Contents of Writ.

The writ of execution shall be issued in the name of the state of Washington, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff of the county in which the property is situated, or coroner when the sheriff is a party or interested, and shall intelligibly refer to the judgment, stating the court, the county where judgment was rendered, the names of the parties, the amount of the judgment if it be for money, and the amount actually due thereon, and shall require substantially as follows:—

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of the debtor, and if sufficient personal property cannot be found, out of his real property upon which the judgment is a lien;

2. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property;

3. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county until he shall pay the judgment, with interest, or be discharged according to law;

4. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, shall be specified therein. If a delivery thereof cannot be had, and if sufficient personal property cannot be found, then out of his real property. When it is to enforce obedience to any special order, it shall particularly command what is required to be done or to be omitted. When the nature of the case shall require it, the execution may embrace one or more of the requirements above mentioned. And in all cases the execution shall require the collection of all interest, costs, and increased costs thereon. [Cf. L. '54, p. 176, § 246; L. '69, p. 81, § 324; Cd. '81, § 328; 2 H. C., § 467.]

Cited in 12 Wash. 517; 24 Wash. 707; 26 Wash. 75; 46 Wash. 406; 71 Wash. 497; 88 Wash. 268.

Name in Which Writ Should Run: See Remington's Digest, Execution, § 19-1; Pederson v. Lease, 48 Wash. 253, 93 Pac. 439, 125 Am. St. Rep. 922.

Direction to Particular Officer or County: See Remington's Digest, Execution, § 20; Lewis v. Bartlett, 12 Wash. 212, 40 Pac. 934, 50 Am. St. Rep. 885.

Description of and Recitals as to Parties: See Remington's Digest, Execution, § 20-1; Pederson v. Lease, 48 Wash. 253, 93 Pac. 439, 125 Am. St. Rep. 922.

Statement of Amount: See Remington's Digest, Execution, § 21; Otis Bros. & Co. v. Nash, 26 Wash. 39, 66 Pac. 111; Pederson v. Lease, 48 Wash. 253, 93 Pac. 439, 125 Am. St. Rep. 922.

Alias Writs: See Remington's Digest, Execution, § 22; Adams v. National Bank of Commerce, 30 Wash. 20, 70 Pac. 105.

§ 514. To What County Execution may Issue.

The party in whose favor judgment has been rendered, entered, or given in any court of record in this state for the recovery of money, or against the property of a judgment debtor, may have execution issued thereon for the collection or enforcement of such judgment to the sheriff of any county in this state: Provided, that when a judgment requires the delivery of real or personal property execution shall be issued to the sheriff of the county where the property, or some part thereof, is situated. [Cf. L. '54, p. 177, § 247; Cd. '81, § 329; L. '88, p. 95, § 2; 2 H. C., § 468.]

Counties to Which Execution may Issue: See Remington's Digest, Execution, § 18; Humphries v. Sorenson, 33 Wash. 563, 74 Pac. 690; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765; Bramel v. Ratliff, 54 Wash. 581, 103 Pac. 817.

§ 515. Sheriff's Duty on Receiving Execution.

The sheriff shall indorse upon the writ of execution the time when he received the same, and such execution shall be returnable within sixty days after its date to the clerk who issued the same. And no sheriff shall retain any moneys collected on execution more than twenty days before paying the same to the clerk of the court who issues the

writ, under penalty of twenty per cent on the amount collected, to be paid by the sheriff, and one-half to the party to whom the judgment is payable, and the other half to the county commissioners of the county wherein the action was brought, for the use of the school fund of said county. And the clerk shall, immediately after the receipt of any moneys collected on any judgment, notify the party to whom the same is payable, and pay over the amount to the said party on demand. On failure to so notify and pay over, without reasonable cause shown for delay, the clerk shall forfeit and pay the same penalty to the same parties as is above prescribed for the sheriff. [Cf. L. '54, p. 177, § 248; L. '69, p. 83, § 226; Cd. '81, § 330; 2 H. C., § 469.]

Cited in 3 Wash. 704; 12 Wash. 517; 21 Wash. 275; 26 Wash. 76; 86 Wash. 303.

Wrongful or Excessive Levy: See Remington's Digest, Execution, § 108; Dawson v. Baum, 3 W. T. 464, 19 Pac. 46; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; Eaid v. Connolly, 48 Wash. 584, 94 Pac. 188.

Persons Entitled to Damages: See Remington's Digest, Execution, § 109; Magnus v. Woolery, 14 Wash. 43, 44 Pac. 130.

Actions—Nature and Form: See Remington's Digest, Execution, § 110; Dawson v. Baum, 3 W. T. 464, 19 Pac. 46; Scott v. McGraw, 3 W. T. 675, 29 Pac. 260; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355; Carpenter v. Barry, 26 Wash. 255, 66 Pac. 393.

Injunction—In General: See Remington's Digest, Execution, § 32; Phelan v.

Smith, 22 Wash. 397, 61 Pac. 31; Grant v. Cole, 23 Wash. 542, 63 Pac. 263.

— **Actions to Restrain Execution:** See Remington's Digest, Execution, § 33; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73; Cline Piano Co. v. Sherwood, 57 Wash. 239, 107 Pac. 724; Humptulips Driving Co. v. Cross, 65 Wash. 636, 118 Pac. 827, 37 L. R. A. (N. S.) 226.

Liability of sheriff, constable, or marshal, neglect of assistant or deputy to make levy. 1 A. L. R. 236, 240.

Officer's return upon an execution or order of sale as a memorandum satisfying the statute of frauds. L. R. A. 1917E, 899.

Effect of return on execution made after return day. 2 A. L. R. 181.

§ 516. Execution Against the Person.

If the action be one in which the defendant may be arrested as provided by law, an execution against the person of the judgment debtor may be issued to any county in the state: Provided, that the sheriff shall not arrest the defendant if he shall deliver to him the property subject to levy, sufficient to satisfy said judgment. [L. '54, p. 177, § 249; Cd. '81, § 331; 2 H. C., § 470.]

Cited in 71 Wash. 497; 84 Wash. 60.

Discharge on Implied Consent of Creditor: See Remington's Digest, Execution, § 107; Burrichter v. Cline, 3 Wash. 135, 28 Pac. 367.

Constitutionality of imprisonment on execution. 34 L. R. A. 634.

Order of arrest or *capias ad respondendum* as condition of right to body execution. L. R. A. 1915A, 706.

Right to break and enter dwelling to serve writ of body execution. L. R. A. 1916D, 284.

§ 517. Imprisonment of Defendant upon Execution.

A person arrested on execution shall be imprisoned within the jail, or the liberties thereof, and kept at his own expense until satisfaction of the execution or his legal discharge; but the plaintiff shall be liable to the sheriff, in the first instance, for such expense as in other cases of arrest in the same manner and to the same extent as therein prescribed. [L. '54, p. 177, § 250; Cd. '81, § 332; 2 H. C., § 471.]

Cited in 88 Wash. 269.

§ 518. What Property Subject to Execution.

All property, real and personal, of the judgment debtor, not exempt by law, shall be liable to execution. [L. '54, p. 177, § 251; Cd. '81, § 333; 2 H. C., § 479.]

Cited in 15 Wash. 489; 31 Wash. 457; 107 Wash. 492.

PROPERTY SUBJECT TO EXECUTION: See Remington's Digest, Execution, §§ 4—8.

A set of abstract books: *Washington Bank v. Fidelity Abstract etc. Co.*, 15 Wash. 487, 46 Pac. 1036, 55 Am. St. Rep. 902, 37 L. R. A. 115.

Interests in Public Lands.—The possessory right of the locator of a mining claim prior to patent: *Phoenix Min. Co. v. Scott*, 20 Wash. 48, 54 Pac. 777. The interest of a lessee of state lands: *Reilley v. Anderson*, 33 Wash. 58, 73 Pac. 799.

Crops: *Tipton v. Martzell*, 21 Wash. 273, 57 Pac. 806, 75 Am. St. Rep. 838.

Franchises and Privileges: *Lawrence v. Times Printing Co.*, 22 Wash. 482, 61 Pac. 166.

Corporate Stock: *Hardin v. White Swan Min. & Mill. Co.*, 26 Wash. 583, 67 Pac. 236; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

Property Mortgaged or Otherwise Encumbered: See Remington's Digest, Execution, § 9; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

Equitable Estates or Interests: See Remington's Digest, Execution, §§ 10, 11; *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070.

See, also, *Gordon v. Hillman*, 107 Wash. 490, 182 Pac. 574.

Interests of Heirs or Distributees: *Cunningham v. Richardson*, 68 Wash. 24, 122 Pac. 368.

Interests of Devisees or Legatees: *Mears v. Lamona*, 17 Wash. 148, 49 Pac. 251.

Ownership or Possession of Property—Property in Custody of Agent or Depositary: See Remington's Digest, Execution, §§ 12, 13; *Sires v. Newton*, 1 W. T. 356; *Potvin v. Wickersham*, 15 Wash. 646, 47 Pac. 25; *Washington Nat. Bank v. Moyer*, 22 Wash. 622, 61 Pac. 712.

Property in Custody of the Law: See Remington's Digest, Execution, § 14; *Eidson v. Woolery*, 10 Wash. 225, 38 Pac. 1025; *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810.

Property or Rights Which may be Reached—In General: See Remington's Di-

gest, Execution, §§ 92—94; *Murne v. Schwabacher*, 2 W. T. 191, 3 Pac. 270; *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

The equitable or reversionary interest of the payee of a promissory note, pledged by him as security for a debt, may be sold on execution, under this section: *Gordon v. Hillman*, 107 Wash. 490, 182 Pac. 574.

Property Exempt from Execution: *Field v. Greiner*, 11 Wash. 8, 39 Pac. 259.

Salaries of Public Officers or Employees: *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

Leasehold estate as subject of levy under execution. 15 Ann. Cas. 867; 17 L. R. A. (N. S.) 841; 29 L. R. A. (N. S.) 886.

Liability of purchaser's interest acquired at execution sale to levy under another execution. 8 Ann. Cas. 475.

Levy under subsequent execution upon surplus in hands of officer after satisfying execution. 6 Ann. Cas. 655.

Judgment as subject to levy and sale under execution. 21 Ann. Cas. 745.

Legacy as subject to execution. 21 Ann. Cas. 201.

Grantor's interest in trust deed as liable to execution. Ann. Cas. 1913A, 1049.

Expectant and contingent interests in real property as subject to levy of execution. 23 L. R. A. 642; 30 L. R. A. (N. S.) 115.

Liability to execution of property in hands of assignee for creditors. 26 L. R. A. 593.

Shares of corporate stock as subject of execution. 1 A. L. R. 653; 55 L. R. A. 796.

Levy of execution upon contents of safety deposit box. 11 A. L. R. 225.

Levy upon contents of sealed package or locked receptacle. 41 L. R. A. (N. S.) 764.

Right of creditors to levy on insurance policy or its cash surrender value. 16 L. R. A. (N. S.) 318, 319.

Proceeds of life insurance as subject to execution. 2 Ann. Cas. 91.

§ 519. Execution in Name of Assignee, Executor, etc.

In all cases in which a judgment has been recovered in any of the courts of this state, which shall have been assigned to any person, execution may issue in the name of the assignee, upon the assignment being recorded in the execution docket by the clerk of the court in which the judgment is recovered; and in all cases in which a judgment has been recovered in any such court, and the person in whose name execution might have issued dies, execution may issue in the name of the executor, administrator, or legal representative of such deceased person upon the letters testamentary or of administration, or other sufficient proof, being filed in said cause and minuted upon said execution docket by the clerk of the court in which said judgment is entered, and upon an order of said court, or the judge thereof, which may be made on an ex parte application, and the provisions of this section shall extend to all judgments heretofore recovered, as well as to those hereafter to be recovered, and to cases of persons now deceased, as well as to those who may hereafter die. [L. '69, p. 84, § 330; Cd. '81, § 334; L. '86, p. 75, § 1; 2 H. C., § 472.]

Assignability of Writ.—Assignment of surety paying the judgment, see *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780.

§ 520. Franchises Liable to Sale Under Execution or Foreclosure.

All franchises of every kind and nature heretofore or hereafter granted, shall be subject to sale upon execution, and upon order of sale issued upon foreclosure of mortgage, in the same manner as any other personal property may be sold upon execution or upon order of sale under foreclosure of mortgage, except as hereinafter provided. [L. '97, p. 96, § 1.]

Cited in 21 Wash. 54; 22 Wash. 490;
86 Wash. 322.

Property or franchise of quasi-public

corporation as subject to sale on
execution. 5 Ann. Cas. 512; 31
L. R. A. (N. S.) 639.

§ 521. Manner of Levy and Sale of Franchises.

The levy of such execution or order of sale shall be made by filing in the office of the auditor of the county in which the franchise was granted, a copy of the same, together with a notice in writing that under such execution or order of sale the officer levying the same has levied upon the franchise to be sold, specifying the time and place of sale, the name of the owner of the franchise, the amount of the claim or judgment for the satisfaction of which the franchise is to be sold, and the name of the plaintiff in the action in which the decree of foreclosure or judgment is entered; and by serving a copy of such execution or order of sale and notice, upon the judgment debtor, or his attorney of record, if any, in the action in which judgment was rendered, twenty days prior to the date of sale. Notice may be served upon a defendant in the same manner that summons is served in civil actions. The sale of any franchise under execution or order of sale upon foreclosure must be made at the front door of the courthouse in the county in which the franchise was granted, not less than twenty days after the levy of the execution or order of sale and the giving of the notice as in this act provided. [L. '97, pp. 96, 97, §§ 2, 3.]

CHAPTER II.

THE STAY OF EXECUTIONS.

§ 522. Stay, in What Cases Allowed.

Stay of execution shall be allowed on judgments rendered in the supreme court and superior courts as follows:—

In the supreme court,—

1. On all sums under five hundred dollars, thirty days;
2. On all sums over five and under fifteen hundred dollars, sixty days;
3. On all sums over fifteen hundred dollars, ninety days;

On judgments rendered in the superior court,—

1. On all sums under three hundred dollars, two months;
2. On all sums over three hundred and under one thousand dollars, five months;
3. On all sums over one thousand dollars, six months. [Cf. L. '54, p. 377, § 1; L. '60, p. 328, § 1; Cd. '81, § 335; 2 H. C., § 473.]

Cited in 95 Wash. 125, 128, 129.

This section is not repealed by section 7249, *infra*, providing that judgments against any indemnity or insurance company upon a bond shall be paid within thirty days, upon penalty of forfeiture of its license to do business in this state: *American Surety Co. v. Fishback*, 95 Wash. 124, 163 Pac. 488.

Stay of Execution: See *Remington's Digest*, Execution, § 29-1; *American Surety Co. v. Fishback*, 95 Wash. 124, 163 Pac. 488.

Quashing or Vacating Writ—Grounds: See *Remington's Digest*, Execution, § 30;

Tacoma Nat. Bank v. Sprague, 33 Wash. 285, 74 Pac. 393.

— **Review of Proceedings and Determination:** See *Remington's Digest*, Execution, § 31; *Sturgiss v. Dart*, 23 Wash. 244, 62 Pac. 858; *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111; *Hewitt v. Root*, 31 Wash. 312, 71 Pac. 1021.

Stay of execution in subsequent action pending garnishment proceedings against same debtor. 9 *Ann. Cas.* 479.

Ratification by corporation of unauthorized stay of execution by officer by acceptance and retention of benefits. 7 *A. L. R.* 1482.

§ 523. Bond Required for Stay.

Before any execution shall be stayed under the provisions of this chapter, the defendant shall give bond to the opposite party in double the amount of the judgment and costs, with surety, to the satisfaction of the clerk, conditioned to pay said judgment, interest, costs, and increased costs at the expiration of the period of said stay. [L. '54, p. 378, § 2; Cd. '81, § 336; 2 H. C., § 474.]

Cited in 50 Wash. 40, 41.

§ 524. Judgment may be Entered Against Sureties.

If the judgment is not satisfied at any time after the expiration of the period for which execution has been stayed, the plaintiff may, upon motion supported by an affidavit that such judgment, or any part thereof, is unpaid, and stating how much remains due thereon, have judgment against the sureties upon said bond for the balance remaining due, and have an execution therefor, upon which no stay shall be allowed. [L. '54, p. 378, § 3; Cd. '81, § 337; 2 H. C., § 475.]

Cited in 50 Wash. 41.

§ 525. Qualification and Justification of Sureties.

The sureties upon a bond for stay of execution shall possess the same qualifications and justify in the same manner as bail upon arrest in civil actions. [L. '54, p. 378, § 4; Cd. '81, § 338; 2 H. C., § 476.]

§ 526. Stay for Part of Period.

When execution has not been stayed, and execution issues before the time has elapsed for which it might have been stayed, as is herein provided, the defendant may have stay for the balance of the time upon giving the proper bond and surety, which bond and surety shall be approved by and justified before the sheriff. [L. '54, p. 378, § 5; Cd. '81, § 339; 2 H. C., § 477.]

§ 527. Bond Lodged With Clerk.

Bonds required by this chapter shall, when taken, be lodged with the clerk of the court where the judgment was rendered and placed on file in his office. [L. '54, p. 378, § 6; Cd. '81, § 340; 2 H. C., § 478.]

CHAPTER III.**HOMESTEADS AND EXEMPTIONS.****§ 528. Homestead, of What Consists.**

The homestead consists of the dwelling-house, in which the claimant resides, and the land on which the same is situated, selected as in this chapter provided. [L. '95, p. 109, § 1.]

For former laws on this subject see: L. '54, p. 178; L. '61, pp. 42, 52; L. '69, p. 85; Cd. '81, §§ 341-348; 2 H. C., §§ 480-490.

Cited in 16 Wash. 377; 17 Wash. 435; 25 Wash. 5; 30 Wash. 40, 54, 313; 32 Wash. 83, 98; 41 Wash. 460, 461, 464, 465; 46 Wash. 577; 48 Wash. 377; 56 Wash. 59; 57 Wash. 44; 75 Wash. 614; 78 Wash. 547; 87 Wash. 360; 92 Wash. 145, 146; 94 Wash. 112; 96 Wash. 482; 109 Wash. 555, 556, 558.

This act did not impliedly repeal Rem. 1915 Code, section 1464, providing for the setting aside of the whole of estates of less than \$1,000 for the use and support of the widow and children of the deceased, since the acts are not repugnant and repeals by implication are not favored: *Scott v. Stark*, 75 Wash. 610, 135 Pac. 643.

Rem. 1915 Code, sections 1465 and 1468, contemplating the vesting of title to the homestead in the widow and minor children on the death of the husband was in that respect repealed by sections 528-561, requiring the selection of specific property: *Bloor's Estate, In re*, 109 Wash. 554, 187 Pac. 396.

Under sections 528-561, no right of homestead existed in any specific property until it was selected and the selection recorded; and prior residence upon

the land lends no support to the claim of homestead rights: *Bloor's Estate, In re*, 109 Wash. 554, 187 Pac. 396.

Effect of Change or Repeal of Homestead Exemption: See *Remington's Digest, Home.*, §§ 1, 2; *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046; *Lewis v. Mauerman*, 35 Wash. 156, 76 Pac. 737.

PERSONS ENTITLED—Debtors or Defendants: See *Remington's Digest, Home.*, § 3; *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794.

Head of Family and Members Thereof: See *Remington's Digest, Home.*, § 4; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358.

See, also, *Morgan v. Cunningham*, 109 Wash. 105, 186 Pac. 309; *Bloor's Estate, In re*, 109 Wash. 554, 187 Pac. 396.

Form and Physical Characteristics: See *Remington's Digest, Home.*, § 12; *Smith v. Ferry*, 43 Wash. 460, 86 Pac. 658; *Morse v. Morris*, 57 Wash. 43, 106 Pac. 468, 135 Am. St. Rep. 968.

For text treatment of "Homesteads," see 13 B. C. L. 535.

§ 529. Exemption of Homestead—Time for Selection.

There shall be also exempt from execution and attachment to every householder, being the head of the family, a homestead not exceeding in value the sum of one thousand dollars, while occupied as such by the owner thereof, or his or her family. Said homestead may consist of a house and lot or lots in any city, or of a farm consisting of any number of acres, so that the value of the same shall not exceed the aforesaid sum of one thousand dollars. Such homestead may be selected at any time before sale. [Cd. '81, § 342; 2 H. C., § 481.]

This section, except the last sentence, seems to be superseded.

Cited in 78 Wash. 547, 549; 84 Wash. 666.

The provision in this section as to the time for selection was not superseded by subsequent laws: *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Feas' Estate, In re*, 30 Wash. 51, 70 Pac. 270; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070.

Time of Acquisition of Homestead Exemption: See *Remington's Digest, Home.*, § 9; *McMillan v. Mau*, 1 Wash. 26, 23 Pac. 441; *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Feas' Estate, In re*, 30 Wash. 51, 70 Pac. 270; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794; *Anderson v.*

Stadlmann, 17 Wash. 433, 49 Pac. 1070; *State ex rel. Jakubowski v. Superior Court*, 84 Wash. 663, 147 Pac. 408.

Time for Making Claim: See *Remington's Digest, Home.*, § 35; *McMillan v. Mau*, 1 Wash. 26, 23 Pac. 441; *Field v. Greiner*, 11 Wash. 8, 39 Pac. 259; *Traders' Nat. Bank of Spokane v. Schorr*, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 3; *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 392.

Subsequent occupancy of land for homestead purposes as divesting lien of prior judgment or attachment. *Ann. Cas.* 1913B, 1147.

§ 530. From What may be Selected.

If the claimant be married the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. When the claimant is not married, but is the head of a family within the meaning of section 553 the homestead may be selected from any of his or her property. [L. '95, p. 109, § 2.]

Cited in 56 Wash. 59; 66 Wash. 166.

Community Property: See *Remington's Digest, Home.*, § 13; *Feas' Estate, In re*, 30 Wash. 51, 70 Pac. 270.

Right of husband, as against creditors, to claim homestead as exempt where title is vested in wife. 14 *Ann. Cas.* 1157; 13 *L. R. A. (N. S.)* 170.

§ 531. Selection from Wife's Separate Estate.

The homestead cannot be selected from the separate property of the wife without her consent, shown by her making the declaration of homestead. [L. '95, p. 109, § 3.]

§ 532. Exempt from Forced Sale.

The homestead is exempt from execution or forced sale, except as in this act provided. [L. '95, p. 109, § 4.]

The exception "as in this act provided" is stated in § 537, *infra*.

"Act" refers to §§ 528, 529—533.

Cited in 66 Wash. 166, 167; 94 Wash. 116.

§ 533. Homestead Subject to Execution.

The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) On debts secured by mechanic's, laborer's,

materialmen's or vendor's liens upon the premises. (2) On debts secured by mortgages on the premises executed and acknowledged by the husband and wife or by any unmarried claimant. [L. '95, p. 110, § 5; L. '09, p. 71, § 1.]

Cited in 66 Wash. 166, 167, 517; 87 Wash. 360; 94 Wash. 116.

Liabilities for which homestead may be held liable: See notes to § 561, *infra*.

A mechanic's lien may be claimed for the erection of a dwelling-house, although the premises are at the time intended to be claimed as a homestead: *Parsons v. Pearson*, 9 Wash. 48, 36 Pac. 974.

A mortgagee, proceeding at law to enforce a deficiency judgment, by a sale of

the homestead, is estopped from claiming an equitable lien on the homestead by reason of its purchase with the proceeds of waste committed upon the mortgaged premises: *Harding v. Atlantic Trust Co.*, 26 Wash. 536, 67 Pac. 222.

A mortgage need not expressly mention the homestead: See *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068.

Homestead as subject of mechanic's lien. *Ann. Cas.* 1917E, 747; *L. R. A.* 1918D, 1055.

§ 534. Conveyance or Encumbrance.

The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife. [L. '95, p. 110, § 6.]

Cited in 44 Wash. 168, 169; 50 Wash. 112.

Mortgage: See *Remington's Digest*, Home., § 19; *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068.

Joinder of Husband and Wife in Mortgage: See *Remington's Digest*, Home., § 20; *Oregon Mortgage Co. v. Hersner*, 14 Wash. 515, 45 Pac. 40; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070.

§ 535. Abandonment.

A homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged,—

1. By the husband and wife if the claimant is married;
2. By the claimant, if unmarried. [L. '95, p. 110, § 7.]

Cited in 30 Wash. 56; 35 Wash. 159; 44 Wash. 168; 78 Wash. 547, 549; 94 Wash. 112, 113; 96 Wash. 484.

ABANDONMENT OR WAIVER—Acts Constituting Abandonment in General: See *Remington's Digest*, Home., § 28; *Feas' Estate*, In re, 30 Wash. 51, 70 Pac. 270; *Asher v. Sekofsky*, 10 Wash. 379, 38 Pac. 1133; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070.

Loss or Relinquishment of Right—Separation of Family: See *Remington's Digest*, Home., § 29; *Murphy's Estate*, In re, 46 Wash. 574, 90 Pac. 916; *Byam v. Albright*, 94 Wash. 108, 162 Pac. 10.

— Removal or Acquisition of Other Domicile or Homestead: See *Remington's Digest*, Home., § 29-1; *Gullickson v. Fenlon*, 48 Wash. 503, 93 Pac. 1074; *Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503; *Byam v. Albright*, 94 Wash. 108, 162 Pac. 10.

By Sale and Conveyance: See *Remington's Digest*, Home., § 30; *Feas' Estate*, In re, 30 Wash. 51, 70 Pac. 270; *Smith v. Ferry*, 43 Wash. 460, 86 Pac. 658.

Mortgage or Other Encumbrance as Waiver of Right: See *Remington's Digest*, Home., § 31; *Oregon Mortgage Company v. Hersner*, 14 Wash. 515, 45 Pac. 40; *Wiss v. Stewart*, 16 Wash. 376, 47 Pac. 736; *Ross v. Howard*, 25 Wash. 1, 64 Pac. 794.

Estoppel to Claim Homestead: See *Remington's Digest*, Home., § 32; *Traders' Nat. Bank of Spokane v. Schorr*, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17.

Effect of remarriage upon widow's existing homestead rights. *L. R. A.* 1916A, 1000.

Imprisonment as affecting abandonment of homestead. 5 *A. L. R.* 259.

§ 536. Declaration, When Effectual.

A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded. [L. '95, p. 110, § 8.]

Cited in 94 Wash. 112, 113; 96 Wash. 484.

§ 537. Proceedings on Execution Against Homestead.

When the execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 533 is levied upon the homestead, the judgment creditor may apply to the superior court of the county in which the homestead is situated for the appointment of persons to appraise the value thereof. [L. '95, p. 110, § 9.]

Cited in 44 Wash. 169.

§ 538. Verified Petition.

The application must be made upon verified petition, showing,—

1. The fact that an execution has been levied upon the homestead;
2. The name of the claimant;
3. That the value of the homestead exceeds the amount of the homestead exemption. [L. '95, p. 110, § 10.]

§ 539. Petition, Where Filed.

The petition must be filed with the clerk of the superior court. [L. '95, p. 110, § 11.]

§ 540. Notice.

A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant at least ten days before the hearing. [L. '95, p. 110, § 12.]

§ 541. Hearing and Appointment of Appraisers.

At the hearing the judge may, upon the proof of the service of a copy of the petition and notice and of the fact stated in the petition, appoint three disinterested resident freeholders of the county to appraise the value of the homestead. [L. '95, p. 110, § 13.]

§ 542. Oath of Appraisers.

The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same. [L. '95, p. 111, § 14.]

§ 543. View of Premises.

They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption, they must determine whether the land claimed can be divided without material injury. [L. '95, p. 111, § 15.]

§ 544. Report of Appraisers.

Within fifteen days after their appointment they must make to the court a report in writing, which report must show the appraised value

and their determination upon the matter of a division of the land claimed. [L. '95, p. 111, § 16.]

§ 545. Division of Property.

If, from the report, it appears to the court that the land claimed can be divided without material injury the court must, by an order, direct the appraisers to set off to the claimant so much of the land including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land. [L. '95, p. 111, § 17.]

§ 546. Sale, if not Divisible.

If, from the report, it appears to the court that the land claimed exceeds in value the amount of the homestead exemption and that it cannot be divided, the court must make an order directing its sale under the execution. [L. '95, p. 111, § 18.]

Sale of Homestead, Validity: See Remington's Digest, Home., § 34; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; Asher v. Sekofsky, 10 Wash. 379, 38 Pac. 1133; Traders' Nat. Bank. v. Schorr, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

Where the law respecting the sale of homesteads was not complied with and no exemption at all allowed, an execution sale of premises that have been

duly selected as a homestead cannot be sustained on the theory that since the judgment was obtained the exemption for a homestead was increased from \$1,000 to \$2,000, and premises were worth more than \$1,000: Lewis v. Maurer, 35 Wash. 156, 76 Pac. 737.

A wife may maintain an action in her own name to restrain the sale of the community realty in which she and her husband claim the right of homestead: Ross v. Howard, 25 Wash. 1, 64 Pac. 794.

§ 547. Bids.

At such sale no bid must be received unless it exceeds the amount of the homestead exemption. [L. '95, p. 111, § 19.]

§ 548. Application of Proceeds.

If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant and the balance applied to the satisfaction of the execution. [L. '95, p. 111, § 20.]

§ 549. Money from Sale Protected.

The money paid to the claimant is entitled to the same protection against legal process and the voluntary disposition of the husband which the law gives to the homestead. [L. '95, p. 111, § 21.]

§ 550. Compensation of Appraisers.

The compensation of the appraisers shall be two dollars per day each. [L. '95, p. 111, § 22.]

§ 551. Costs.

The execution creditor must pay the costs of these proceedings in the first instance; but in the case provided for in sections 545 and 546 the amount so paid must be added as costs on execution, and collected accordingly. [L. '95, p. 111, § 23.]

§ 552. Selection and Value of Homestead.

Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of two thousand dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes. [L. '95, p. 112, § 24.]

Cited in 30 Wash. 38; 57 Wash. 44; 78 Wash. 547, 549; 94 Wash. 111, 117; 96 Wash. 106.

Value: See Remington's Digest, Home., §§ 11, 26; Lloyd's Estate, In re, 34 Wash. 84, 74 Pac. 1061; Lewis v. Mauerman, 35 Wash. 156, 76 Pac. 737; Murphy's Estate, In re, 46 Wash. 574, 90 Pac. 916.

Necessity and Sufficiency of Occupancy: See Remington's Digest, Home., § 6; Phil-

brick v. Andrews, 8 Wash. 7, 35 Pac. 358; Anderson v. Stadlmann, 17 Wash. 433, 49 Pac. 1070; Feas' Estate, In re, 30 Wash. 51, 70 Pac. 270; Lewis v. Mauerman, 35 Wash. 156, 76 Pac. 737; Schoenheider v. Tuengel, 96 Wash. 103, 164 Pac. 748.

Homestead exemption as extending to premises used for hotel, lodging or boarding house. **Ann. Cas.** 1913E, 1256; 41 **L. R. A. (N. S.)** 303.

§ 553. Head of a Family Defined.

The phrase "head of the family," as used in this chapter, includes within this meaning,—

1. The husband or wife, when the claimant is a married person;
2. Every person who has residing on the premises with him or her, and under his or her care and maintenance, either,—
 - (1.) His or her minor child or the minor child of his or her deceased wife or husband;
 - (2.) A minor brother or sister or the minor child of a deceased brother or sister;
 - (3.) A father, mother, grandmother or grandfather;
 - (4.) The father, mother, grandfather or grandmother of deceased husband or wife;
 - (5.) An unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves. [L. '95, p. 112, § 25.]

Cited in 90 Wash. 223; 96 Wash. 103, 104; 109 Wash. 105, 556, 558.

A man living on the premises with his illegitimate minor child cannot claim a homestead exemption as the head of a family, within this section: Peerless Pacific Co. v. Burekhard, 90 Wash. 221, 155 Pac. 1037, **Ann. Cas.** 1918B, 247, **L. R. A.** 1917C, 353.

A widower when not the "head of a family" as defined by this section: Borrow's Estate, In re, 92 Wash. 143, 158 Pac. 735.

A widow is not entitled to claim a homestead, as having residing with her a minor son under her care and "maintenance," within this section, where the son had been emancipated by his marriage and was himself the head of a

family and was contributing to the support of the combined family rather than being maintained by his mother: Morgan v. Cunningham, 109 Wash. 105, 186 Pac. 309.

Neither the surviving husband nor wife who was not the "head of a family" within the meaning of this section, could acquire a homestead in community property when homestead rights had not been perfected prior to the death of the other spouse: Bloor's Estate, In re, 109 Wash. 554, 187 Pac. 396.

Loss of homestead exemption by loss of family. 12 **Ann. Cas.** 1217; 21 **Ann. Cas.** 1148.

What constitutes a family under homestead exemption. 4 **L. R. A. (N. S.)** 366; **L. R. A.** 1917C, 361.

§ 554. Alienation in Case of Insanity.

In case of a homestead, if either the husband or wife shall become hopelessly insane, upon application of the husband or wife not insane to the superior court of the county in which the homestead is situated, and upon due proof of such insanity, the court may make an order permitting the husband or wife not insane to sell and convey or mortgage such homestead. [L. '95, p. 112, § 26.]

Cited in 45 Wash. 23.

Prior to this act, there was no statutory authority for the mortgage of the homestead of an insane husband or wife, and a mortgage by a husband, for him-

self and as guardian for his insane wife, under authority of the probate court, was void: Curry v. Wilson, 45 Wash. 19, 87 Pac. 1065.

§ 555. Notice of Application.

Notice of the application for such order shall be given by publication of the same in a newspaper published in the county in which such homestead is situated, if there be a newspaper published therein, once each week for three successive weeks prior to the hearing of such application, and a copy of such notice shall be served upon the nearest male relative of such insane husband or wife, resident in this state, at least three weeks prior to such application, and in case there be no such male relative known to the applicant, a copy of such notice shall be served upon the prosecuting attorney of the county in which such homestead is situated; and it is hereby made the duty of such prosecuting attorney, upon being served with a copy of such notice, to appear in court and see that such application is made in good faith, and that the proceedings therein are fairly conducted. [L. '95, p. 112, § 27.]

§ 556. Petition.

Thirty days before the hearing of any application under the provisions of this chapter, the applicant shall present and file in the court in which such application is to be heard a petition for the order mentioned, subscribed and sworn to by the applicant, setting forth the name and age of the insane husband or wife; a description of the premises constituting the homestead; the value of the same; the county in which it is situated; and such facts in addition to that of the insanity of the husband or wife relating to the circumstances and necessities of the applicant and his or her family as he or she may rely upon in support of the petition. [L. '95, p. 113, § 28.]

§ 557. Order and Effect.

If the court shall make the order provided for in section 554, the same shall be entered upon the minutes of the court; and thereafter any sale, conveyance [or] mortgage made in pursuance of such order shall be as valid and effectual as if the property affected thereby was the absolute property of the person making such sale, conveyance or mortgage in fee simple. [L. '95, p. 113, § 29.]

§ 558. Mode of Selection.

In order to select a homestead the husband or other head of a family, or in case the husband has not made such selection, the wife

must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record. [L. '95, p. 113, § 30.]

Cited in 30 Wash. 38; 56 Wash. 59; 76 Wash. 455; 86 Wash. 59; 87 Wash. 365; 96 Wash. 482.

Selection by a husband out of the community property vests title in him in fee; and this section supersedes that part of Rem. 1915, Code, § 1465, requiring a "setting aside" of a homestead by the probate court where none had been claimed by "the head of a family in his lifetime": *Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659.

Declaration or Certificate: See Rem-

ington's Digest, Home., § 7; *Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 543, 125 Am. St. Rep. 937; *Covert v. Burger*, 76 Wash. 454, 136 Pac. 675; *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739.

See, also, *Bloor's Estate, In re*, 109 Wash. 554, 187 Pac. 396.

Necessity for selection of homestead where property is not in excess of exemption. Ann. Cas. 1913C, 1281.

§ 559. Declaration of Homestead—Contents.

The declaration of homestead must contain,—

1. A statement showing that the person making it is the head of a family; or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit;

2. A statement that the person making it is residing on the premises or has purchased the same for a homestead and intends to reside thereon and claims them as a homestead;

3. A description of the premises;

4. An estimate of their actual cash value. [L. '95, p. 113, § 31.]

Cited in 30 Wash. 39, 54; 70 Wash. 560; 87 Wash. 359, 365; 96 Wash. 482.

§ 560. Recording Declaration.

The declaration must be recorded in the office of the auditor of the county in which the land is situated. [L. '95, p. 114, § 32.]

Cited in 30 Wash. 39; 87 Wash. 359, 365; 96 Wash. 482.

The original declaration, showing indorsement of county auditor of filing and recording, is admissible in evidence: See *Smith v. Veysey*, 30 Wash. 18, 70 Pac. 94.

There is no homestead right in property acquired since the passage of this act unless a declaration of homestead is executed and filed as therein required: *Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 534, 125 Am. St. Rep. 937.

§ 561. Tenure by Which Homestead is Held.

From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this chapter; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this act. [L. '95, p. 114, § 33.]

"Act" refers to §§ 528, 529—533.

See *infra*, § 1474, probate homestead.

Cited in 24 Wash. 174; 30 Wash. 39, 55; 34 Wash. 90, 91; 56 Wash. 59, 61; 86 Wash. 62; 94 Wash. 113; 96 Wash. 482.

This section is germane to the title of the act: *Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659.

The widow cannot select a permanent homestead from the unselected separate estate of her husband to the exclusion of the other heirs, but the same descends to the heirs at law, under this section, and Rem. 1915 Code, §§ 1465 and 1468: *Lloyd's Estate, In re*, 34 Wash. 84, 74 Pac. 1061.

Duration and Termination in General: See Remington's Digest, Home., § 24; *Feas' Estate, In re*, 30 Wash. 51, 70 Pac. 270.

LIABILITIES ENFORCEABLE AGAINST HOMESTEAD—Exception of Pre-existing Liabilities and Liens—Liabilities Existing Before Establishment of Homestead: See Remington's Digest, Home., § 13-1; *Olson v. Goodsell*, 56 Wash. 251, 105 Pac. 463; *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153.

Claims and Liens for Creation, Im-

provement or Preservation of Property: See Remington's Digest, Home., § 14; *Parsons v. Pearson*, 9 Wash. 48, 36 Pac. 974; *Harding v. Atlantic Trust Co.*, 26 Wash. 536, 67 Pac. 222.

Alimony: See Remington's Digest, Home., § 15; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358.

Judgments: See Remington's Digest, Home., § 16; *Traders' Nat. Bank of Spokane v. Schorr*, 20 Wash. 1, 54 Pac. 543, 72 Am. St. Rep. 17; *Kenyon v. Erskine*, 69 Wash. 110, 124 Pac. 392.

Evidence: See Remington's Digest, Home., § 10; *Smith v. Veysey*, 30 Wash. 18, 70 Pac. 94.

Claim by Minor.—The denial of a minor's claim to have the use of his mother's portion of community real property assigned to him upon her death, as permitted by this section, will not be reversed when it appears he was within sixteen days of the age of majority, and there is no showing that the use of the property for that limited period would have been of value to him: *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116.

§ 562. Subsequent Homestead Acquired by Proceeds of Former.

In case of the sale of said homestead, any subsequent homestead acquired by the proceeds thereof shall also be exempt from attachment and execution; nor shall any judgment or other claim against the owner of such homestead be a lien against the same in the hands of a bona fide purchaser for a valuable consideration. [L. '69, p. 87, § 342; Cd. '81, § 346; 2 H. C., § 485.]

Cited in 20 Wash. 7; 44 Wash. 169; 50 Wash. 112.

Rights of Surviving Wife, Husband, Children or Heirs: See Remington's Digest, Home., §§ 21—27; *McMillan v. Mau*, 1 Wash. 26, 23 Pac. 441; *Wortman v. Vorhies*, 14 Wash. 152, 44 Pac. 129; *Eyre's Estate, In re*, 7 Wash. 291, 34 Pac. 831; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070; *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155; *Lloyd's Estate, In re*, 34 Wash. 84, 74 Pac. 1061; *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116; *Feas' Estate, In re*, 30 Wash. 51, 70 Pac. 270; *Moyses v. Nyboe*, 90 Wash. 257, 155 Pac. 1036; *Borrow's Estate, In re*, 92 Wash. 143, 158 Pac. 735; *Murphy's Estate, In re*, 46 Wash. 574, 90 Pac. 916; *Fairfax v. Walters*, 66 Wash. 583, 120 Pac. 81; *Clark v. Baker*, 76 Wash. 110, 135 Pac. 1025; *Hedemark's*

Estate, In re, 77 Wash. 525, 137 Pac. 1031; *Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659.

Proceeds of Homestead—Voluntary Sale: See Remington's Digest, Home., § 12-1; *Becher v. Shaw*, 44 Wash. 166, 87 Pac. 71, 120 Am. St. Rep. 982.

The proceeds of a federal homestead are not exempt from execution, under a claim that the homesteader is the head of a family and intends to use the proceeds in the acquisition of a new homestead to be owned and occupied by him under the laws of the state; since this section applies only to the state exemptions of a certain value: *Ritzville Hardware Co. v. Bennington*, 50 Wash. 111, 96 Pac. 826, 126 Am. St. Rep. 894.

Exemption of proceeds of voluntary sale of homestead. 1 A. L. R. 483.

§ 563. Specification of Exempt Property.

The following property shall be exempt from execution and attachment, except as hereinafter specially provided:—

1. All wearing apparel of every person and family;
2. All private libraries, not to exceed five hundred dollars in value, and all family pictures and keepsakes;

3. To each householder, one bed and bedding, and one addition[al] bed and bedding for each additional member of the family, and other household goods and utensils and furniture not exceeding five hundred dollars, coin, in value. The other household goods and utensils and furniture specified above, shall, on the demand of the officer having the execution or attachment in hand, be selected by the husband, if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder, shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils and furniture equal in value to said five hundred dollars, and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be prima facie evidence,—(1.) That such household goods, utensils, and furniture are exempt from execution and attachment; (2.) That the value of the property so selected is not over five hundred dollars;

4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months: Provided, that in case such householder should not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section;

5. To a farmer, one span of horses or mules, with harness, or two yoke of oxen, with yokes and chains, and one wagon; also farming utensils actually used about the farm, not exceeding in value five hundred dollars in coin; also one hundred and fifty bushels of wheat, one hundred and fifty bushels of oats or barley, fifty bushels of potatoes, ten bushels of corn, ten bushels of peas, and ten bushels of onions for seeding purposes;

6. To a mechanic, the tools and instruments used to carry on his trade for the support of himself and family, also material used in his trade, not exceeding in value five hundred dollars in coin;

7. To a physician, his library, not to exceed in value five hundred dollars in coin; also, one horse, with the harness and buggy, the instruments used in his practice, and medicines not exceeding in value two hundred dollars in coin;

8. To attorneys, clergymen, and other professional men, their libraries, not exceeding one thousand dollars, in coin value; also office furniture, fuel and stationery, not exceeding in value two hundred dollars in coin;

9. All firearms kept for the use of any person or family;

10. To any person, a canoe, skiff, or small boat, with its oars, sails, and rigging, not exceeding in value two hundred and fifty dollars;

11. To a person engaged in lightering for his support or that of his family, one or more lighters, barges, or scows, and a small boat, with

oars, sails and rigging, not exceeding in the aggregate two hundred and fifty dollars, in coin value;

12. To a teamster or drayman engaged in that business for the support of himself or his family, his team, consisting of one span of horses, or mules, or two yoke of oxen, or a horse and mule, with harness, yoke, one wagon, truck, cart, or dray;

13. To a person engaged in the business of logging for his support or that of his family, three yoke of work cattle and their yokes, and axes, chains, implements for the business, and camp equipments, not exceeding three hundred dollars, coin in value;

14. A sufficient quantity of hay, grain, or feed to keep the animals mentioned in the several subdivisions of this chapter for six weeks. But no property shall be exempt from an execution issued upon a judgment for the price thereof, or any part of the price thereof, or for any tax levied thereon.

Each person shall be entitled to select the property to which he is entitled under the several subdivisions of this section. [Cf. L. '54, p. 178, § 253; L. '69, p. 87, § 343; L. '79, p. 157, § 1; Cd. '81, § 347; L. '83, p. 36, § 1; L. '86, p. 96, § 1; 2 H. C., § 486.]

See Const., Art. XIX, § 1.

See *infra*, § 637, exemption of personal earnings and trust funds.

See *infra*, § 703, exemptions of wages, etc., in garnishment.

See *infra*, §§ 1102, 1103, exemption in assignment for benefit of creditors.

Cited in 6 Wash. 329, 330; 8 Wash. 259; 11 Wash. 468; 13 Wash. 179; 26 Wash. 173; 58 Wash. 49, 50; 59 Wash. 83; 80 Wash. 359, 363; 93 Wash. 41; 98 Wash. 38, 40.

Liberal Construction of Exemption Laws in General: See Remington's Digest, Exemp., § 3; Mikkleson v. Parker, 3 W. T. 527, 19 Pac. 31; Dennis v. Kass & Co., 11 Wash. 353, 39 Pac. 656, 48 Am. St. Rep. 880; Puget Sound etc. Pack. Co. v. Jeffs, 11 Wash. 466, 39 Pac. 962, 48 Am. St. Rep. 885, 27 L. R. A. 808; Heilbron's Estate, In re, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

Householders: See Remington's Digest, Exemp., § 6; Peterson v. Bingham, 13 Wash. 178, 43 Pac. 22; Peerless Pacific Co. v. Burckhard, 90 Wash. 221, 155 Pac. 1037, Ann. Cas. 1918B, 247, L. R. A. 1917C, 353.

PROPERTY AND RIGHTS EXEMPT—Amount of Exemption and Value of Property: See Remington's Digest, Exemp., § 10; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

SUBDIVISION 3.—Under this section, subdivision 3, authorizing the selection of certain specified articles and other "household goods, utensils and furniture" not exceeding \$500 in value, the debtor has no right to select the proceeds of livestock sold, in lieu of goods of the exempt class: Carter v. Davis, 6 Wash. 327, 33 Pac. 833.

SUBDIVISION 4.—The proviso to this

section, subdivision 4, authorizes a lieu selection of any other kind of property, as shares of stock; the rule of ejusdem generis having no application: Lemagie v. Acme Stamp Works, 98 Wash. 34, 167 Pac. 60.

The "other property" to be selected must be property of a like nature, under the rule of ejusdem generis; hence money cannot be selected in lieu of such exempt property: Creditors' Collection Assn. v. Bisbee, 80 Wash. 358, 141 Pac. 886.

SUBDIVISION 5—Vehicles and Teams: See Remington's Digest, Exemp., § 12; Mikkleson v. Parker, 3 W. T. 527, 19 Pac. 31; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28.

Under a liberal construction of this section, subdivision 5, a team, harness and wagon need not be actually used about the farm or the farmer living thereon; it is sufficient if farming has been his principal occupation for years: State ex rel. McKee v. McNeill, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038.

SUBDIVISION 6—Tools and Implements of Trade: See Remington's Digest, Exemp., § 13; State ex rel. Achey v. Creech, 18 Wash. 186, 51 Pac. 363; American Paper Co. v. Sullivan, 34 Wash. 391, 75 Pac. 991.

A mechanic who is neither the head of a family nor a householder is entitled to exemption from execution under this section, subdivision 6: Geiger

v. Kobilka, 26 Wash. 171, 66 Pac. 423, 90 Am. St. Rep. 733.

For text treatment of "Exemptions," see 11 R. C. L. 487.

Meaning of term "wearing apparel" in exemption statutes. 15 Ann. Cas. 159.

What are "tools," "implements," "instruments," "utensils" or "apparatus" within meaning of debtors exemption laws. 2 A. L. R. 818; 9 A. L. R. 1020; Ann. Cas. 1917D, 96.

§ 564. No Exemption Against Wages.

No property shall be exempt from execution for clerk's, laborer's or mechanic's wages earned within this state, nor for actual necessities, not exceeding fifty dollars in value or amount furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor, nor shall any property be exempt from execution issued upon a judgment against an attorney or agent on account of any liability incurred by such attorney or agent to his client or principal on account of any moneys or other property coming into his hands from or belonging to his client or principal: Provided, that nothing herein shall be construed as repealing or in any wise affecting section 703, *infra*. [L. '97, p. 93, § 1; L. '01, p. 323, § 1; L. '03, p. 135, § 1.]

Cited in 70 Wash. 560; 89 Wash. 414; 94 Wash. 118.

Laws of 1897, page 93, section 1 (superseded by this section), providing that there shall be exempt from execution and attachment to every householder in the state of Washington personal property to the amount and value of \$1,000 in addition to the property exempt under section 563, is unconstitutional, in that it includes an additional provision which alters its scope and effect, and fails to set forth the statute in full as amended: *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. Rep. 769.

This section has no application to homestead exemptions: *Ervay v. Hill*, 46 Wash. 457, 90 Pac. 590.

LIABILITIES ENFORCEABLE

AGAINST EXEMPT PROPERTY—Liabilities Incurred in Fiduciary Capacity: See *Remington's Digest*, Exemp., § 19; *Ervay v. Hill*, 46 Wash. 457, 90 Pac. 590.

Under this section, an execution sale of a homestead upon a judgment for \$645 is not validated by the fact that \$32.79 of the sum received was for necessities furnished within the time limited, there being no allegation in the complaint that part was for necessities: *Byam v. Albright*, 94 Wash. 108, 162 Pac. 10.

Exemption of debtor's wages after payment by employer. 18 L. R. A. 586.

Right to set up counterclaim as set-off against wages exempt from execution. Ann. Cas. 1914A, 1183.

§ 565. Householder Defined.

A householder, as designated in all statutes relating to exemptions, is defined to be:—

1. The husband and wife, or either;
2. Every person who has residing with him or her, and under his or her care and maintenance, either,—
 - (a) His or her minor child, or the minor child of his or her deceased wife or husband;
 - (b) A minor brother or sister, or the minor child of a deceased brother or sister;
 - (c) A father, mother, grandfather or grandmother;
 - (d) The father, mother, grandfather or grandmother of deceased husband or wife;

(e) An unmarried sister, or any other of the relatives mentioned in this section who has attained the age of majority, and are unable to take care of or support themselves. [L. '97, p. 93, § 2.]

Cited in 70 Wash. 560; 90 Wash. 224.

§ 566. Pension Money Exempt.

Any money received by any citizen of the state of Washington as a pension from the government of the United States, whether the same be in the actual possession of such person or be deposited or loaned by him, shall be exempt from execution, attachment or seizure by or under any legal process whatever. [L. '90 p. 88, § 1; 2 H. C., § 487.]

Cited in 70 Wash. 560.

Exemption of bounty or pension from execution. 17 Ann. Cas. 1191.

Exemption of property purchased with pension money. 19 L. R. A. 34.

§ 567. Pension Money Exempt to Family.

When a debtor dies or absconds, and leaves his family any money exempted by the last preceding section, the same shall be exempt to his family as provided in said section. [L. '90, p. 89, § 2; 2 H. C., § 488.]

§ 568. Fire Insurance Money Exempt.

Whenever property, which by the laws of this state is exempt from execution or attachment, is insured and the same is destroyed by fire, then the insurance money coming to or belonging to the person thus insured, to an amount equal to the exempt property thus destroyed, shall be exempt from execution and attachment. [L. '95, p. 135, § 1.]

Cited in 90 Wash. 225.

Proceeds of Fire Insurance: See Remington's Digest, Exemp., § 17; Puget Sound Dressed Beef etc. Co. v. Jeffs, 11 Wash. 466, 39 Pac. 962, 48 Am. St. Rep. 885, 27 L. R. A. 808; Winsor v. McLachlan, 12 Wash. 154, 40 Pac. 727;

Peerless Pacific Co. v. Burekhard, 90 Wash. 221, 155 Pac. 1037, Ann. Cas. 1918B, 247, L. R. A. 1917C, 353.

Does exemption of proceeds of insurance extend to property purchased therewith. 24 L. R. A. (N. S.) 1018.

§ 569. Proceeds of Life Insurance Exempt.

The proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt. [Cf. L. '95, p. 336, § 1; L. '97 p. 70, § 1.]

Life insurance payable to beneficiary, see *infra*, section 7230-1.

Cited in 38 Wash. 372, 373; 65 Wash. 375; 77 Wash. 629; 79 Wash. 48; 83 Wash. 236; 89 Wash. 414—416; 93 Wash. 604, 605, 608.

A decision of the federal court that the national bankruptcy act subjects life insurance policies to the payment of debts, notwithstanding this section expressly exempting the same, does not affect such exemption when an attempt is made to enforce a debt under the state law: Flood v. Libby, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

Retroactive Operation.—This section has no application to policies of insurance issued, or debts contracted by the beneficiary, prior to its enactment: Heilbron's

Estate, In re, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602.

But it applies to a judgment founded upon a note dated September 10, 1896: Flood v. Libby, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

Exemption of Proceeds of Life Insurance: See Remington's Digest, Exemp., § 15; Heilbron's Estate, In re, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; Flood v. Libby, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851; Northwestern Mutual Life Ins. Co. v. Chehalis County Bank, 65 Wash. 374, 118 Pac. 326; Reiff v. Armour & Co., 79 Wash. 48, 139 Pac. 633, L. R. A. 1915A, 1201; German-American State Bank of Ritzville v. Godman, 83 Wash. 231, 145 Pac. 221.

Construed together as in *pari materia* with this section, section 6158, Rem. 1915 Code, was intended to modify the sweeping provisions of this section, providing that the proceeds or avails of all life and accident insurance shall be exempt from all liability for any debt; hence, to claim the exemption, the insurance must be payable to some beneficiary "other than the assured or his legal representatives": *Elsom v. Gadd*, 93 Wash. 603, 161 Pac. 483, 162 Pac. 867.

The repealing clause of the Insurance Code (section 7292, *infra*), repealing all

prior acts "on the subject of the organization and government of insurance companies and insurance business," was not intended to repeal this section: *Elsom v. Gadd*, 93 Wash. 603, 161 Pac. 483, 162 Pac. 867.

Constitutionality of statute exempting proceeds of life or benefit insurance. 1 A. L. R. 757.

Are paid-up or indowment policies within statutes exempting life insurance policies. 25 L. R. A. (N. S.) 722.

§ 570. Separate Property of Wife Exempt.

All real and personal estate belonging to any married woman at the time of her marriage, and all which she may have acquired subsequently to such marriage, or to which she shall hereafter become entitled in her own right, and all her personal earnings, and all the issues, rents and profits of such real estate, shall be exempt from attachment and execution upon any liability or judgment against the husband, so long as she or any minor heir of her body shall be living: Provided, that her separate property shall be liable for debts owing by her at the time of her marriage. [L. '54, p. 178, § 252; L. '69, p. 85, § 337; Cd. '81, § 341; 2 H. C., § 480.]

Cited in 6 Wash. 512; 69 Wash. 571; 70 Wash. 560.

§ 571. Waiver of Exemption—Absconding Debtors.

This chapter shall not be so construed as to prevent any single man, or married man, his wife joining him, from waiving, by agreement in writing, the benefit of this chapter: Provided, that any agreement of waiver made by a husband and wife shall be witnessed and acknowledged as required in case of a deed conveying real estate: And provided also, that nothing in this chapter shall be construed to exempt from attachment or execution the property, real or personal, of non-residents, or a person who has left or is about to leave the state with the intent to defraud his creditors. [L. '69, p. 88, § 344; L. '77, p. 74, § 352; Cd. '81, § 348; 2 H. C., § 489.]

"Chapter" refers to the Code of 1881, §§ 341 to 349. See §§ 529, 562, 563, 570, *supra*, and 572, *infra*.

Cited in 6 Wash. 331; 43 Wash. 181, 182; 48 Wash. 504; 58 Wash. 50; 90 Wash. 700; 93 Wash. 42; 94 Wash. 115—117; 104 Wash. 517.

Residence: See Remington's Digest, Exemp., §§ 9, 9-1; *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480; *Churchill v. Miller*, 90 Wash. 694, 156 Pac. 851; *State ex rel. McKee v. McNeill*, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038.

Where a person has left the state with intent to defraud his creditors his property is not exempt from attachment and his wife cannot claim the statutory exemption in his behalf: *Carter v. Davis*, 6 Wash. 327, 33 Pac. 833.

By this section, absconding debtors are not entitled to return and claim a homestead: *Gullickson v. Fenlon*, 48 Wash. 503, 93 Pac. 1074.

This section providing that nothing in this "chapter" shall be construed to exempt from attachment or execution the property of nonresidents, applies only to the Code of 1881, and not to the subsequent act of 1895; and hence does not prevent persons removing from the state from claiming homestead rights in lands acquired under the act of 1895: *Byam v. Albright*, 94 Wash. 108, 162 Pac. 10.

WAIVER OR FORFEITURE.—This section providing that a mortgagor may

waive the benefit of all his exemptions, is repugnant to and annulled by constitution, article XIX, providing that the legislature shall protect from sale a portion of the homestead and other property of all heads of families and making any

such waiver in a mortgage void: *Slyfield v. Willard*, 43 Wash. 179, 86 Pac. 392.

Estoppel to Claim Exemption: See *Remington's Digest*, Exemp., § 21; *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858; *Shell v. Svennson*, 93 Wash. 40, 159 Pac. 1076.

§ 572. Claim of Exemption and Proceedings Thereon.

When a debtor claims personal property as exempt, he shall deliver to the officer making the levy an itemized list of all the personal property owned or claimed by him, including money, bonds, bills, notes, claims and demands, with the residence of the person indebted upon the said bonds, bills, notes, claims and demands, and shall verify such list by affidavit. He shall also deliver to such officer a list, by separate items, of the property he claims as exempt. If the husband be absent or incapable of acting, the claim may be made, the list delivered and verified, by the wife. If the creditor, his agent or attorney, demand an appraisement thereof, two disinterested householders of the neighborhood shall be chosen, one by the debtor and the other by the creditor, his agent or attorney, and these two, if they cannot agree, shall select a third; [but if either party fail to choose an appraiser, or the two fail to select a third, or] if one or more of the appraisers fail to act, the officer shall appoint one. The appraisers shall forthwith proceed to make a list, by separate items, of the personal property selected by the debtor as exempt, which they shall decide as exempt, stating the value of each article, and annexing to the list their affidavit to the following effect: "We solemnly swear that, to the best of our judgment, the above is a fair cash valuation of the property therein described," which affidavit shall be signed by two appraisers at least, and be certified by the officer administering the oaths. The list shall be delivered to the officer holding the execution or other process, and be by him annexed to and made part of his return, and the property therein specified shall be exempt from levy and sale, and the other personal estate of the debtor shall remain subject thereto. In case no appraisement be required, the officer shall return with the process the list of the property claimed as exempt by the debtor. The appraisers shall each be entitled to one dollar, to be paid by the creditor, if all the property claimed by the debtor shall be exempt; otherwise, to be paid by the debtor. [L. '69, p. 88, § 346; L. '77, p. 74, § 353; Cd. '81, § 349; 2 H. C., § 490.]

Cited in 32 Wash. 553, 556; 33 Wash. 355, 358; 34 Wash. 393; 39 Wash. 41; 51 Wash. 328; 58 Wash. 50; 93 Wash. 41.

PROTECTION AND ENFORCEMENT OF EXEMPTION RIGHTS—Necessity for Claim: See *Remington's Digest*, Exemp., § 22; *Zelinsky v. Price*, 8 Wash. 256, 36 Pac. 28.

Time for Making Claim: See *Remington's Digest*, Exemp., § 23; *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858; *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480; *United States Fid. & Guar. Co. v. Hollenshead*, 51 Wash. 326, 98 Pac. 749;

Hanson v. Hodge, 92 Wash. 425, 159 Pac. 388.

Form and Requisites of Claim—Inventory or Schedule: See *Remington's Digest*, Exemp., § 24; *Mikkleson v. Parker*, 3 W. T. 527, 19 Pac. 31; *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Wiser v. Thomas*, 39 Wash. 40, 80 Pac. 854.

Appraisement: See *Remington's Digest*, Exemp., § 25; *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858; *State ex rel. McKee v. McNeill*, 58 Wash. 47, 107 Pac. 1028, 137 Am. St. Rep. 1038.

Denial or Infringement of Rights—Levy on or Sale of Exempt Property: See Remington's Digest, Exempt., § 26; McKinley v. Morgan, 36 Wash. 561, 79 Pac. 45.

Relief as to Exemptions: See Remington's Digest, Exempt., §§ 27—29. Nature and form of action: American Paper Co. v. Sullivan, 34 Wash. 391, 75 Pac. 991. Mandamus: State ex rel. Achey v. Creech, 18 Wash. 186, 51 Pac. 363; State ex rel. Hill v. Gardner, 32 Wash. 559, 73 Pac. 690, 98 Am. St. Rep. 858; American Paper Co. v. Sullivan, 34 Wash. 391, 75 Pac. 991. Actions for damages: Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480.

Proceedings for Relief: See Remington's Digest, Exempt., §§ 30—33; Defenses: Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786. Jurisdiction: Smalley v. Laugenour, 30 Wash. 307, 70 Pac. 786; McKinley v. Morgan, 36 Wash. 561, 79 Pac. 45. Pleading and proof: Winsor v. McLachlan, 12 Wash. 154, 40 Pac. 727; Wiser v. Thomas, 39 Wash. 40, 80 Pac. 854. Damages: Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480.

Where the wife's personal earnings are community property, this section, exempting them from attachment or execution upon any liability against the husband, does not exempt them from execution upon a judgment against the community: Marsh v. Fisher, 69 Wash. 570, 125 Pac. 951.

Under this section a sheriff is bound to return upon demand exempt goods which he had levied upon, where the creditor has not demanded an appraisal thereof within a reasonable time: State ex rel. Hill v. Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858.

An execution plaintiff and the officer executing the writ, who ignore a claim for exemptions and proceed to sell without an appraisal, should respond in damages for the conversion of plaintiff's exempt property, seized and sold under an attachment issued on the theory that plaintiff was a nonresident: Messenger v. Murphy, 33 Wash. 353, 74 Pac. 480.

Proceedings for Enforcement of Homestead Claims: See Remington's Digest, Home., §§ 17, 18; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; Parsons v. Pearson, 9 Wash. 48, 36 Pac. 974.

Actions and Defenses as to Homesteads—Nature and Form of Remedy: See Remington's Digest, Home., § 38; Harding v. Atlantic Trust Co., 26 Wash. 536, 67 Pac. 222; Lewis v. Mauerman, 35 Wash. 156, 76 Pac. 737.

Parties and Pleading: See Remington's Digest, Home., §§ 39, 40; Ross v. Howard, 25 Wash. 1, 64 Pac. 794.

The question whether real estate sold under execution was at the time exempt as the homestead of the judgment debtor may be heard and determined by the court upon the motion for confirmation of the sale: Waldron v. Kineth, 41 Wash. 459, 84 Pac. 16, 111 Am. St. Rep. 1022.

Objection cannot be made that a homestead occupied by mortgagors during the period of redemption from sale exceeds in value the statutory homestead exemption, where no proceedings were sought to appraise or segregate the exempt portion or amount: North Pacific Loan & Trust Co. v. Bennett, 49 Wash. 34, 94 Pac. 664.

Review: See Remington's Digest, Home., § 27; Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116.

CHAPTER IV.

ADVERSE CLAIMS TO PROPERTY LEVIED UPON.

§ 573. Claim by Third Person to Property Levied on or Attached.

When any other person than the judgment debtor shall claim property levied upon or attached, he may have the right to demand and receive the same from the sheriff or other officer making the attachment or levy, upon his making an affidavit that the property is his, or that he has a right to the immediate possession thereof, stating on oath the value thereof, and giving to the sheriff or officer a bond, with sureties in double the value of such property, conditioned that he will appear in the superior court of the county in which the property was seized within ten days after the bond is accepted by the sheriff or other officer, and make good his title to the same, or that he will return the property or pay its value to the said sheriff or other officer. [Cf. L. '54, p. 179, § 256; Cd. '81, § 350; L. '91, p. 79, § 1; 2 H. C., § 491.]

Cited in 3 Wash. 678; 4 Wash. 4, 597; 5 Wash. 772; 6 Wash. 88; 9 Wash. 637; 10 Wash. 227, 335; 16 Wash. 45; 18 Wash. 92; 19 Wash. 405; 22 Wash. 62; 26 Wash. 257; 34 Wash. 155, 156; 35 Wash. 530, 534; 54 Wash. 299; 63 Wash. 140; 65 Wash. 651, 653; 70 Wash. 589; 78 Wash. 598; 83 Wash. 77; 84 Wash. 421, 699; 90 Wash. 695; 92 Wash. 357, 474; 93 Wash. 42; 96 Wash. 515; 99 Wash. 181, 182; 100 Wash. 415; 103 Wash. 210, 212.

This section is not mandatory: *Mayer v. Woolery*, 10 Wash. 354, 39 Pac. 135.

An action of replevin brought against a sheriff in possession cannot be sustained as a proceeding by a third party who gave bond under this section, where the pleadings and process were in the usual form for replevin under section 255, *supra*: *Eidson v. Woolery*, 10 Wash. 225, 38 Pac. 1025.

Intervention in General: See Remington's Digest, Attach., § 46; *Langert v. Brown*, 3 W. T. 102, 13 Pac. 704; *Seibensbaum v. Delanty*, 4 Wash. 596, 30 Pac. 662; *Medcalf v. Bush*, 4 Wash. 386, 30 Pac. 325.

Bonds by Claimants and Indemnity to Officer: See Remington's Digest, Attach., § 47; *Peterson v. Wright*, 9 Wash. 202, 37 Pac. 419; *Mayer v. Woolery*, 10 Wash. 354, 39 Pac. 135; *State ex rel. Peterson v. Superior Court*, 6 Wash. 417, 34 Pac. 151; *Carstens v. Gustin*, 18 Wash. 901, 50 Pac. 933; *Carpenter v. Barry*, 26 Wash. 255, 66 Pac. 393.

Upon filing a claim for exemptions from execution due to a householder and farmer it is the duty of the sheriff to release the property where no appraisal was demanded, as provided in this section: *Shell v. Svensson*, 93 Wash. 40, 159 Pac. 1076.

§ 574. Justification of Sureties.

If the sheriff or other officer require it, the sureties shall justify as in other cases, and in case they do not so justify when required, the sheriff or officer shall retain the property; if the sheriff or officer do not require the bail to justify, he shall stand good for their sufficiency. He shall date and indorse his acceptance upon the bond. [Cf. L. '54, p. 179, § 256; Cd. '81, § 351; 2 H. C., § 492.]

§ 575. Return of Officer—Trial.

The officer shall return the affidavit, bond and justification, if any, to the office of the clerk of the superior court, and this [the] case shall stand for trial in said court. [Cf. L. '54, p. 179, § 257; Cd. '81, § 352; L. '91, p. 80, § 2; 2 H. C., § 493.]

Cited in 4 Wash. 763.

The execution plaintiff cannot, on the trial of the issue of title, interpose a counterclaim: *Meyers v. Landrum*, 4 Wash. 762, 31 Pac. 33.

Proceedings for Establishment and Determination of Claims to Property: See Remington's Digest, Attach., §§ 48, 49; *State ex rel. Peterson v. Superior Court*, 5 Wash. 639, 32 Pac. 553; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Mayer v. Woolery*, 10 Wash. 354, 39 Pac. 135.

Pleading, Proof and Evidence: See Remington's Digest, Attach., §§ 50, 51; *Chapin v. Bokee*, 4 Wash. 1, 29 Pac. 936; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732; *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732; *First Nat. Bank of Seattle v. Hagan*, 16 Wash. 45, 47 Pac. 223; *Berlin v. Van De Vanter*, 25 Wash. 465, 65 Pac. 756.

See, also, *Schloss v. Stringer*, 113 Wash. 529, 194 Pac. 577.

Security by Claimant: See Remington's Digest, Execution, § 34; *Carpenter v. Berry*, 26 Wash. 255, 66 Pac. 393.

Right of Plaintiff to Counterclaim: See Remington's Digest, Execution, § 35; *Myers v. Landrum*, 4 Wash. 762, 31 Pac. 33.

Right to Redelivery and Proceedings Thereon: See Remington's Digest, Execution, § 35-1; *Meakim v. Ludwig*, 99 Wash. 180, 169 Pac. 24; *Lanham v. Longmire*, 100 Wash. 413, 171 Pac. 237.

— **Choice of Remedies:** See Remington's Digest, Execution, § 35-2; *Simon Piano Co. v. Fairfield*, 103 Wash. 206, 173 Pac. 457.

Sheriff's duty as to adverse claims to proceeds of judgments in his hands except in cases of rival executions. 47 L. R. A. 737.

Where property seized by the sheriff under execution or attachment against a debtor is claimed by a third person, who files his affidavit and bond as required, such proceeding is a new and inde-

pendent action, which must be placed on the trial docket of the court in the county where the property was seized, and the court of no other county has jurisdiction of the subject matter of the action: *State ex rel. Peterson v. Superior Court*, 5 Wash. 639, 32 Pac. 553.

The affidavit and bond mentioned in this section shall be placed upon the trial docket, with claimant as plaintiff and the sheriff and plaintiff in execution as defendants, and no other pleadings are

necessary: *Chapin v. Bokee*, 4 Wash. 1, 29 Pac. 936.

Plaintiff is not entitled to a directed verdict in his favor, upon a trial of the right of ownership to property, attached as the property of another, but which was claimed by plaintiff under a bill of sale, when there is any testimony tending to show that the transfer to plaintiff was made with intent to hinder, delay or defraud creditors: *Burns v. Woolery*, 15 Wash. 134, 45 Pac. 894.

§ 576. Parties.

The person claiming the property shall be plaintiff, and the sheriff and plaintiff in the execution, defendants. [L. '54, p. 179, § 258; Cd. '81, § 353; 2 H. C., § 494.]

Cited in 16 Wash. 47.

§ 577. Judgment and Costs.

If the claimant makes good his title to the property, the bond shall be canceled; if to a portion thereof, a like proportion of the bond shall be canceled; but if he shall not maintain his title, judgment shall be rendered against him and his sureties for the value of the property, or for such less amount as shall not exceed the amount due on the original execution or attachment. When the judgment is in favor of the sheriff for the entire property, the claimant shall pay the costs; when the claimant recovers all the property, judgment shall be given in favor of the claimant for costs; when the claimant recovers a portion of the property only, the costs shall be apportioned. When the plaintiff prevails, the costs may be taxed against the defendant who was plaintiff in the execution or attachment, or the court may, if it shall be of opinion that the sheriff attached or levied upon said property without the exercise of due caution, adjudge him to pay the costs, or any portion thereof. [L. '54, p. 179, § 259; Cd. '81, § 354; 2 H. C., § 495.]

Cited in 4 Wash. 4; 34 Wash. 155, 156; 35 Wash. 533, 534; 65 Wash. 651; 78 Wash. 599; 90 Wash. 695; 91 Wash. 612; 93 Wash. 234; 96 Wash. 515.

Operation and Effect of Determination: See *Remington's Digest*, Attach., § 52; *Sayward v. Nunan*, 6 Wash. 87, 32 Pac. 1022; *Peterson v. Woolery*, 9 Wash. 390,

37 Pac. 416; *Hill v. Gardner*, 35 Wash. 529, 77 Pac. 808.

Where there is nothing to show the amount due under the attachment, it will be presumed in aid of the judgment that it was not a less sum as required by this section: *Hill v. Gardner*, 35 Wash. 529, 77 Pac. 808.

CHAPTER V.

SALE OF PROPERTY UNDER EXECUTION AND REDEMPTION.

§ 578. Writ, How Executed.

When the writ of execution is against the property of the judgment debtor, it shall be executed by the sheriff as follows:—

1. If property has been attached, he shall indorse on the execution and pay to the clerk forthwith the amount of the proceeds of sales of perishable property or debts due the defendant received by him sufficient to satisfy the judgment;

2. If the judgment is not then satisfied, and property has been attached and remains in his custody, he shall sell the same, or sufficient thereof to satisfy the judgment;

3. If then any portion of the judgment remains unsatisfied, or if no property has been attached, or the same has been discharged, he shall levy on the property of the judgment debtor sufficient to satisfy the judgment;

4. Property shall be levied on in like manner and with like effect as similar property is attached;

5. Until a levy, personal property shall not be affected by the execution. When property has been sold or debts received by the sheriff on execution, he shall pay the proceeds thereof, or sufficient to satisfy the judgment, as commanded in the writ;

6. When property has been attached, and it is probable that such property will not be sufficient to satisfy the judgment, the execution may be levied on other property of the judgment debtor without delay. If after satisfying the judgment any property, or the proceeds thereof, remain in the custody of the sheriff, he shall deliver the same to the judgment debtor. [L. '69, p. 91, § 351; Cd. '81, § 355; 2 H. C., § 496.]

Cited in 20 Wash. 6; 28 Wash. 423; 54 Wash. 301. tion, § 26; Murray v. Meade, 5 Wash. 693, 32 Pac. 780.

Priorities Between Executions: See Remington's Digest, Execution, §§ 24, 25; Wunsch v. McGraw, 4 Wash. 72, 29 Pac. 832; Griswold v. Case, 13 Wash. 623, 43 Pac. 876; Wallace & Sons Mfg. Co. v. Sharick, 15 Wash. 643, 47 Pac. 20; Commercial Nat. Bank of Seattle v. Johnson, 16 Wash. 536, 48 Pac. 267; Morse v. Estabrook, 19 Wash. 92, 52 Pac. 531, 67 Am. St. Rep. 723; Hacker v. White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

Control of Writ and Directions to Officer: See Remington's Digest, Execu-

Mode and Sufficiency of Levy—In General: See Remington's Digest, Execution, § 27; Fuller & Co. v. Hull, 19 Wash. 400, 53 Pac. 666.

— **Personal Property, in General:** See Remington's Digest, Execution, § 28; Arthur v. Sherman, 11 Wash. 254, 39 Pac. 670; Cupples v. Level, 54 Wash. 299, 103 Pac. 430, 23 L. R. A. (N. S.) 519.

Execution sale as judicial sale. **Ann. Cas.** 1913A, 1217.

Injunction against execution sale. **Ann. Cas.** 1918C, 152, 324, 325, 328, 330, 332.

§ 579. Levy on Joint Realty.

When a defendant in execution owns real estate subject to execution jointly or in common with any other person, the judgment shall be a lien, and the execution be levied upon the interest of the defendant only. [L. '54, p. 220, § 499; Cd. '81, § 751; 2 H. C., § 802.]

Cited in 15 Wash. 135.

§ 580. Levy on Joint Personalty.

When he owns personal property jointly or in copartnership with any other person, and the interest cannot be separately attached, the sheriff shall take possession of the property, unless the other person having an interest therein shall give the sheriff a sufficient bond, with surety, to hold and manage the property according to law; and the sheriff shall then proceed to sell the interest of the defendant in such property, describing such interest in his advertisement as nearly as may be, and the purchaser shall acquire all the interest of such defendant therein; but nothing herein contained shall be so construed as

to deprive the copartner of any such defendant of his interest in any such property. [L. '54, p. 220, § 499; Cd. '81, § 752; 2 H. C., § 802.]

Cited in 21 Wash. 14.

Joint or Several Property: See Remington's Digest, Execution, § 15; Graden

v. Turner, 15 Wash. 136, 45 Pac. 733; Skavdale v. Moyer, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

§ 581. Retention of Property by Judgment Debtor.

When the sheriff shall levy upon personal property by virtue of an execution, he may permit the judgment debtor to retain the same, or any part thereof, in his possession until the day of sale, upon the defendant executing a written bond to the sheriff, with sufficient surety, in double the value of such property, to the effect that it shall be delivered to the sheriff at the time and place of sale; and for nondelivery thereof, an action may be maintained upon such bond by the sheriff or the plaintiff in the execution; but the sheriff shall not thereby be discharged from his liability to the plaintiff for such property. [Cf. L. '54, p. 182, § 268; L. '69, p. 92, § 354; Cd. '81, § 358; 2 H. C., § 499.]

§ 582. Notice of Sale.

Before the sale of property under execution, order of sale or decree, notice thereof shall be given as follows:

1. In case of personal property, by posting written or printed notice of the time and place of sale in three (3) public places in the county where the sale is to take place, for a period of not less than ten (10) days prior to the day of sale.

2. In case of real property, by posting a similar notice, particularly describing the property for a period of not less than four (4) weeks prior to the day of sale, in three (3) public places in the county, one of which shall be at the courthouse door, where the property is to be sold, and publishing a copy thereof once a week, consecutively, for the same period, in a newspaper of general circulation published in the county.

3. All notices of sales of property on execution or order of sale required by law to be published in any newspaper shall be so published in a newspaper of the county which shall be selected by the sheriff, and if there is no newspaper published in the county, then such notice shall be published in the newspaper published in this state nearest to the place of sale: Provided, that if the person at whose instance the execution or order of sale is issued, or his attorney, shall present to the sheriff a receipt of the publisher of any newspaper, showing full payment for the publication, then the notice shall be published in that newspaper: And provided, further, that the charge for any such publication shall not exceed seventy-five cents per square for first insertion, and thirty-seven and one-half cents per square for each subsequent insertion. [L. '03, p. 381, § 1; Cf. L. '97, p. 265, § 1; L. '99, p. 86, § 3.]

Cited in 17 Wash. 612, 643; 18 Wash. 555, 583; 21 Wash. 400; 33 Wash. 60; 66 Wash. 115; 77 Wash. 136; 84 Wash. 300; 90 Wash. 490, 491.

The judgment debtor cannot, prior to default, waive by stipulation the provisions of this section before amendment declaring that sales of real property

under execution shall be made one year after the filing of the levy: Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

Time of Sale: See Remington's Digest, Execution, § 38; Dennis v. Moses, 18 Wash. 637, 52 Pac. 333; Packwood v. Briggs, 25 Wash. 530, 65 Pac. 846;

Hardin v. Day, 29 Wash. 664, 70 Pac. 118; Hensen v. Peter, 95 Wash. 628, 164 Pac. 512.

Notice of Sale: See Remington's Digest, Execution, § 39; National Bank of Commerce v. Lock, 17 Wash. 528, 50 Pac. 478, 61 Am. St. Rep. 923; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046; Reilley v. Anderson, 33 Wash. 58, 73 Pac. 799; Ervay v. Hill, 46 Wash. 457, 90 Pac. 599; Merritt v. Graves, 52 Wash. 57, 100 Pac. 164.

See, also, Osner & Mehlhorn v. Loewe, 111 Wash. 550, 191 Pac. 746.

Under the proviso to this section the sheriff has no power to select the paper:

State ex rel. Lewis v. Hodge, 90 Wash. 487, 156 Pac. 404.

A typical weekly country newspaper, of four pages of seven columns, containing general news, having a circulation among its paid subscribers and advertising patrons of eight hundred copies, and one hundred additional copies, is a "newspaper of general circulation," within this section, subdivision 2: State ex rel. Lewis v. Hodge, 90 Wash. 487, 156 Pac. 404.

Misnomer of party in notice of judicial sale as affecting its validity. *Ann. Cas.* 1917B, 1046.

Place of posting notice of judicial or public sale. *L. R. A.* 1916E, 1143.

§ 583. Sale, How Conducted.

All sales of property under execution, orders of sale or decree, shall be made by auction between nine o'clock in the morning and four o'clock in the afternoon. After sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property capable of manual delivery, and not in the possession of a third person, association or corporation, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, consisting of several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price, or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be sold separately. Sales of real property shall be made at the courthouse door on Saturday. [L. '97, p. 71, § 2; L. '99, p. 87, § 4.]

Cited in 18 Wash. 558, 592; 56 Wash. 440; 81 Wash. 283; 111 Wash. 556.

Mode of Sale: See Remington's Digest, Execution, § 37; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046.

Sale en Masse or in Parcels: See Remington's Digest, Execution, § 40; Feck v. Brewer, 11 Wash. 264, 39 Pac. 655; Otis Bros. & Co. v. Nash, 26 Wash. 39, 66 Pac. 111.

See, also, Osner & Mehlhorn v. Loewe, 111 Wash. 550, 191 Pac. 746.

This section and section 587 do not abrogate the equitable power of the court to order a sale in parcels, and in the inverse order of alienation, on the foreclosure of a mortgage covering the entire tract, part of which had been conveyed

by the mortgagor to a third party, where the equities of the parties will be subserved thereby, and without impairing the security of the mortgagee: Black v. Suydam, 81 Wash. 279, 142 Pac. 700, *Ann. Cas.* 1916D, 1113.

Persons Who may Purchase: See Remington's Digest, Execution, § 40-1; Merritt v. Graves, 52 Wash. 57, 100 Pac. 164; Johnson v. Johnson, 66 Wash. 113, 119 Pac. 22.

Execution sale of property en masse or in parcels. 8 *Ann. Cas.* 741; *Ann. Cas.* 1913B, 619.

Execution sale of property en masse as ground for collateral attack. 1 *A. L. R.* 1442.

§ 584. Sale of Leasehold Absolute.

Upon the sale of real property under execution, decree or order of sale, when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases such property shall

be subject to redemption, as hereinafter provided. At the time of the sale the sheriff shall give to the purchaser a certificate of the sale, containing a particular description of the property sold, the price bid for each distinct lot, or parcel, the whole price paid, and when subject to redemption, it shall be so stated. The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ. [L. '99, p. 87, § 5.]

§ 585. Postponement of Sale.

If, at the time appointed for the sale, the sheriff should be prevented from attending at the place appointed, or, being present, should deem it for the advantage of all concerned to postpone the sale for want of purchasers, or other sufficient cause, he may postpone the sale not exceeding one week next after the day appointed, and so from time to time, for the like cause, giving notice of every adjournment by public proclamation made at the same time, and by posting written notices of such adjournment under the notices of sale originally posted by him. The sheriff, for like causes, may also adjourn the sale from time to time, not exceeding thirty days beyond the day at which the writ is made returnable, with the consent of the plaintiff indorsed upon the writ. [Cf. L. '54, p. 182, § 269; L. '69, p. 93, § 357; Cd. '81, § 361; 2 H. C., § 502.]

Notice of postponement of sale. L. R. A. 1915B, 640.

§ 586. Bill of Sale by Sheriff.

When the purchaser of any personal property, capable of manual delivery, and not in the possession of a third person, association or corporation, shall pay the purchase money, the sheriff shall deliver to him the property, and if desired shall give him a bill of sale containing an acknowledgment of the payment. In all other sales of personal property the sheriff shall give the purchaser a bill of sale with the like acknowledgment. [Cf. L. '54, p. 183, § 270; L. '69, p. 94, § 358; Cd. '81, § 362; 2 H. C., § 503.]

§ 587. Manner of Selling Real Estate.

The form and manner of sale of real estate by execution shall be as follows: The sheriff shall proclaim aloud at the place of sale, in the hearing of all the bystanders: "I am about to sell the following tracts of real estate (here reading the description) upon the following execution" (here reading the execution). He shall also state the amount which he is required to make upon the execution, which shall include damages, interests, and costs up to the day of sale, and increased costs. He shall then offer the land for sale, the lots and parcels separately or together, as he shall deem most advantageous. All land, except town lots, shall be sold by the acre. [Cf. L. '54, p. 181, § 262; L. '69, p. 94, § 359; Cd. '81, § 363; 2 H. C., § 504.]

Cited in 11 Wash. 266, 689; 19 Wash. 378; 56 Wash. 440; 81 Wash. 283; 105 Wash. 53.

§ 588. Allotment When Sold by Acre.

When the land is sold by the acre, and any less number of acres than the whole tract or parcel is sold, it shall be measured off to the

purchaser in a square form, from the northeast corner of the tract or parcel, unless some person having an interest in the land shall, at the sale, or prior thereto, and before the bidding is made, request that the land sold shall be taken from some other part, or in some other form; in such case, if such request is reasonable, the officer making the sale shall sell accordingly. [L. '54, p. 181, § 263; Cd. '81, § 364; 2 H. C., § 505.]

Cited in 11 Wash. 689.

§ 589. Sale by Acre not to be Measured.

When an entire tract or parcel of land is sold by the acre, it shall not be measured, but shall be deemed and taken to contain the number of acres named in the description, and be paid for accordingly; and when the number of acres is not contained in the description, the officer shall declare, according to his judgment, how many acres are contained therein, which shall be deemed and taken to be the true number of acres. [L. '54, p. 182, § 264; Cd. '81, § 365; 2 H. C., § 506.]

§ 590. Striking Off, Return and Payment.

The officer shall strike off the land to the highest bidder, who shall forthwith pay the money bid to the officer, who shall return the money with his execution and his doings thereon to the clerk of the court from which the execution issued, according to the order thereof: Provided, however, that when final judgment shall have been entered in the supreme court, and the execution upon which sale has been made issued from said court, the proceedings on execution and return shall be docketed for confirmation in the superior court in which the action was originally commenced, and like proceedings shall be had as though said execution had issued from the said superior court. [L. '54, p. 182, § 265; L. '69, p. 95, § 362; Cd. '81, § 366; 2 H. C., § 507.]

Cited in 9 Wash. 109; 12 Wash. 517; 18 Wash. 119; 26 Wash. 76; 46 Wash. 406; 56 Wash. 442.

Under this and the next section, the "sale" of property under foreclosure means the knocking down of the property by the sheriff: *State ex rel. Steele v. Northwestern etc. Bank*, 18 Wash. 118, 50 Pac. 1023.

RETURN: See Remington's Digest, Execution, §§ 85, 86. Time for making: *State ex rel. Commercial Inv. Co. v. Hartman*, 26 Wash. 524, 67 Pac. 223. Form and requisites: *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

See, also, *Osner & Mehlhorn v. Loewe*, 111 Wash. 550, 191 Pac. 746.

The sheriff's certificate of sale does not pass title and is only evidence of an inchoate estate: *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896; *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795; *Hays v. Merchants' Bank*, 14 Wash. 192, 44 Pac. 137.

A sheriff cannot maintain a civil action to correct his erroneous return on execution, which showed he had received a

larger sum than the actual amount, his remedy being by motion in the original cause; nor can such action be treated as the equivalent of a motion: *Toner v. Page*, 91 Wash. 314, 157 Pac. 866.

Terms and Conditions, Liabilities and Enforcement: See Remington's Digest, Mtg., §§ 209-1—211; *Bartlett Estate Co. v. Fairhaven Land Co.*, 56 Wash. 437, 105 Pac. 848; *Moody v. Northwestern etc. Bank*, 20 Wash. 413, 55 Pac. 568; *State ex rel. Thompson v. Prince*, 9 Wash. 107, 37 Pac. 291.

Report or Return—Fees of Sheriff: See Remington's Digest, Mtg., § 212; *State ex rel. Thompson v. Prince*, 9 Wash. 107, 37 Pac. 291; *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A. 670; *Spinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006; *Scandinavian-Amer. State Bank v. Downs*, 76 Wash. 62, 135 Pac. 807.

Vacation of execution sale on account of chilling or puffing bids. 3 Ann. Cas. 423; 42 L. R. A. (N. S.) 1198.

Proper medium of payment by purchaser at execution sale. *Ann. Cas.* 1915C, 996.

Power to extend time for compliance with bid at execution sale. 43 *L. R. A. (N. S.)* 671.

§ 591. Confirmation of Sale of Land—Disposition of Proceeds.

Upon the return of any sale of real estate as aforesaid, the clerk shall enter the cause, on which the execution or order of sale issued, by its title, on the motion docket, and mark opposite the same: "Sale of land for confirmation," and the following proceedings shall be had:

(1.) The plaintiff at any time after ten days from the filing of such return shall be entitled, on motion therefor, to have an order confirming the sale, unless the judgment debtor, or in case of his death, his representative, shall file with the clerk within ten days after the filing of such return, his objections thereto.

(2.) If such objections be filed the court shall, notwithstanding, allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting. In the latter case, the court shall disallow the motion and direct that the property be resold, in whole or in part, as the case may be as upon an execution received of that date.

(3.) Upon the return of the execution, the sheriff shall pay the proceeds of sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment. If an order of resale be afterwards made, and the property sell for a greater amount to any person other than the former purchaser, the clerk shall first repay to such purchaser the amount of his bid out of the proceeds of the latter sale.

(4.) Upon a resale, the bid of the purchaser at the former sale shall be deemed to be renewed and continue in force, and no bid shall be taken, except for a greater amount. An order confirming a sale shall be a conclusive determination of the regularity of the proceedings concerning such sale as to all persons in any other action, suit or proceeding whatever.

(5.) If, after the satisfaction of the judgment, there be any proceeds of the sale remaining, the clerk shall pay such proceeds to the judgment debtor, or his representative, as the case may be, at any time before the order is made upon the motion to confirm the sale: Provided, such party file with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale; but if the sale be confirmed, such proceeds shall be paid to said party of course; otherwise they shall remain in the custody of the clerk until the sale of the property has been disposed of. [L. '99, p. 87, § 6. Cf. L. '54, p. 182, § 266; L. '69, p. 95, § 363; Cd. '81, § 367; 2 H. C., § 508.]

Cited in 11 Wash. 266; 17 Wash. 612, 643; 18 Wash. 119, 463, 558; 52 Wash. 59; 72 Wash. 38; 90 Wash. 491; 101 Wash. 164.

Proceedings on Motion: See Remington's Digest, Execution, § 43; Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054; Harding v. Atlantic Trust Co., 26 Wash.

536, 67 Pac. 222; Hardin v. Day, 29 Wash. 664, 70 Pac. 118; Whitworth v. McKee, 32 Wash. 83, 72 Pac. 1046; Scott v. Guiberson, 72 Wash. 36, 129 Pac. 886; Mowbray Pearson Co. v. Pershall, 92 Wash. 516, 159 Pac. 682.

Confirmation: See Remington's Digest, Execution, § 42; Morrow v. Moran, 5 Wash.

692, 32 Pac. 770; *Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379; *Feek v. Brewer*, 11 Wash. 264, 39 Pac. 655; *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111; *McHugh v. Conner*, 68 Wash. 229, 122 Pac. 1018.

Persons Who may Question Validity of Sale—Waiver and Estoppel: See Remington's Digest, Execution, §§ 45, 46; *Stark Brothers v. Royce*, 44 Wash. 287, 87 Pac. 340; *Asher v. Sekofsky*, 10 Wash. 379, 38 Pac. 1133; *Hamilton v. Carter*, 12 Wash. 510, 41 Pac. 911; *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 79 Am. St. Rep. 960, 51 L. R. A. 889; *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884; *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765; *McLiesh v. Ball*, 58 Wash. 690, 109 Pac. 209, 137 Am. St. Rep. 1087.

See, also, *Grunden v. German*, 110 Wash. 237, 188 Pac. 491.

Opening or Vacating—Defects and Irregularities: See Remington's Digest, Execution, §§ 47—49; *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931; *Brooks v. Lewis*, 22 Wash. 192, 60 Pac. 121; *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572; *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22.

Opening or Vacating—Inadequacy of Price: See Remington's Digest, Jud. Sale, § 2; *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, 21 Ann. Cas. 272; *Miller v. Winslow*, 70 Wash. 401, 126 Pac. 906, Ann. Cas. 1914B, 833; *Prince v. Mottman*, 84 Wash. 287, 146 Pac. 841.

— Inadequacy of Price in Connection With Other Objections: See Remington's Digest, Execution, § 50; *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486; *Schaad v. Robinson*, 59 Wash. 346, 109 Pac. 1072; *Johnson v. Johnson*, 66 Wash. 113, 119 Pac. 22; *Triplett v. Bergman*, 82 Wash. 639, 144 Pac. 899.

See, also, *Osner & Mehlhorn v. Loewe*, 111 Wash. 550, 191 Pac. 746; *Lovejoy v. Americus*, 111 Wash. 571, 191 Pac. 790.

— Advance on Bid: See Remington's Digest, Execution, § 50-1; *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164.

— Application and Proceedings Thereon: See Remington's Digest, Execution, § 51; *Bank v. Doherty*, 37 Wash. 32, 79 Pac. 486.

— Security or Other Conditions: See Remington's Digest, Execution, § 52; *Cherry v. Western Washington etc. Co.*, 11 Wash. 586, 40 Pac. 136.

— Effect of Order: See Remington's Digest, Execution, § 44; *Otis Bros. & Co. v. Nash*, 26 Wash. 39, 66 Pac. 111; *McLiesh v. Ball*, 58 Wash. 690, 109 Pac. 209, 137 Am. St. Rep. 1087.

Collateral Attack on Sale: See Remington's Digest, Execution, § 55; *Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379.

Presumption of Validity: See Remington's Digest, Execution, § 56; *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907.

Actions to Set Aside Sale: See Remington's Digest, Execution, § 53; *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931; *Griffith v. Burlingame*, 18 Wash. 429, 51 Pac. 1059; *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

Effect of Setting Aside Sale: See Remington's Digest, Execution, § 54; *Benney v. Clein*, 15 Wash. 581, 46 Pac. 1037.

PROCEEDS: See Remington's Digest, Execution, §§ 81—84. Disposition in general: *State ex rel. Gordon v. Superior Court*, 3 Wash. 702, 29 Pac. 204.

The sheriff is not entitled to a commission on sales where the property is bid in by the execution plaintiff: *State ex rel. Thompson v. Prince*, 9 Wash. 107, 37 Pac. 291; *State ex rel. Sutter v. O'Loughlin*, 9 Wash. 529, 37 Pac. 669; *State ex rel. Cannon v. Pugh*, 9 Wash. 694, 38 Pac. 79; *Soderberg v. King County*, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A. 670; *Moody v. Northwestern etc. Bank*, 20 Wash. 413, 55 Pac. 568.

A plaintiff in foreclosure proceedings who bids in the property for the amount of the debt cannot be compelled to pay the amount of his bid in cash: *State ex rel. Thompson v. Prince*, 9 Wash. 107, 37 Pac. 291.

Application to Mortgages and Other Liens: *Hamilton v. Carter*, 12 Wash. 510, 41 Pac. 911.

Right to Surplus: *Spinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006.

Proceedings for Distribution: *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 47 Pac. 894.

TITLE AND RIGHTS OF PURCHASER—Nature and Effect of Transfer in General—Partnership Rights and Interests: See Remington's Digest, Execution, § 57; *Skavdale v. Moyer*, 21 Wash. 10, 56 Pac. 841, 46 L. R. A. 481.

Estate or Interest Acquired—In General: See Remington's Digest, Execution, § 58; *Morrow v. Moran*, 5 Wash. 692, 32 Pac. 770; *Cherry v. Western Washington etc. Co.*, 11 Wash. 586, 40 Pac. 136; *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057; *Ransom v. Wickstrom & Co.*, 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 588.

— Particular Estates or Interests of Debtor: See Remington's Digest, Execution, § 58-1; *White v. McSorley*, 47 Wash. 18, 91 Pac. 243; *Continental Distributing*

Co. v. Hays, 86 Wash. 300, 150 Pac. 416, Ann. Cas. 1917B, 708.

— **Time as of Which Title Vests in Purchaser:** See Remington's Digest, Execution, § 59; Hardy v. Herriott, 11 Wash. 460, 39 Pac. 958 (overruled); Hays v. Merchants' Bank, 10 Wash. 573, 39 Pac. 98; Hays v. Merchants' Bank, 14 Wash. 192, 44 Pac. 137; Knowles v. Rogers, 27 Wash. 211, 67 Pac. 572; Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896; De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795; Diamond v. Turner, 11 Wash. 189, 39 Pac. 379.

Rights Passing as Incidents: See Remington's Digest, Execution, § 60; Hays v. Merchants' Bank, 10 Wash. 573, 39 Pac. 98.

Liens or Encumbrances on Property: See Remington's Digest, Execution, § 61; Hamilton v. Carter, 12 Wash. 510, 41 Pac. 911.

Equities Against Debtor: See Remington's Digest, Execution, § 62; Elwood v. Stewart, 5 Wash. 736, 32 Pac. 735, 1000; Port Townsend Nat. Bank v. Port Townsend Gas etc. Co., 6 Wash. 597, 34 Pac. 155; Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765.

Bona Fide Purchasers—In General: See Remington's Digest, Execution, § 63; Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896; Shepherd v. Schmied, 78 Wash. 685, 139 Pac. 589; Carson v. Wiley, 98 Wash. 476, 167 Pac. 1111.

— **Judgment Creditor as Purchaser:** See Remington's Digest, Execution, § 64; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; McEachern v. Brackett, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037; Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501; Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94; Hacker v. White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; Roher v. Snyder, 29 Wash. 199, 69 Pac. 748; Lee v. Wrixon, 37 Wash. 47, 79 Pac. 489; American Savings Bank & Trust Co. v. Helgesen, 67 Wash. 572, 122 Pac. 26, Ann. Cas. 1913A, 390; Ransom v. Wickstrom & Co., 84 Wash. 419, 146 Pac. 1041, L. R. A. 1916A, 58S.

Effect of Defects or Irregularities in Execution, Levy or Sale: See Remington's Digest, Execution, § 65; O'Brien v. Allen, 42 Wash. 393, 85 Pac. 8; Hays v. Peavey, 54 Wash. 78, 102 Pac. 889.

Effect of Modification, Vacation, or Reversal of Judgment: See Remington's Digest, Execution, § 66; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037; Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896.

Confirmation of execution sale of land as adjudication that the land was not exempt. 5 A. L. R. 390.

Right of bidder at judicial sale to be heard when question of its confirmation. L. R. A. 1918C, 1179.

Lapse of time as bar to confirmation of execution sale. 43 L. R. A. (N. S.) 630.

§ 592. Eviction of Purchaser—Recovery.

If the purchaser of real property sold on execution, or his successor in interest, be evicted therefrom in consequence of the reversal of the judgment, he may recover the price paid, with interest, and the costs and disbursements of the suit by which he was evicted, from the plaintiff in the writ of execution. [L. '69, p. 96, § 364; Cd. '81, § 368; 2 H. C., § 509.]

§ 593. Contribution and Subrogation.

When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays without a sale more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation or contract of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal. In such case the person so paying or contributing shall be entitled to the benefit of the judgment to enforce contribution or repayment if within thirty days after his payment he file with the clerk of the court where the judgment was rendered notice of his payment and claim to contribution or repayment. Upon filing such notice, the clerk shall make an entry thereof in the

margin of the docket where the judgment is entered. [L. '54, p. 183, § 272; Cd. '81, § 369; 2 H. C., § 510.]

§ 594. Redemption from Sale.

Property sold subject to redemption, as above provided, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:—

1. The judgment debtor or his successor in interest, in the whole or any part of the property separately sold.

2. A creditor having a lien by judgment, decree or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in subdivision two of this section are termed redemptioners. [L. '99, p. 89, § 7. Cf. L. '97, p. 75, § 15.]

"As above provided," in this section refers to the act of 1899, § 1121, *infra*, and §§ 583-584, *supra*.

Cited in 69 Wash. 648; 97 Wash. 702; 102 Wash. 626; 109 Wash. 33.

Right to Redeem in General: See Remington's Digest, Execution, § 73; Scott v. Patterson, 1 Wash. 487, 20 Pac. 593; State ex rel. Stickel v. Shattuck, 95 Wash. 119, 163 Pac. 414.

In view of sections 594, 595, entitling a junior mortgagee to redeem within one year after foreclosure of a senior mortgage, a senior mortgagee who took a quitclaim deed under an agreement for redemption within one year, without notice of a prior unrecorded mortgage, is not a bona fide purchaser for value, but takes subject to the junior mortgagee's right to redeem: Malm v. Griffith, 109 Wash. 30, 186 Pac. 647.

REDEMPTION. See Remington's Digest, Mtg., §§ 252-254; Right to redeem in general. Parker v. Dacres, 2 W. T. 439, 7 Pac. 893; Hardy v. Herriott, 11 Wash. 460, 39 Pac. 958; Mississippi Valley Trust Co. v. Hofius, 20 Wash. 272, 55 Pac. 54; Knipe v. Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Rodda v. Needham, 78 Wash. 636, 139 Pac. 628; Beverly v. Davis, 79 Wash. 537, 140 Pac. 696.

Right of Redemption as to Part of Property: State ex rel. Twiss v. Carpenter, 19 Wash. 378, 53 Pac. 342.

Statutory Provisions: Parker v. Dacres, 2 W. T. 439, 7 Pac. 893; Swinburne v. Mills, 17 Wash. 611, 50 Pac. 489, 61 Am. St. Rep. 932.

Persons Entitled to Redeem: See Remington's Digest, Mtg., § 255; Preston-Parton Mill Co. v. Dexter Horton & Co., 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928; Krutz v. Gardner, 25 Wash. 396, 35 Pac. 771; Geddis v. Packwood, 30 Wash. 270, 70 Pac. 481; McSorley v. Lindsay, 62 Wash. 203, 113 Pac. 267.

— **Waiver, Estoppel and Laches** —
Waiver by Agreement: See Remington's Digest, Mtg., §§ 256, 257; Mohny v. Ellis, 69 Wash. 643, 125 Pac. 1031; Dennis v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; Plummer v. Isle, 41 Wash. 5, 82 Pac. 1009, 111 Am. St. Rep. 997, 2 L. R. A. (N. S.) 627; Boyer v. Paine, 60 Wash. 56, 110 Pac. 682; Scammon v. Ward, 1 Wash. 179, 23 Pac. 439.

See, also, Malm v. Griffith, 109 Wash. 30, 186 Pac. 647.

Proceedings on Redemption: See Remington's Digest, Execution, § 75; Scott v. Patterson, 1 Wash. 487, 20 Pac. 593; Baggott v. Turner, 21 Wash. 339, 58 Pac. 212; Carroll v. Hill Tract Imp. Co., 44 Wash. 569, 87 Pac. 835; State ex rel. Stickel v. Shattuck, 95 Wash. 119, 163 Pac. 414.

Actions to Redeem and for Accounting: See Remington's Digest, Execution, § 77; McKay v. Smith, 27 Wash. 442, 67 Pac. 982; Kennedy v. Trumble, 32 Wash. 614, 73 Pac. 698.

Rights of Action and Defenses: See Remington's Digest, Mtg., § 264; Investment Securities Co. v. Adams, 37 Wash. 211, 79 Pac. 625; Shepard v. Vincent, 38 Wash. 493, 80 Pac. 777.

— **Time to Sue, Limitations and Laches:** See Remington's Digest, Mtg., § 265; Parker v. Dacres, 2 W. T. 439, 7 Pac. 893; Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555, 87 Am. St. Rep. 766, 54 L. R. A. 526; Krutz v. Gardner, 25 Wash. 396, 35 Pac. 771; Catlin v. Murray, 37 Wash. 164, 79 Pac. 605.

— **Parties:** See Remington's Digest, Mtg., § 266; Smithson Land Co. v. Brautigam, 16 Wash. 174, 47 Pac. 434.

— **Final Judgment or Decree, and Enforcement Thereof:** See Remington's

Digest, Mtg., § 267; Sloan v. Lucas, 37 Wash. 348, 79 Pac. 949; Sawyer v. Vermont Loan etc. Co., 41 Wash. 524, 84 Pac. 8; Gravelle v. Canadian etc. Co., 42 Wash. 457, 85 Pac. 36.

Operation and Effect: See Remington's Digest, Mtg., § 268; De Roberts v. Stiles, 24 Wash. 611, 64 Pac. 795; Merz v. Mehner, 67 Wash. 135, 120 Pac. 893.

Allowance of Deduction of Rents and Profits: See Remington's Digest, Mtg., § 259; Debenture Corporation v. Warren, 9 Wash. 312, 37 Pac. 451; Knipe v. Austin, 13 Wash. 189, 43 Pac. 25; Hardy v. Herriott, 11 Wash. 460, 39 Pac. 958; Woods v. Netherlands American Mortgage Bank, 92 Wash. 370, 159 Pac. 123; Cogswell v. Brown, 102 Wash. 625, 173 Pac. 623.

See, also, Boston & Spokane Realty Co. v. Franc Inv. Co., 112 Wash. 113, 191 Pac. 826.

§ 595. Time for Redemption.

The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser or his successor in interest may have paid thereon after purchase, and like interest on such amount; and if the purchaser be also a creditor having a lien by judgment, decree or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest. [L. '99, p. 89, § 8.]

Compare L. '54, p. 183; L. '69, p. 97; Cd. '81, § 370 et seq.; 2 H. C., § 511 et seq., superseded by the act of Mar. 10, '97.

Cited in 69 Wash. 648; 83 Wash. 121; 109 Wash. 33.

Time for Redemption—Agreements as to Time and Extension: See Remington's Digest, Mtg., § 258; Mann v. Provident Life etc. Co., 42 Wash. 581, 85 Pac. 56; Wechner v. Dorchester, 83 Wash. 118, 145 Pac. 197.

Compensation for Taxes Paid: See Remington's Digest, Mtg., § 261; Farrell v. Gustin, 18 Wash. 239, 51 Pac. 372; Shepard v. Vincent, 38 Wash. 493, 80 Pac. 777.

Upon redemption from an illegal execution sale, the purchaser is not entitled to fifteen per cent interest upon taxes and assessments paid on the property, but only interest at the legal rate: Miller v. Winslow, 70 Wash. 401, 126 Pac. 906, Ann. Cas. 1914B, 833.

§ 596. Successive Redemptions.

If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from

Compensation for Improvements: See Remington's Digest, Mtg., § 260; Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949; Woods v. Netherlands American Mortgage Bank, 92 Wash. 370, 159 Pac. 123.

Payment: See Remington's Digest, Execution, § 87; Adams v. National Bank of Commerce, 30 Wash. 20, 70 Pac. 105; Murray v. Meade, 5 Wash. 693, 32 Pac. 780.

Liability of property redeemed by judgment debtor or his grantee to satisfy deficiency on indebtedness for which it was originally sold. 47 L. R. A. (N. S.) 1048.

Right of one who redeems from judicial sale as against purchaser where title fails. 48 L. R. A. (N. S.) 481.

Applicability to existing purchasers to changes in law relating to redemption from judicial sales. L. R. A. 1915C, 414.

Tender and Payment into Court: See Remington's Digest, Mtg., § 262; State ex rel. Twiss v. Carpenter, 19 Wash. 378, 53 Pac. 342; Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949; Sawyer v. Vermont Loan etc. Co., 41 Wash. 524, 84 Pac. 8; Rodda v. Needham, 78 Wash. 636, 139 Pac. 628; Calhoun v. McConaghey, 79 Wash. 6, 139 Pac. 635.

Time to redeem from judicial sale as running from date of sale or date of confirmation of sale. Ann. Cas. 1913B, 41.

Right to redeem from judicial sale after expiration of statutory period. Ann. Cas. 1913E, 1187.

Constitutionality of statute extending period for redemption from judicial sale. 1 A. L. R. 143.

the last redemptioner by paying the sum paid on such last redemption with interest at the rate of eight per cent per annum, and the amount of any taxes or assessment which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and in addition thereto by paying the amount of any liens, by judgment, decree or mortgage, held by said last redemptioner prior to his own, with interest; but the judgment under which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption, on paying the sum paid on the last previous redemption with interest thereon at the rate of eight per cent per annum, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with like interest thereon, and the amount of any liens by judgment, decree or mortgage, other than the judgment under which the property was sold, held by the last redemptioner, previous to his own, with interest. If the purchaser or redemptioner shall pay any taxes or assessments, or have or acquire any such lien as herein mentioned, he must file a statement thereof with the auditor of the county where said property is situate before the property shall have been redeemed from him, otherwise the property may be redeemed without paying such tax, assessment or lien. Such statement shall be recorded by such auditor. [L. '99, p. 89, § 9.]

§ 597. Certificate of Redemption.

If no redemption be made within one year after the sale the purchaser, or his assignee is entitled to a conveyance; or, if so redeemed, whenever sixty (60) days have elapsed, and no other redemption has been made, or notice given operating to extend period of redemption, and the time for redemption has expired, the last redemptioner or his assignee is entitled to a sheriff's deed; but in all cases the judgment debtor shall have the entire period of one year from the date of the sale to redeem the property. If the judgment debtor redeem he must make the same payments as are required to effect a redemption by the redemptioner. If the judgment debtor redeem, the effect of the sale is terminated and he is restored to his estate. A certificate of redemption must be filed and recorded in the office of the auditor of the county in which the property is situated, and the auditor must note the record thereof in the margin of the record of the certificate of sale. [L. '99, p. 90, § 10. Cf. L. '97, p. 75, § 16.]

§ 598. Payment on Successive Redemptions.

When two or more persons apply to the sheriff to redeem at the same time he shall allow the person having the prior lien to redeem first, and so on. The sheriff shall immediately pay the money over to the person from whom the property is redeemed, if he attend at the redemption; or if not, at any time thereafter when demanded. When a sheriff shall wrongfully refuse to allow any person to redeem, his right to redeem shall not be prejudiced thereby, and the sheriff may be required, by order of the court, to allow such redemption. [L. '99, p. 91, § 11.]

§ 599. Notice of Redemption—Certificate.

The mode of redeeming shall be as provided in this section. The person seeking to redeem shall give the sheriff at least five days written notice of his intention to apply to the sheriff for that purpose. It shall be the duty of the sheriff to notify the purchaser or redemptioner, as the case may be, or his attorney, of the receipt of such notice, if such person be within such county. At the time and place specified in such notice the person seeking to redeem may do so by paying to the sheriff the sum required. The sheriff shall give the person redeeming a certificate stating therein the sum paid on redemption, from whom redeemed, the date thereof and a description of the property redeemed. A person seeking to redeem shall submit to the sheriff the evidence of his right thereto, as follows:—

(1) If he be a lien creditor, a copy of the docket of the judgment or decree under which he claims the right to redeem, certified by the clerk of the court where such judgment or decree is docketed; or if he seeks to redeem upon mortgage, the certificate of the record thereof; also an affidavit, verified by himself or agent, showing the amount then actually due thereon.

(2) A copy of any assignment necessary to establish his claim, verified by the affidavit of himself or agent, showing the amount then actually due on the judgment, decree or mortgage.

(3) If the redemptioner or purchaser has a lien prior to that of the lien creditor seeking to redeem, such redemptioner or purchaser shall submit to the sheriff the evidence thereof, and the amount due thereon, or the same may be disregarded. [L. '99, p. 91, § 12.]

Cited in 62 Wash. 205; 69 Wash. 648; 93 Wash. 386; 95 Wash. 122.

§ 600. Rents and Profits During Period of Redemption.

The purchaser, from the time of the sale until the redemption, and the redemptioner from the time of his redemption until another redemption, except as hereinafter provided, is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by such person or persons thus entitled thereto, from the property thus sold, preceding the redemption thereof from him, the amount of such rents and profits, over and above the expenses paid for operating, caring for, protecting and insuring the property, shall be a credit upon the redemption money to be paid; and if the redemptioner or other person entitled to make such redemption, before the expiration of the time allowed for such redemption, files with the sheriff a demand in writing for a written and verified statement of the amounts of such rents and profits thus received, and expenses paid and incurred, the period for redemption is extended five (5) days after such sworn statement is given by such person thus receiving such rents and profits, or by his agent, to the person making such demand, or to the sheriff. It shall be the duty of the sheriff to serve a copy of such demand upon the person receiving such rents and profits, his agent or his attorney, if such service can be made in the county where the property is situate. If such person shall,

for a period of ten days after such demand has been given to the sheriff, fail or refuse to give such statement, such redemptioner or other person entitled to redeem from such sale, making such demand, may bring an action within sixty days after making such demand, but not later, in any court of competent jurisdiction, to compel an accounting and disclosure of such rents, profits and expenses, and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner or other person making such demand who shall be entitled to redeem. If a sworn statement is given by the purchaser or other person receiving such rents and profits, and such redemptioner or other person entitled to redeem, who makes such demand, desires to contest the correctness of the same, he must first redeem in accordance with such sworn statement, and if he desires to bring an action for an accounting thereafter he may do so within thirty days after such redemption, but not later: Provided, that if such property be farming or agricultural property and be in possession of any purchaser or any redemptioner and is redeemed after the first day of April and before the first day of December, and the purchaser or his tenant has performed any work in preparing such property for crops, or planted crops, he shall be entitled to reimbursement for such work and labor or the right to retain possession of such property until the first day of December following, and the redemptioner shall be entitled to collect the reasonable rental value thereof during such farming year, unless such reasonable rental shall have been collected by such purchaser and accounted for to the redemptioner. [L. '99, p. 92, § 13.]

Cited in 92 Wash. 371; 97 Wash. 336, 337.

Rents and Profits—During Period for Redemption: See Remington's Digest, Mtg., § 223; Debenture Corporation v. Warren, 9 Wash. 312, 37 Pac. 451; Hardy v. Herriott, 11 Wash. 460, 39 Pac. 958; Knipe v. Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531.

A purchaser at mortgage foreclosure sale could not be required at the suit of a mortgagor to account for rents and profits while in possession prior to redemption under 2 Hill's Code, 519, providing that the purchaser is entitled to possession from the day of sale until redemption: Hardy v. Herriott, 11 Wash. 460, 39 Pac. 958; Knipe v. Austin, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531.

Rents and Profits: See Remington's Digest, Execution, § 69; Debenture Corporation v. Warren, 9 Wash. 312, 37 Pac. 451; Byers v. Rothschild, 11 Wash. 296, 34

Pac. 688; Griffith v. Burlingame, 18 Wash. 429, 51 Pac. 1059; Wilson v. Wold, 21 Wash. 398, 58 Pac. 223, 75 Am. St. Rep. 846.

The making of an unsworn statement of rents and profits received by the purchaser will not affect the extension of time given by the statute in case of a failure to make the statement demanded by the redemptioner: Kennedy v. Trumble, 32 Wash. 614, 73 Pac. 698.

Rights and Remedies on Avoidance of Sale or Failure of Title: See Remington's Digest, Execution, § 70; Frank v. Jenkins, 11 Wash. 611, 40 Pac. 220.

Liabilities of Purchasers: See Remington's Digest, Execution, § 71; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037.

Purchasers from Execution Purchasers: See Remington's Digest, Execution, § 72; Singly v. Warren, 18 Wash. 434, 51 Pac. 1066, 63 Am. St. Rep. 896.

§ 601. Restraining Waste During Redemption Period.

Until the expiration of the time allowed for redemption the court may restrain the commission of waste on the property. But it is not waste for the person in possession of the property at the time of the sale or entitled to possession afterward during the period allowed for redemption to continue to use it in the same manner in which it was previously

used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family while he occupies the property. [L. '99, p. 93, § 14.]

Cited in 97 Wash. 338; 102 Wash. 627.

A purchaser at a mortgage foreclosure sale, upon receiving a certificate of sale and before receiving his deed, was entitled to the possession and to the title of the mortgagor, subject to redemption,

under this section, and hence has a "valid subsisting interest in real property and the right to the possession thereof": *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786.

§ 602. Possession During Period of Redemption.

The purchaser from the day of sale until a resale or redemption, and the redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the period of redemption: Provided, that when a mortgage contains a stipulation that in case of foreclosure the mortgagor may remain in possession of the mortgaged premises after sale and until the period of redemption has expired the court shall make its decree to that effect and the mortgagor have such right: Provided further, that as to any land so sold which is at the time of the sale used for farming purposes, or which is a part of a farm used at the time of sale for farming purposes the judgment debtor shall be entitled to retain possession thereof during the period of redemption and the purchaser or his successor in interest shall if the judgment debtor do not redeem have a lien upon the crops raised or harvested thereon during the period of such possession for interest on the purchase price at the rate of six per cent per annum during the period of possession and for any taxes with interest: And, provided further, that in case of any homestead occupied for that purpose at the time of sale, the judgment debtor shall have the right to retain possession thereof during the period of redemption without accounting for issues or value of occupation. [L. '99, p. 93, § 15.]

Cited in 56 Wash. 62; 67 Wash. 138; 95 Wash. 608; 96 Wash. 483; 97 Wash. 336, 338; 98 Wash. 159, 161, 451; 111 Wash. 575.

Possession—During Period for Redemption: See *Remington's Digest*, Execution, § 67; *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958; *Frank v. Jennings*, 11 Wash. 611, 40 Pac. 220; *Knipe v. Austin*, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531; *Hagerman v. Heltzel*, 21 Wash. 444, 58 Pac. 580; *State ex rel. Montgomery v. Superior Court*, 21 Wash. 564, 58 Pac. 1065; *State ex rel. Steel v. Northwestern & Pac. etc. Bank*, 18 Wash. 118, 50 Pac. 1023; *Canadian & Amer. Mort. & T. Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 55 Am. St. Rep. 946; *Woodhurst v. Cramer*, 29 Wash. 40, 69 Pac. 501; *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765.

Possession of Homestead.—Covenants of

warranty in a mortgage do not prevent the mortgagors from claiming the right to occupy the homestead during the period of redemption, under this section: *North Pacific Loan & Trust Co. v. Bennett*, 49 Wash. 34, 94 Pac. 664.

Since this section is to be liberally construed as an exemption law, a homestead claim is in time if asserted after sale while the mortgagors are still in possession of the property: *North Pacific Loan & Trust Co. v. Bennett*, 49 Wash. 34, 94 Pac. 664.

The filing of a *lis pendens* in an action to foreclose a mortgage bars a declaration of homestead by a subsequent purchaser from the mortgagors; since the right to claim a homestead under this section is a right reserved "to the judgment debtor" during the period of redemption, and cannot be transferred to

one who had neither possession nor right of homestead at the time the lis pendens was filed: *Skinner v. Hunter*, 95 Wash. 607, 164 Pac. 244.

Possession of Mortgaged Premises—During Period for Redemption: See Remington's Digest, Mtg., § 221; *Debenture Corp. of London v. Warren*, 9 Wash. 312, 37 Pac. 451; *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958; *State ex rel. Steele v. Northwestern & Pac. Hypotheek Bank*, 18 Wash. 118, 50 Pac. 1023; *Canadian & Amer. Mtg. & T. Co. v. Blake*, 24 Wash. 102, 63 Pac. 1100, 85 Am. St. Rep. 946; *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Washburn v. Wilen*,

96 Wash. 480, 165 Pac. 403; *State ex rel. Warner v. Superior Court*, 97 Wash. 472, 166 Pac. 791; *Virges v. Gregory Co.*, 97 Wash. 333, 166 Pac. 610; *Northwest Trust & Safe Deposit Co. v. Butcher*, 98 Wash. 158, 167 Pac. 46.

— **Remedies for Recovery:** See Remington's Digest, Mtg., § 222; *Debenture Corp. of London v. Warren*, 9 Wash. 312, 37 Pac. 451; *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 715; *State ex rel. Hartman v. Superior Court*, 21 Wash. 469, 58 Pac. 572.

Damages for Waste or Other Injury: See Remington's Digest, Mtg., § 258-1; *Cogswell v. Brown*, 102 Wash. 625, 173 Pac. 623.

§ 603. Sheriff's Deed.

In all cases where real estate has been, or may hereafter be sold in pursuance of law by virtue of an execution or other process, issued upon an ordinary money judgment, or by virtue of an execution or other process, issued upon a decree for the foreclosure of a mortgage or other lien it shall be the duty of the sheriff or other officer making such sale to execute and deliver to the purchaser, or other person entitled to the same a deed of conveyance of the real estate so sold immediately after the time for redemption from such sale has expired; Provided, such sale has been duly confirmed by order of the court. In case the term of office of the sheriff or other officer making such sale shall have expired before a sufficient deed has been executed, then the successor in office of such sheriff shall, within the time specified in this act, execute and deliver to the purchaser or other person entitled to the same a deed of the premises so sold, and such deeds shall be as valid and effectual to convey to the grantee the lands or premises so sold, as if the deed had been made by the sheriff or other officer who made the sale. [L. '99, p. 94, § 16. Cf. L. '97, p. 75, § 16.]

Cited in 97 Wash. 336.

CONVEYANCE TO PURCHASER—Form and Contents—Description of Property: See Remington's Digest, Execution, § 78; *Lawrence v. Times Printing Co.*, 22 Wash. 482, 61 Pac. 166.

Cancellation: See Remington's Digest, Execution, § 79; *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931.

Construction and Operation—Relation Back: See Remington's Digest, Execution, § 80; *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43; *Prentice v. How*, 84 Wash. 136, 146 Pac. 388.

Sheriff's Deed—Validity: See Remington's Digest, Execution, § 80-1; *Prentice v. How*, 84 Wash. 135, 146 Pac. 388.

Conveyance to Purchaser: See Remington's Digest, Mtg., § 225; *National Bank of Commerce v. Lock*, 17 Wash. 528, 50 Pac. 478, 61 Am. St. Rep. 923; *Dennis*

v. Moses, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302.

A certificate of purchase and confirmation of sale passes the substantial title of defendant upon an execution sale, and the fact that a deed in pursuance thereof was executed to the purchaser thereof after his death will not defeat the title of those claiming under him: *Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379.

The fact that a judgment debtor, after a void execution sale of his homestead, and the execution of a sheriff's deed thereto, sells the land to a third party and removes therefrom, will not cure the invalidity of the sheriff's deed: *Asher v. Sekofsky*, 10 Wash. 379, 38 Pac. 1133.

In an action by a redemptioner to set aside a sheriff's deed as having been made before the right of redemption had expired, the complaint does not state a cause of action when it nowhere alleges

how long it was after the execution sale when the deed was made nor when there is no sufficient allegation as to any offer to redeem within the time provided by statute after the confirmation of sale: *Bryant v. Stetson & Post Mill Co.*, 13 Wash. 692, 43 Pac. 931.

The title of the purchaser relates back to the time the lien of the judgment attached: See *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43.

§ 604. Entry of Deed.

The party to whom such sheriff's deed is given shall, upon receipt thereof, take the same to the clerk of the superior court, who shall enter in his book of levies, where the levy is recorded, the sale of real estate therein conveyed, and shall indorse the fact upon the deed, with the date when presented to him and when made. And no county auditor shall record any such deed without such indorsement. [L. '99, p. 95, § 17.]

CHAPTER VI.

COMMISSIONERS TO CONVEY REAL ESTATE.

§ 605. Court may Appoint, When.

The several superior courts may, whenever it is necessary, appoint a commissioner to convey real estate,—

1. When, by a judgment in an action, a party is ordered to convey real property to another, or any interest therein;

2. When real property, or any interest therein, has been sold under a special order of the court, and the purchase money paid therefor. [L. '54, p. 205, § 390; Cd. '81, § 528; 2 H. C., § 814.]

Cited in 79 Wash. 557.

The fact that the court may, under this section, whenever necessary, appoint a commissioner to convey real estate, does not prevent judgment in contempt pro-

ceedings requiring the defendant to execute a deed in compliance with a judgment, within five days or be committed: *Wright v. Suydam*, 79 Wash. 550, 140 Pac. 578.

§ 606. Contents of Deed.

The deed of the commissioner shall so refer to the judgment authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally. [L. '54, p. 205, § 391; Cd. '81, § 529; 2 H. C., § 815.]

§ 607. Conveyance Made in Pursuance of Judgment—Effect of.

A conveyance made in pursuance of a judgment shall pass to the grantee the title of the parties ordered to convey the land. [L. '54, p. 205, § 392; Cd. '81, § 530; 2 H. C., § 816.]

§ 608. Conveyance Made in Pursuance of a Sale—Effect of.

A conveyance made in pursuance of a sale ordered by the court shall pass to the grantee the title of all the parties to the action or proceeding. [L. '54, p. 205, § 393; Cd. '81, § 531; 2 H. C., § 817.]

§ 609. Approval by Court Necessary.

A conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be in-

dorsed on the conveyance, and recorded with it. [L. '54, p. 205, § 394; Cd. '81, § 532; 2 H. C., § 818.]

§ 610. Execution of Conveyance.

It shall be sufficient for the conveyance to be signed by the commissioner only, without affixing the name of the parties whose title is conveyed, but the names of the parties shall be recited in the body of the conveyance. [L. '54, p. 205, § 395; Cd. '81, § 533; 2 H. C., § 819.]

§ 611. Recording.

The conveyance shall be recorded in the office in which by law it should have been recorded had it been made by the parties whose title is conveyed by it. [L. '54, p. 205, § 396; Cd. '81, § 534; 2 H. C., § 820.]

§ 612. Conveyance, How Enforced.

In case of a judgment to compel a party to execute a conveyance of real estate, the court may enforce the judgment by attachment or sequestration, or appoint a commissioner to make the conveyance. [L. '54, p. 205, § 397; Cd. '81, § 535; 2 H. C., § 821.]

CHAPTER VII.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.

§ 613. Order to Examine Judgment Debtor.

At any time within six years after entry of a judgment for the sum of twenty-five (\$25) dollars or over, and after the return of an execution against property wholly or partially unsatisfied upon proof thereof, by affidavit or other competent written evidence satisfactory to the judge or after the issuing of an execution against property and upon proof by the affidavit of a party or otherwise to the satisfaction of the court or a judge thereof judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before the judge granting the order, or a referee appointed by him, to answer concerning the same; and the judge to whom application is made under this act may, if it is made to appear to him by the affidavit of the judgment creditor, his agent or attorney that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before the judge granting the order. Upon being brought before the judge he may be ordered to enter into a bond, with sufficient sureties, that he will attend from time to time before the judge or referee, as shall be directed, during the pendency of the proceedings and until the final termination thereof. [L. '93, p. 435, § 1; L. '99, p. 146, § 1.]

For former laws on this subject compare: L. '54, pp. 183-186; L. '69, pp. 101-102; Cd. '81, §§ 381-387; 2 H. C., §§ 522-528.

See *infra*, § 647 et seq., attachments.

See *infra*, § 680 et seq., garnishments.

Cited in 11 Wash. 653; 13 Wash. 632; 18 Wash. 152; 21 Wash. 200; 54 Wash. 4.

Nature and Purpose of Remedy: See Remington's Digest, Execution, § 89; Murne v. Schwabacher, 2 W. T. 191, 3

Pac. 270; Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004; Klosterman v. Mason County etc. R. Co., 8 Wash. 281, 36 Pac. 136; Mears v. Lamona, 17 Wash. 148, 49 Pac. 251; Klepsch v. Donald, 18 Wash.

150, 51 Pac. 352; Frankenthal v. Solomonson, 20 Wash. 460, 55 Pac. 754, 72 Am. St. Rep. 116, 44 L. R. A. 311.

This act does not warrant the citation and examination of officers of an insolvent corporation for which a receiver has been appointed: Allen v. Stallcup, 13 Wash. 631, 43 Pac. 884.

The provisions of this act do not afford an adequate remedy for the purpose of canceling and setting aside a fraudulent conveyance of real estate, and resort may consequently be had to a court of equity for relief: Klosterman v. Mason County R. Co., 8 Wash. 281, 36 Pac. 136.

Persons Against Whom Proceedings may be Maintained: See Remington's Digest, Execution, § 91; Murne v. Schwabacher, 2 W. T. 130, 3 Pac. 899 (overruled); Murne v. Schwabacher, 2 W. T. 191, 3 Pac. 270; Allen v. Stallcup, 13 Wash. 631, 43 Pac. 884.

Process or Other Proceedings as Against Which Exemption may be Allowed—In General: See Remington's Digest, Home, § 33; Field v. Greiner, 11 Wash. 8, 39 Pac. 259.

Proceedings for Examination of Debtor—After Return of Execution: See Remington's Digest, Execution, §§ 95, 96; Timm

v. Stegman, 6 Wash. 13, 23 Pac. 1004; Allen v. Stallcup, 13 Wash. 631, 43 Pac. 884; Klepsch v. Donald, 18 Wash. 150, 51 Pac. 352. Affidavits: Murne v. Schwabacher, 2 W. T. 130, 3 Pac. 899; Klepsch v. Donald, 18 Wash. 150, 51 Pac. 352; Flood v. Libby, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

Proceedings for Examination of Third Persons—Affidavits: See Remington's Digest, Execution, §§ 97, 98; Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004.

Defects and Irregularities in Proceedings, and Waiver Thereof: See Remington's Digest, Execution, § 106-1; Breschli v. Kubillus, 56 Wash. 541, 106 Pac. 1135.

Exhausting remedies at law as a condition of right of supplementary proceedings. 33 L. R. A. 550.

Lien acquired by service of notice in supplementary proceedings. 3 L. R. A. (N. S.) 123.

Supplementary proceedings to reach seat in chamber of commerce, board of trade, or stock exchange. 14 A. L. R. 285.

Perjury or false swearing in supplementary proceedings as contempt. 11 A. L. R. 349.

§ 614. Warrant, How Vacated, etc.

A warrant issued as prescribed in the last section may be vacated or modified by the judge making the same, or by the court out of which the execution was issued, upon giving three days' notice to the opposite party. [L. '93, p. 435, § 2.]

§ 615. Order to Discover Property, etc., of Judgment Debtor.

Upon proof by affidavit or otherwise, to the satisfaction of the judge, that execution has been issued as prescribed by section 613 of this chapter, and also that any person or corporation has personal property of the judgment debtor of the value of twenty-five dollars or over, or is indebted to him in said amount, the judge may make an order requiring such person or corporation, or an officer thereof, to appear at a specified time and place before him, or a referee appointed by him, and answer concerning the same. [L. '93, p. 436, § 3.]

Cited in 20 Wash. 460.

An order in supplemental proceedings "to appear before S., court commissioner," for examination will be considered as an order of reference to a court commissioner especially where the court of original jurisdiction construed the same

to have that effect; since the journal entry is only evidence of the court's action, and on appeal will be given the same interpretation as given by the lower court: Howard v. Hanson, 49 Wash. 314, 95 Pac. 265.

§ 616. Before Whom Examined—Referee to Certify Evidence.

An order requiring a person to attend and be examined, made pursuant to any provision of this chapter, must require him so to attend and be examined either before the judge to whom the order is returnable or before a referee designated therein. Where the examination is taken be-

fore a referee, he must certify to the judge to whom the order is returnable all of the evidence and other proceedings taken before him. [L. '03, p. 436, § 4.]

§ 617. Proceedings upon Examination—Adjournment.

Upon an examination made under this chapter, the answer of the party or witness examined must be under oath. A corporation must attend by and answer under the oath of an officer thereof, and the judge may, in his discretion, specify the officer. Either party may be examined as a witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action. The judge or referee may adjourn any proceedings under this chapter, from time to time, as he thinks proper. [L. '93, p. 436, § 5.]

Proceedings on Examination—Right to Trial by Jury: See Remington's Digest, Execution, § 99; *Murphy v. Schwabacher*, 2 W. T. 130, 3 Pac. 899.

See Remington's Digest, Execution, § 100; *Frankenthal v. Solomonson*, 20 Wash. 460, 55 Pac. 754, 72 Am. St. Rep. 116, 44 L. R. A. 311.

— **Privilege of Party or Witness:**

§ 618. Referee to be Sworn.

Unless the parties expressly waive the referee's oath, a referee appointed as prescribed in this chapter must, before entering upon an examination or taking testimony, subscribe and take an oath that he will faithfully and fairly discharge his duty upon the reference, and make a just and true report according to the best of his understanding. The oath must be returned to the judge with the report of the testimony. [L. '93, p. 436, § 6.]

§ 619. Order Authorizing Payment to Sheriff.

At any time after the commencement of a special proceeding authorized by this chapter, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge by whom the order or warrant was granted or to whom it is made returnable, may, in his discretion upon proof by affidavit to his satisfaction that a person or corporation is indebted to the judgment debtor, and upon such notice given to such person or corporation as he deems just, or without notice make an order permitting the person or corporation to pay the sheriff designated in the order a sum on account of the alleged indebtedness not exceeding the sum which will satisfy the execution. A payment thus made is to the extent thereof a discharge of the indebtedness except as against a transferee from the judgment debtor in good faith, and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice when the payment was made. [L. '93, p. 436, § 7.]

§ 620. Order Requiring Delivery of Money, etc., to Sheriff or Receiver.

Where it appears from the examination or testimony taken in the special proceedings authorized by this chapter that the judgment debtor has in his possession or under his control money or other personal property belonging to him, or that one or more articles of personal property capable of manual delivery, his right to the possession whereof is not substantially disputed, are in the possession or under the control of another

person, the judge by whom the order or warrant was granted, or to whom it is returnable, may in his discretion, and upon such notice given to such persons as he deems just, or without notice, make an order directing the judgment debtor, or other person, immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order, unless a receiver has been appointed or a receivership has been extended to the special proceedings, and in that case to the receiver. [L. '93, p. 437, § 8.]

Cited in 38 Wash. 375; 75 Wash. 459.

"Substantially disputed," has reference to property claimed by third persons not parties to the suit as to whom a trial of the title would be without due process: *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

Order for Payment or Delivery of Property: See *Remington's Digest*, Execution, §§ 101, 102; *Klepsch v. Donald*, 18 Wash. 150, 51 Pac. 352; *Belknap v. Platter*, 54 Wash. 1, 103 Pac. 432, 132 Am. St. Rep. 1097. Against third persons:

Murne v. Schwabacher, 2 W. T. 191, 3 Pac. 270; *Timm v. Stegman*, 6 Wash. 13, 32 Pac. 1004.

The finding in supplemental proceedings that certain realty is liable to execution and an order for its sale to satisfy a judgment, creates no special lien against the property, and where such property is claimed as a homestead it is entitled to exemption to the extent allowed under the statute granting a judgment debtor exemption of his homestead premises: *Field v. Greiner*, 11 Wash. 8, 39 Pac. 259.

§ 621. Duty of Sheriff.

If the sheriff to whom money is paid or other property is delivered, pursuant to an order made as prescribed in the last section of this chapter, does not then hold an execution upon the judgment against the property of the judgment debtor, he has the same rights and power, and is subject to the same duties and liabilities with respect to the money or property, as if the money had been collected or the property had been levied upon by him by virtue of such an execution, except as provided in the next section. [L. '93, p. 437, § 9.]

§ 622. How Money or Property Applied.

After a receiver has been appointed or a receivership has been extended to the special proceedings, the judge must, by order, direct the sheriff to pay the money, or the proceeds of the property, deducting his fees, to the receiver; or if the case so requires to deliver to the receiver the property in his hands. But if it appears to the satisfaction of the judge that an order appointing a receiver or extending a receivership is not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money so paid, or the proceeds of the property so delivered, upon an execution in favor of the judgment creditor issued either before or after the payment or delivery to the sheriff. [L. '93, p. 438, § 10.]

§ 623. Balance, How Disposed of.

Where money is paid or property is delivered as prescribed in the last four sections and afterwards the special proceeding is discontinued or dismissed, or the judgment is satisfied without resorting to the money or property, or a balance of the money or of the proceeds of the property, or a part of the property remains in the sheriff's or receiver's hands after satisfying the judgment and the costs and expenses of the special proceeding, the judge must make an order directing the sheriff or receiver to pay the money or deliver the property so remaining in his hands

to the debtor, or to such other person as appears to be entitled thereto, upon payment of his fees and all other sums legally chargeable against the same. [L. '93, p. 438, § 11.]

§ 624. Transfer of Property may be Enjoined, etc.

The judge by whom the order or warrant was granted or to whom it is returnable may make an injunction order restraining any person or corporation, whether a party or not a party to the special proceeding, from making or suffering any transfer or other disposition of or interference with the property of the judgment debtor or the property or debt concerning which any person is required to attend and be examined, until further direction in the premises. Such an injunction may be made simultaneously with the order or warrant by which the special proceeding is instituted, and upon the same papers or afterwards, upon an affidavit showing sufficient grounds therefor. The judge or court may, as a condition of granting an application to vacate or modify the injunction order require the applicant to give security in such sum and in such manner as justice requires. [L. '93, p. 438, § 12.]

Cited in 75 Wash. 465.

The court may by injunction restrain all persons having notice from conveying

or interfering with the property involved: *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

§ 625. Mode of Service of Certain Orders.

An injunction order or an order requiring a person to attend and be examined made as prescribed in this chapter must be served,—

1. By delivering to the person to be served a certified copy of the original order and a copy of the affidavit on which it was made;

2. Service upon a corporation is sufficient if made upon an officer, to whom a copy of a summons must be delivered. Where a summons is personally served upon a corporation, unless the officer to be served is specially designated in the order, the order may be served by any person who can serve a summons in an action. [L. '93, p. 439, § 13.]

§ 626. Service of Warrant.

The sheriff, when he arrests a judgment debtor by virtue of a warrant issued as prescribed in this chapter, must deliver to him a copy of the warrant and of the affidavit upon which it was granted. [L. '93, p. 439, § 14.]

§ 627. Discontinuance or Dismissal of Proceedings.

A special proceeding instituted as prescribed in this chapter may be discontinued at any time upon such terms as justice requires, by an order of the judge made upon the application of the judgment creditor. Where the judgment creditor unreasonably delays or neglects to proceed, or where it appears that his judgment has been satisfied, his proceedings may be dismissed upon like terms by a like order made upon the application of the judgment debtor, or of plaintiff in a judgment creditor's action against the debtor, or of a judgment creditor who has instituted either of the special proceeding[s] authorized by this chapter. Where an order appointing a receiver or extending a receivership has been made in the

course of the special proceeding, notice of the application for an order specified in this section must be given in such manner as the judge deems proper, to all persons interested in the receivership as far as they can conveniently be ascertained. [L. '93, p. 439, § 15.]

§ 628. Costs to Judgment Creditor.

The judge may make an order allowing to the judgment creditor a fixed sum as costs, consisting of his witness fees and referee's fees and other disbursements, and of a sum in addition thereto not exceeding twenty-five dollars, and directing the payment thereof out of any money which has come or may come to the hands of the receiver or of the sheriff within a time specified in the order. [L. '93, p. 439, § 16.]

Cited in 49 Wash. 320.

Wash. 314, 95 Pac. 265; Smith v. Weed, 75 Wash. 452, 134 Pac. 1070.

Costs: See Remington's Digest, Execution, § 103-1; Howard v. Hanson, 49

§ 629. Costs to Judgment Debtor.

Where the judgment debtor or other person against whom the special proceeding is instituted has been examined, and property applicable to the payment of the judgment has not been discovered, the judge may make an order allowing him a like sum as costs, and directing the payment thereof within a time specified in the order by the judgment creditor. [L. '93, p. 440, § 17.]

§ 630. Disobedience of Order, How Punished.

A person who refuses, or without sufficient excuse neglects, to obey an order of a judge or referee made pursuant to any of the provisions of this chapter, and duly served upon him, or an oral direction given directly to him by a judge or referee in the course of the special proceeding, or to attend before a judge or referee according to the command of a subpoena duly served upon him, may be punished by the judge of the court out of which the execution issued, as for contempt. [L. '93, p. 440, § 18.]

Disobedience to Order or Subpoena as Contempt: See Remington's Digest, Execution, §§ 104—106; Murne v. Schwabacher, 2 W. T. 191, 3 Pac. 270; State ex rel. Timm v. Trounce, 5 Wash. 804, 32 Pac. 750; Van Alstine, In re, 21 Wash. 194, 57 Pac. 348.

§ 631. Attendance of Judgment Debtor—Corporations.

A judgment debtor who resides or does business in the state cannot be compelled to attend pursuant to an order made under the provisions of this chapter at a place without the county where his residence or place of business is situated. Where the judgment debtor to be examined under this chapter is a corporation the court may cause such corporation to appear and be examined by making like order or orders as are prescribed in this chapter, directed to any officer or officers thereof. [L. '93, p. 440, § 19.]

§ 632. Not Excused from Answering.

A party or witness examined in a special proceeding authorized by this chapter is not excused from answering a question on the ground that

his examination will tend to convict him of a commission of a fraud, or to prove that he has been a party to or privy to or knowing of a conveyance, assignment, transfer or other disposition of property for any purpose; or that he or another person claims to be entitled as against the judgment creditor or receiver appointed or to be appointed in the special proceeding to hold property derived from or through the judgment debtor, or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding. [L. '93, p. 440, § 20.]

§ 633. Proceedings in Case of Joint Debtors.

When, in proceedings under this chapter, personal service of the summons in the action was not made on all of the defendants, a debt due to, or other personal property owned by, one or more of the defendants not summoned jointly with the defendants summoned, or with any of them, may be reached by proceedings under this chapter. [L. '93, p. 441, § 21.]

§ 634. Continuance.

A special proceeding under this chapter instituted before one judge may be continued from time to time before another judge of the same court with like effect as if it had been instituted or commenced before the judge who last heard the same. [L. '93, p. 441, § 22.]

§ 635. Proceedings Applicable to Judgments of Justices' Courts.

This chapter shall apply to judgments recovered in justice court upon which a transcript has been issued and filed with the clerk of the superior court. [L. '93, p. 441, § 23.]

§ 636. Proceedings, Before Whom Instituted.

Special proceedings under this chapter may be instituted and prosecuted before the superior court of the county in which the judgment was entered or any judge thereof, or before the superior court of any county to the sheriff of which an execution has been issued or in which a transcript of said judgment has been filed in the office of the clerk of said court or before any judge thereof. [L. '99, p. 146, § 2; Cf. L. '93, p. 441, § 24.]

§ 637. Property Exempt from Seizure.

This chapter does not authorize the seizure of, or other interference with any property which is expressly exempt by law from levy and sale by virtue of an execution, or any money, thing in action or other property held in trust for a judgment debtor where the trust has been created by, or the fund so held in trust has proceeded from, a person other than the judgment debtor; or the earnings of the judgment debtor for his personal services rendered within sixty days next before the institution of the special proceeding, where it is made to appear by his oath or otherwise that those earnings are necessary for the use of a family wholly or partly supported by his labor. [L. '93, p. 441, § 25.]

Cited in 38 Wash. 371.

§ 638. Proceedings are Special—To be Heard Without Jury.

Proceedings under this chapter are special proceedings, and shall be heard by the judge or referee before whom the same are returnable without a jury. [L. '93, p. 441, § 26.]

§ 639. Fees of Referee.

The fees of referees appointed in proceedings under this chapter shall be five dollars per day. [L. '93, p. 441, § 27.]

§ 640. Receiver, Appointment—Notice.

At any time after making an order requiring the judgment debtor or any other person to attend and be examined, or the issuing of a warrant, as prescribed in this chapter, the judge to whom the order or warrant is returnable, or the court out of which the order was issued, may make an order appointing a receiver of the property of the judgment debtor. At least two days' notice of the application for the order appointing a receiver must be given personally to the judgment debtor, unless the judge or court is satisfied that he cannot, with reasonable diligence, be found within the state, in which case the order must recite that fact and may dispense with the notice, or may direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined or the warrant has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him. [L. '93, p. 441, § 28.]

Cited in 75 Wash. 460, 464.

Receivers: See Remington's Digest, Execution, § 103; Flood v. Libby, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851; Smith v. Weed, 75 Wash. 452, 134 Pac. 1070.

Necessity of return of supplementary proceedings as condition of right of judgment creditor to procure a receivership. 33 L. R. A. 546.

Right of receiver in supplementary proceedings to contest will. L. R. A. 1918A, 462.

§ 641. Notice to Other Creditors.

The judge must ascertain, if practicable, by the oath of the judgment debtor or otherwise, whether any other special proceeding authorized by this chapter is pending against the judgment debtor, or if a receiver has been appointed or application has been made for the appointment of a receiver of the property of the judgment debtor in any other action by a judgment creditor. If either is pending, and a receiver has not been appointed therein, notice of the application for the appointment of a receiver, and of all of the subsequent proceedings respecting the receivership, must be given in such manner as the judge directs to the judgment creditor prosecuting it. [L. '93, p. 442, § 29.]

§ 642. Only One Receiver Appointed—Extending Receivership.

Only one receiver of the property of the judgment debtor shall be appointed. Where a receiver thereof has already been appointed the judge, instead of making the order prescribed in the last section, must make an order extending the receivership to the special proceedings before him. Such an order gives to the judgment creditor the same rights as

if a receiver were appointed upon his application, including the right to apply to the court to control, direct or remove the receiver, or to subordinate the proceedings in or by which the receiver was appointed to those taken under his judgment. [L. '93, p. 442, § 30.]

§ 643. Order to be Filed.

An order appointing a receiver or extending a receivership must be filed in the office of the county clerk wherein the judgment-roll in the action is filed; or if the special proceeding is founded upon an execution issued out of a court other than that in which the judgment was rendered, in the office of the clerk of the county wherein the transcript of the judgment is filed. [L. '93, p. 442, § 31.]

§ 644. Property Vests in Receiver.

The property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him or extending his receivership, as the case may be, subject to the following exceptions:—

1. Real property is vested in the receiver only from the time when the order, or a certified copy thereof, as the case may be, is filed with the auditor of the county where it is situated;

2. When the judgment debtor, at the time when the order is filed, resides in another county of the state, his personal property is vested in the receiver only from the time when a copy of the order, certified by the auditor in whose office it is recorded, is filed with the auditor of the county where he resides. [L. '93, p. 443, § 32.]

Cited in 75 Wash. 460.

§ 645. Receiver's Title, How Extended by Relation.

Where the receiver's title to personal property has become vested, as prescribed in the last section, it also extends back by relation, for the benefit of the judgment creditor, in whose behalf the special proceeding was instituted as follows:—

1. When an order requiring the judgment debtor to attend and be examined, or a warrant requiring the sheriff to arrest him and bring him before the judge, has been served, before the appointment of the receiver, or the extension of the receivership, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or warrant;

2. Where an order or warrant has not been served as specified in the foregoing subdivision, but an order has been made requiring a person to attend and be examined concerning property belonging or a debt due to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor, which was in the hands or under the control of the person or corporation thus required to attend at the time of the service of the order, and to a debt then due to him from that person or corporation;

3. In every other case where notice of application for the appointment of a receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor at the time when

the notice was served, either personally or by complying with the requirements or [of] an order prescribing a substitute for personal service;

4. Where the case is within two or more of the foregoing subdivisions of this section, the rule most favorable to the judgment creditor must be adopted. But this section does not affect the title of a purchaser in good faith without notice, and for a valuable consideration; or the payment of a debt in good faith and without notice. [L. '93, p. 443, § 33.]

§ 646. Records to be Kept by Clerk.

Each county clerk must keep in his office a book indexed to the names of the judgment debtors, styled "book of orders appointing receivers of judgment debtors." A county clerk in whose office an order or a certified copy of an order is filed, as prescribed in this chapter, must immediately note thereupon the time of filing it, and as soon as practicable, must record it in the book so kept by him. He must also, upon request, furnish forthwith to any party or person interested, one or more certified copies thereof. For each omission to comply with any provision of this section, a county clerk forfeits to the party aggrieved two hundred and fifty dollars, in addition to all damages sustained by reason of the omission. [L. '93, p. 444, § 34.]

PROVISIONAL REMEDIES.

TITLE V.

PROVISIONAL REMEDIES.

CHAPTER I.—ATTACHMENTS.

- 647. Attachment—Time for granting.
- 648. Issuance of writ, affidavit for.
- 649. Attachment on debt not due.
- 650. Answer, in case debt not due.
- 651. Judgment suspended.
- 652. Bond for attachment—Sureties—Qualifications—Conditions.
- 653. Additional security—Restitution on failure to give.
- 654. Action on bond—Damages.
- 655. Contents of writ—Levy.
- 656. Writs to different counties—Costs.
- 657. Order of execution of writs.
- 658. Following property into adjoining county.
- 659. Manner of executing writ.
- 660. Examination of defendant touching his property.
- 661. Receiver appointed for attached property.
- 662. Sale before judgment—Perishable property.
- 663. Custody of money received.
- 664. Attachment of moneys in hands of officer.
- 665. Attachment of moneys in court.
- 666. Inventory of sheriff.
- 667. Subjection of attached property to judgment.
- 668. Collection when property attached insufficient—Surplus.
- 669. Procedure in case execution returned unsatisfied.
- 670. Judgment for defendant, effect of.
- 671. Discharge of attachment on counter-bond.
- 672. Judgment on bond.
- 673. Motion to discharge attachment.
- 674. Hearing of motion to discharge—Affidavits.
- 675. Discharge of writ.
- 676. Return of sheriff.
- 677. Liberal construction—Amendments.
- 678. Power of judge at chambers.
- 679. Sheriff, defined—Proceedings in justices' courts.

CHAPTER II.—GARNISHMENTS.

- 680. Writ, grounds for issuance of.
- 680-1. Municipal corporations subject to after judgment.
- 680-2. Enforcement against municipal corporations.
- 681. Bond to be executed.
- 682. Application for writ—Affidavit.
- 683. Writ, when and how issued.
- 684. Writ against incorporated companies—Service.
- 685. Writ, form of.
- 686. Dating and attestation.
- 687. Service of writ—Return and proof.
- 688. Effect of service.
- 689. Bond to discharge writ.
- 690. Answer and service of.
- 691. Discharge of garnishee.
- 692. Judgment by default.
- 693. Judgment against garnishee, enforcement of.
- 694. Execution.
- 695. Decree to deliver effects.
- 696. Procedure on failure of garnishee to surrender effects.
- 697. Sale of shares of stock.
- 698. Sale, how made.
- 699. Effect of sale.
- 700. Answer controverted by plaintiff.
- 701. Answer controverted by defendant.
- 702. Issue and trial.
- 703. Exemption of wages and family necessities.
- 704. Costs and attorney's fees.
- 705. Answer—Sufficiency against defendant.
- 706. Provisions inapplicable to justices of the peace.

CHAPTER III.—CLAIM AND DELIVERY (REPLEVIN).

- 707. Plaintiff may claim immediate delivery.
- 708. Affidavit for delivery.
- 709. Bond—Service of bond and affidavit.
- 710. Objections to bond—Justification of sureties.
- 711. Redelivery bond.
- 712. Justification of defendant's sureties.
- 713. Qualifications of sureties.
- 714. Buildings may be broken open.
- 715. Sheriff must safely keep property.
- 716. Claims by third person—Proceedings.
- 717. Return of sheriff.

CHAPTER IV.—INJUNCTIONS.

- 718. By whom granted.
- 719. Grounds for injunction.
- 720. Injunction for malicious erection of structures.

- | | |
|--|--|
| 721. Time for granting. | 731. Money collected on enjoined judgment to be paid into court. |
| 722. Notice—Emergency. | 732. Order disobeyed—Contempt. |
| 723. Affidavits on hearing of application. | 733. Arrest and indemnity. |
| 724. Terms and conditions imposed. | 734. Bond for appearance. |
| 725. Bond for injunction. | 735. Motion to vacate or modify. |
| 726. Second bond when first insufficient. | 736. Damages upon dissolution of injunction to stay proceedings. |
| 727. Copy of order sufficient writ. | 737. Damages for waste and rents. |
| 728. Stay of judgment—Release of errors. | 738. Motion to reinstate. |
| 729. Who bound by. | 739. Power of judge or court. |
| 730. Notice—Effect. | |

CHAPTER V.—RECEIVERS.

- | | |
|---------------------------|---|
| 740. Receiver, defined. | 743. Powers of receiver. |
| 741. Appointment—Grounds. | 744. Order when part of claim admitted. |
| 742. Oath and bond. | |

CHAPTER VI.—DEPOSITS IN COURT.

- | | |
|---------------------------------|----------------------------------|
| 745. Deposits in court. | 747. Custody of money deposited. |
| 746. Manner of enforcing order. | |

CHAPTER VII.—ARREST AND BAIL.

- | | |
|--|--|
| 748. No arrest except as provided by statute. | 761. Proceedings against bail. |
| 749. Defendant, when subject to arrest. | 762. Exoneration of bail. |
| 750. Proof required to obtain order. | 763. Return of sheriff—Exception to bail. |
| 751. Court or judge must fix bail. | 764. Notice of justification. |
| 752. Bond required of plaintiff. | 765. Qualifications of bail. |
| 753. Defendant may move to vacate order—Proceedings thereon. | 766. Justification, how made. |
| 754. Warrant must not issue till complaint is filed. | 767. Order when bail found sufficient. |
| 755. Warrant must state cause of arrest. | 768. Deposit of money instead of bail. |
| 756. Defendant entitled to copy of warrant. | 769. Bail money to be paid into court. |
| 757. Execution of warrant—Fees of sheriff. | 770. Bail may be substituted for money. |
| 758. Conditions of bail bond. | 771. Disposition of bail money after judgment. |
| 759. Surrender of defendant. | 772. Liability of sheriff for escape. |
| 760. Bail may arrest defendant. | 773. Judgment—Sheriff as bail. |
| | 774. Bail liable to sheriff. |
| | 775. Examination of surety by officer. |
| | 776. Money may be deposited for bail. |
| | 777. Bonds not to fail for want of form. |

CHAPTER VIII.—NE EXEAT.

- | | |
|---|--------------------------------|
| 778. Affidavit for writ. | 781. Persons entitled to writ. |
| 779. Complaint—Bond—Order of arrest. | 782. Habeas corpus. |
| 780. Recognizance—Commitment—Discharge. | 783. Before justices. |
| | 784. Venue. |

CHAPTER I.

ATTACHMENTS.

§ 647. Attachment—Time for Granting.

The plaintiff at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant, or that of any one or more of several defendants, attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may may recover. [L. '86, p. 39, § 1; 2 H. C., § 288.]

For former enactments on this subject see: L. '54, pp. 155-162; L. '60, pp. 30-36; L. '63, pp. 112-120; L. '69, pp. 41-47; L. '71, pp. 9, 10; L. '73, pp. 43-50; L. '77, pp. 35-40; Cd. '81, §§ 174-192.

The foregoing provisions are repealed by the provisions of this chapter.

Cited in 10 Wash. 450; 29 Wash. 203; 86 Wash. 304; 93 Wash. 100; 110 Wash. 50.

Nature and Purpose of Remedy: See Remington's Digest, Attach., § 1; Nesqually Mill Co. v. Taylor, 1 W. T. 1; Windt v. Banniza, 2 Wash. 147, 26 Pac. 189; Denny v. Sayward, 10 Wash. 422, 39 Pac. 119; Bingham v. Keylor, 19 Wash. 555, 53 Pac. 729; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748; Clifford v. Pateros Transfer Co., 71 Wash. 665, 129 Pac. 369.

Actions in Which Attachment is Authorized: See Remington's Digest, Attach., § 1-1; Advance Thresher Co. v. Schimke, 47 Wash. 162, 91 Pac. 645; State ex rel. Getzelman v. Superior Court, 93 Wash. 98, 159 Pac. 1193.

An attachment may issue in an equitable action, when the object is to recover a specified amount of money: Bingham v. Keylor, 19 Wash. 555, 53 Pac. 729; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

PROPERTY SUBJECT TO ATTACH-

MENT: See Remington's Digest, Attach., §§ 5-7. Personal property in general: Barlow v. Coggan, 1 W. T. 257; Real property in general: Jean v. Dec, 5 Wash. 580, 32 Pac. 460; Krutz v. Batts, 18 Wash. 460, 51 Pac. 1054. Property mortgaged or otherwise encumbered: Marsh v. Wade, 1 Wash. 538, 20 Pac. 578 (modifying Byrd v. Forbes, 3 W. T. 318, 13 Pac. 715); Voorhies v. Hennessy, 7 Wash. 243, 34 Pac. 931.

Ownership or Possession of Property as Determining Liability: See Remington's Digest, Attach., § 8; Clerf v. Montgomery, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733; Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345; Standard Furniture Co. v. Van Alstine, 31 Wash. 499, 72 Pac. 119.

For text treatment of "Attachment," see 2 R. C. L. 797.

Attachment for goods or money embezzled, stolen or converted. 4 A. L. R. 832.

Attachment in libel and slander cases. 11 A. L. R. 378.

§ 648. Issuance of Writ, Affidavit for.

The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or someone in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets), and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and either,—

1. That the defendant is a foreign corporation; or
2. That the defendant is not a resident of this state; or
3. That the defendant conceals himself so that the ordinary process of law cannot be served upon him; or
4. That the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be served upon him; or
5. That the defendant has removed or is about to remove any of his property from this state, with intent to delay or defraud his creditors; or
6. That the defendant has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, any of his property, with intent to delay or defraud his creditors; or
7. That the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or
8. That the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or
9. That the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female. [L. '86, p. 39, § 2; 2 H. C., § 289.]

Amendments of, see *infra*, § 677.

Cited in 1 Wash. 463; 2 Wash. 151; 12 Wash. 284; 17 Wash. 297; 19 Wash. 557; 21 Wash. 635; 47 Wash. 164; 54 Wash. 509; 79 Wash. 467; 81 Wash. 38; 93 Wash. 101.

An unliquidated claim for damages for breach of covenant is an "indebtedness" within this section: *State ex rel. Getzelman v. Superior Court*, 93 Wash. 98, 159 Pac. 1193.

PROCEEDINGS TO PROCURE: See *Remington's Digest, Attach.*, §§ 10—12. Jurisdiction of action: *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40; *Yarbrough v. Pugh*, 63 Wash. 140, 114 Pac. 918, 33 L. R. A. (N. S.) 351. Jurisdiction of person of defendant: *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660. Place of bringing proceedings: *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76; *State ex rel. Peterson v. Superior Court, Pierce County*, 5 Wash. 639, 32 Pac. 553.

AFFIDAVITS: See *Remington's Digest, Attach.*, §§ 13—15. Formal requisites: *Tacoma Grocery Co. v. Draham*, 8 Wash. 263, 36 Pac. 31, 40 Am. St. Rep. 907. Alternative or conjunctive statements: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1; *Blackinton v. Rumpf*, 12 Wash. 279, 40 Pac. 1063. Amendment and supplemental affidavits: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1; *Brandenstein v. Way*, 17 Wash. 293, 49 Pac. 511.

Fraudulent Transfer or Other Disposition of Property: See *Remington's Digest, Attach.*, § 3; *Holbrook v. Peters etc. Co.*, 8 Wash. 344, 36 Pac. 256; *Blackinton v. Rumpf*, 12 Wash. 279, 40 Pac. 1063; *Burns v. Woolery*, 15 Wash. 134, 45 Pac. 894; *Holt Mfg. Co. v. Thomas*, 69 Wash. 488, 125 Pac. 772.

Fraud in Contracting or Incurring Liability: See *Remington's Digest, Attach.*, § 2; *Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729.

Criminal Act in Incurring Liability: See *Remington's Digest, Attach.*, § 4; *Brandenstein v. Way*, 17 Wash. 293, 49 Pac. 511; *Bingham v. Keylor*, 19 Wash. 555, 53 Pac. 729; *Tacoma Mill Co. v. Perry*, 32 Wash. 650, 73 Pac. 801.

This section, subdivision 9, does not limit the causes for which the attachment may be issued in actions for damages; but the attachment may issue under other subdivisions when the debt is alleged to be due and the defendants are non-residents: *State ex rel. Getzelman v. Superior Court*, 93 Wash. 98, 159 Pac. 1193.

Effect of alternative or disjunctive statement of grounds in affidavit for attachment. 11 *Ann. Cas.* 27; 20 *Ann. Cas.* 576.

Questioning validity of attachment for insufficiency of affidavits. 35 *L. R. A.* 778.

Omission of officer's jurat or signature on affidavit for attachment. 1 *A. L. R.* 1571.

What intent to defraud will sustain an attachment. 30 *L. R. A.* 465.

Fraudulent sale or conveyance of property as ground for attachment. 5 *Ann. Cas.* 618.

Sale of property without delivery or change of possession as ground for attachment. *Ann. Cas.* 1914D, 1094.

Right to issue attachment against foreign corporation on ground of nonresidence. *Ann. Cas.* 1916E, 362; 31 *L. R. A.* (N. S.) 278; *L. R. A.* 1915D, 116.

What is nonresidence for the purpose of attachment. 19 *L. R. A.* 665; *L. R. A.* 1915A, 400.

When does nonresidence of person intending to leave permanently begin. 1 *L. R. A.* (N. S.) 778.

§ 649. Attachment on Debt not Due.

An action may be commenced and the property of a debtor may be attached previous to the time when the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the affidavit, in addition to that fact, states,—

1. That the defendant is about to dispose of his property with intent to defraud his creditors; or

2. That the defendant is about to remove from the state, and refuses to make any arrangements for securing the payment of the debt when it falls due, and which contemplated removal was not known to the plaintiff at the time the debt was contracted; or

3. That the defendant has disposed of his property, in whole or in part, with intent to defraud his creditors; or

4. That the debt was incurred for property obtained under false pretenses. [L. '86, p. 39, § 3; 2 H. C., § 290.]

Cited in 1 Wash. 153; 2 Wash. 382; 23 Wash. 595; 40 Wash. 337; 54 Wash. 509; 76 Wash. 526.

The dissolution of an attachment will abate an action upon a promissory note brought before maturity under this section, "when nothing but time is wanting to fix an absolute indebtedness"; and plaintiff is not entitled to judgment, although his note matures before the dissolution of the attachment: Augir v. Foresman, 23 Wash. 595, 63 Pac. 201.

WRIT OR WARRANT—Time for Issuance of Writ: See Remington's Digest, Attach., § 17; Cosh-Murray Co. v. Tut-tich, 10 Wash. 449, 38 Pac. 1134; Schwa-

bacher Bros. & Co. v. Abrahams Grocery Co., 14 Wash. 225, 44 Pac. 257; Cox v. Dawson, 2 Wash. 381, 26 Pac. 973; Augir v. Foresman, 23 Wash. 597, 63 Pac. 201.

PROCEEDINGS TO SUPPORT OR ENFORCE—Sufficiency of Complaint or Other Pleading, on Debt not Due: See Remington's Digest, Attach., § 31; Cox v. Dawson, 2 Wash. 381, 26 Pac. 973; Augir v. Foresman, 23 Wash. 595, 63 Pac. 201; Carstens v. Milo, 40 Wash. 335, 82 Pac. 410; Johnson v. Muenz, 76 Wash. 526, 137 Pac. 126. Amendment of complaint: Roznik v. Becker, 68 Wash. 63, 122 Pac. 593.

§ 650. Answer, in Case Debt not Due.

If the debt or demand for which the attachment is sued out is not due at the time of the commencement of the action, the defendant is not required to file any pleadings until the maturity of such debt or demand, but he may, in his discretion, do so, and go to trial as early as the cause is reached. [L. '86, p. 40, § 4; 2 H. C., § 291.]

§ 651. Judgment Suspended.

No final judgment shall be rendered in such action, unless the party consents, as in the last section, until the debt or demand upon which it is based becomes due. But property of a perishable nature may be sold as in other cases of attachment. [L. '86, p. 40, § 5; 2 H. C., § 292.]

See references to § 647.

§ 652. Bond for Attachment—Sureties—Qualifications—Conditions.

Before the writ of attachment shall issue the plaintiff, or someone in his behalf, shall execute and file with the clerk a bond or undertaking, with two or more sureties, in the sum in no case less than three hundred dollars, in the superior court, nor less than fifty dollars in the justice court, and double the amount for which plaintiff demands judgment, conditional that the plaintiff will prosecute his action without delay and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the amount specified in such bond or undertaking, as the penalty thereof, should the same be wrongfully, oppressively or maliciously sued out. With said bond or undertaking there shall also be filed the affidavit of the sureties, from which it must appear that such sureties are qualified and that they are, taken together, worth the sum specified in the bond or undertaking, over and above all debts and liabilities, and property exempt from execution. No person not qualified to become bail upon arrest shall be qualified to become surety upon a bond or undertaking for an attachment: Provided, that when it is desired to attach real estate only, and such fact is stated in the affidavit for attachment and the ground of attachment is that the defendant is a foreign corporation or is not a resident of the state, or conceals himself or that the ordinary process of law

cannot be served upon him, or has absconded or absented himself from his usual place of abode, so that the ordinary process of law cannot be served upon him, the writ of attachment shall issue without bond or undertaking by or on behalf of the plaintiff: And provided further, that when the claim, debt or obligation, whether in contract or tort, upon which plaintiff's cause of action is based, shall have been assigned to him, and his immediate or any other assignor thereof retains or has any interest therein, then the plaintiff and every assignor of said claim, debt or obligation who retains or has any interest therein, shall be jointly and severally liable to the defendant for all costs that may be adjudged to him and for all damages which he may sustain by reason of the attachment, should the same be wrongfully, oppressively or maliciously sued out. [L. '03, p. 47, § 1. Cf. L. '86, p. 40, § 6; 2 H. C., § 293.]

Cited in 6 Wash. 306; 11 Wash. 187; 20 Wash. 110; 68 Wash. 66.

Bond: See Remington's Digest, Attach., §§ 16, 16-1. Sufficiency and justification of sureties: *Baxter v. Smith*, 2 W. T. 97, 4 Pac. 35. Amendment: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

Validity and effect of attachment bond having sureties fewer than required number. 9 Ann. Cas. 708.

False justification by surety on attachment bond as contempt. 11 A. L. R. 347.

§ 653. Additional Security—Restitution on Failure to Give.

The defendant may, at any time before judgment, move the court or judge for additional security on the part of the plaintiff, and if, on such motion, the court or judge is satisfied that the surety in the plaintiff's bond has removed from this state, or is not sufficient, the attachment may be vacated, and restitution directed of any property taken under it, unless in a reasonable time, to be fixed by the court or judge, further security is given by the plaintiff in form as provided in the preceding section. [L. '86, p. 40, § 7; 2 H. C., § 294.]

Cited in 48 Wash. 428.

§ 654. Action on Bond—Damages.

In an action on such bond, the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual damages sustained and reasonable attorney's fees to be fixed by the court; and if it be shown that such attachment was sued out maliciously, he may recover exemplary damages, nor need he wait until the principal suit is determined before suing on the bond. [L. '86, p. 41, § 8; 2 H. C., § 295.]

Cited in 6 Wash. 29, 307; 12 Wash. 16; 20 Wash. 108; 79 Wash. 468.

LIABILITIES ON BONDS FOR WRONGFUL ATTACHMENT—Accrual or Release of Liability by Breach or Fulfillment of Conditions: See Remington's Digest, Attach., § 53; *Maxwell v. Griffith*, 20 Wash. 106, 54 Pac. 938; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

Persons Entitled to Damages: See Remington's Digest, Attach., § 55; *Slauson v. Schwabacher*, 4 Wash. 783, 31 Pac. 329,

31 Am. St. Rep. 948; *Gutter v. Joiner*, 56 Wash. 202, 105 Pac. 457.

Persons Liable: See Remington's Digest, Attach., § 56; *Rodolph v. Mayer*, 1 W. T. 133; *Chezum v. Parker*, 19 Wash. 645, 54 Pac. 22; *Van De Vanter v. Davis*, 23 Wash. 693, 63 Pac. 555.

Actions—Presumption of Want of Probable Cause, and Malice: See Remington's Digest, Attach., § 57; *Dawson v. Baum*, 3 W. T. 464, 19 Pac. 46; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; *Sloan v. Langert*, 6

Wash. 26, 32 Pac. 1015; Hilfrich v. Meyer, 11 Wash. 186, 39 Pac. 455; McGill v. Fuller & Co., 45 Wash. 615, 88 Pac. 1038.

— **Existence of Probable Cause:** See Remington's Digest, Attach., § 58; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Curry v. Catlin, 12 Wash. 322, 41 Pac. 55; Levy v. Fleischner Co., 12 Wash. 15, 40 Pac. 384; Voss v. Bender, 32 Wash. 566, 73 Pac. 697; Wild Rose Orchard Co. v. Critzer, 79 Wash. 462, 140 Pac. 561.

— **Pleading:** See Remington's Digest, Attach., § 59; Church v. Campbell, 7 Wash. 547, 35 Pac. 381; Cole v. Noerdlinger, 22 Wash. 51, 60 Pac. 57; Voss v. Bender, 32 Wash. 566, 73 Pac. 697.

Sureties are not liable when the complaint does not allege the execution of the bond by the sureties: Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

— **Damages:** See Remington's Digest, Attach., § 60; Sloan v. Langert, 6 Wash. 26, 32 Pac. 1015; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Hilfrich v. Meyer, 11 Wash. 186, 39 Pac. 455.

The attorney's fees in proceedings for dissolving an attachment is a matter of damages to be submitted to the jury in an action on a bond, while the fees in an action on the bond, are, under this section, to be fixed by the court: Maxwell v. Griffith, 20 Wash. 106, 54 Pac. 938.

— **Measure of Damages:** See Remington's Digest, Attach., § 61; Seattle Crockery Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156; Curry v. Catlin, 12 Wash. 322, 41 Pac. 55; McGill v. Fuller & Co., 45 Wash. 615, 88 Pac. 1038; Wild Rose Orchard Co. v. Critzer, 79 Wash. 462, 140 Pac. 561.

— **Exemplary Damages:** See Remington's Digest, Attach., § 62; Sloan v. Langert, 6 Wash. 26, 32 Pac. 1015. (Spokane Truck & Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689, distinguished); Hilfrich v. Meyer, 11 Wash. 186, 39 Pac. 455; Levy v. Fleischner, 12 Wash. 15, 40 Pac. 384; McGill v. Fuller & Co., 45 Wash. 615, 88 Pac. 1038.

Who is real party in interest who must bring action on attachment bond. 64 L. R. A. 605.

Form of judgment on attachment bond. 62 L. R. A. 442.

Punitive damages as recoverable in action on attachment bond. Ann. Cas. 1915A, 349; 29 L. R. A. (N. S.) 272.

Judgment against principal as judgment against surety on attachment bond. 9 Ann. Cas. 157; Ann. Cas. 1915D, 407; 40 L. R. A. (N. S.) 743; L. R. A. 1918E, 820.

Measure of damages recoverable for wrongful levy under writ of attachment. Ann. Cas. 1915B, 1219.

Injury to credit as element of damages for wrongful attachment. Ann. Cas. 1915A, 1221.

Loss of profits as element of damages by seizure under wrongful attachment. 52 L. R. A. 54; 46 L. R. A. (N. S.) 470.

Mental suffering as element of damages for wrongful attachment. 2 Ann. Cas. 55.

Joint liability where several independent writs were executed simultaneously, each of which alone causes, or tends to produce, some damage. 9 A. L. R. 944.

§ 655. Contents of Writ—Levy.

The writ of attachment shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep the property of such defendant within his county, to the requisite amount, which shall be stated in conformity with the affidavit. The sheriff shall in all cases attach the amount of property directed, if sufficient not exempt from execution be found in his county, giving that in which the defendant has a legal and unquestionable title a preference over that in which his title is doubtful or only equitable, and he shall, as nearly as the circumstances of the case will permit, levy upon property fifty per cent greater in valuation than the amount which plaintiff in his affidavit claims to be due. When property is seized on attachment, the court may allow to the officer having charge thereof such compensation for his trouble and expenses in keeping the same as shall be reasonable and just. [L. '86, p. 41, § 9; 2 H. C., § 296.]

Cited in 5 Wash. 689.

§ 656. Writs to Different Counties—Costs.

Writs of attachment may be issued from the superior courts to different counties, and several may, at the option of the plaintiff, be issued at the same time, or in succession and subsequently, until sufficient property has been attached; but only those executed shall be taxed in the costs, unless otherwise ordered by the court, and if more property is attached in the aggregate than the plaintiff is entitled to have held, the surplus must be abandoned and the plaintiff pay all costs incurred in relation to such surplus. After the first writ shall have issued, it shall not be necessary for the plaintiff to file any further affidavit or bond, but he shall be entitled to as many writs as may be necessary to secure the amount claimed. [L. '86, p. 41, § 10; 2 H. C., § 297.]

Cited in 25 Wash. 183.

Under this section, which authorizes the issuance of successive writs of attachment, and section 677, which provides for the amendment of the affidavit for the writ, the dissolution of an attach-

ment on one ground is not res judicata when a new or amended affidavit sets up an entirely new ground for the writ: *Bingham v. Keylor*, 25 Wash. 156, 64 Pac. 942.

§ 657. Order of Execution of Writs.

Where there are several attachments against the same defendant, they shall be executed in the order in which they were received by the sheriff. [L. '86, p. 41, § 11; 2 H. C., § 298.]

Cited in 15 Wash. 645; 86 Wash. 122, 304.

Under section 515 and this section, the sale must be made under the senior writ to enable the senior creditor to protect his interest by a bid at his own sale; and the sheriff and his official bondsmen are liable for the value of the goods, if sale is made at a less value under a junior writ: *Continental Distributing Co. v. Hays*, 86 Wash. 300, 150 Pac. 416, Ann. Cas. 1917B, 708.

PRIORITIES: See *Remington's Digest*, Attach., §§ 21, 22. Priorities between attachments: *Meacham Arms Co. v. Strong*, 3 W. T. 61, 13 Pac. 245; *Wallace etc. Mfg. Co. v. Sharick*, 15 Wash. 643, 47

Pac. 20. Priorities between attachments and other liens or claims: *State ex rel. Arthur Mach. Co. v. Superior Court*, 7 Wash. 77, 34 Pac. 430; *State ex rel. Hunt v. Superior Court*, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; *State ex rel. Shelly v. Superior Court*, 8 Wash. 659, 35 Pac. 1092; *State ex rel. Perkins v. Graham*, 9 Wash. 528, 36 Pac. 1085; *State ex rel. Baum v. Superior Court*, 14 Wash. 324, 44 Pac. 542; *Alexander v. Hemrich*, 4 Wash. 727, 31 Pac. 21; *Wells v. Columbia Nat. Bank*, 6 Wash. 621, 34 Pac. 160; *Puget Sound Nat. Bank v. Levy*, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; *State ex rel. Schwabacher Bros. Co. v. Superior Court*, 11 Wash. 63, 39 Pac. 244.

§ 658. Following Property into Adjoining County.

If, after an attachment has been placed in the hands of the sheriff, any property of the defendant is moved from the county, the sheriff may pursue and attach the same in an adjoining county, within twenty-four hours after removal. [L. '86, p. 42, § 12; 2 H. C., § 299.]

§ 659. Manner of Executing Writ.

The sheriff to whom the writ is directed and delivered must execute the same without delay, as follows:—

1. Real property shall be attached by filing a copy of the writ, together with a description of the property attached, with the county auditor of the county in which the attached real estate is situated;

2. Personal property capable of manual delivery shall be attached by taking into custody;

3. Stock or shares, or interest in stock or shares, of any corporation, association, or company shall be attached by leaving with the president or other head of the same, or the secretary, cashier, or managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ. [L. '86, p. 42, § 13; 2 H. C., § 300.]

Parts of sections 659, 662, 666—668 omitted as repealed by chapter II relating to garnishments.

Subdivision 4 of this section omitted as repealed. See L. '93, p. 102, § 27; *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223.

Cited in 14 Wash. 177; 28 Wash. 423; 54 Wash. 301; 86 Wash. 528.

LEVY, LIEN AND CUSTODY AND DISPOSITION OF PROPERTY: See Remington's Digest, Attach., §§ 18—20. Mode and sufficiency of levy: *Byrd v. Forbes*, 3 W. T. 318, 13 Pac. 715; *Meacham Arms Co. v. Strong*, 3 W. T. 61, 13 Pac. 245; *Godefroy v. Hupp*, 93 Wash. 371, 160 Pac. 1056.

A levy upon a growing crop of wheat made by posting notices of sale and delivering a copy of the execution and notices to the judgment debtors, is not valid as to subsequent purchasers from the debtors: *Cupples v. Level*, 54 Wash. 299, 103 Pac. 430, 23 L. R. A. (N. S.) 519.

Property Levied on Under Other Process: *Meacham Arms Co. v. Strong*, 3 W. T. 61, 13 Pac. 245. Operation and effect of levy in general: *Dixon v. Barnett*, 3 Wash. 645, 29 Pac. 209; *McConnell v. Kaufman*, 5 Wash. 686, 32 Pac. 782.

DURATION OF LIEN: See Remington's Digest, Attach., §§ 24—26. In general: *Sheppard v. Guisler*, 10 Wash. 41, 38 Pac. 759; *Van de Vanter v. Davis*, 23 Wash. 693, 63 Pac. 555; *Bierer v. Blurock*, 9 Wash. 63, 36 Pac. 975. Waiver, release, discharge or extinguishment: *Renton v. St. Louis*, 1 W. T. 215; *Schloss v. State Bank of Washington*, 4 Wash. 726, 31 Pac. 23; *Gullickson v. Fenlon*, 48 Wash. 503, 93 Pac. 1074. Restoration of lien: *Anderson v. Land*, 5 Wash. 493, 32 Pac. 107, 34 Am. St. Rep. 875.

What is sufficient levy on personal property. *Ann. Cas.* 1916B, 984, 1000.

Sufficiency of levy upon, and custody of, property in car or other vehicle of common carrier. *L. R. A.* 1915F, 1184.

What is sufficient levy of attachment on cattle on range. *Ann. Cas.* 1916B, 995.

§ 660. Examination of Defendant Touching His Property.

Whenever it appears by the affidavit of the plaintiff, or by the return of the attachment, that no property is known to the plaintiff or officer on which the attachment can be executed, or not enough to satisfy the plaintiff's claim, and it being shown to the court or judge by affidavit that the defendant has property within the state not exempt, the defendant may be required by such court or judge to attend before the court or judge, or referee appointed by the court or judge, and give information on oath respecting the same. [L. '86, p. 42, § 14; 2 H. C., § 301.]

§ 661. Receiver Appointed for Attached Property.

The court before whom the action is pending, or the judge thereof, may at any time appoint a receiver to take possession of property attached under the provisions of this chapter, and to collect, manage, and control the same, and pay over the proceeds, according to the nature of the property and the exigency of the case. [L. '86, p. 42, § 15; 2 H. C., § 302.]

Cited in 7 Wash. 80; 14 Wash. 326; 20 Wash. 249.

Jurisdiction and Authority of Court or Judge: See Remington's Digest, Receivers,

§ 14; *State ex rel. Baum v. Superior Court*, 14 Wash. 324, 44 Pac. 542.

An attaching creditor has the right not only to have his debt paid out of the

proceeds of the property attached, but also to have it retained intact until he obtains judgment and issues execution; and a nonattaching creditor cannot interfere therewith by securing a receiver: State ex rel. Arthur Mach. Co. v. Su-

perior Court, 7 Wash. 77, 34 Pac. 430; see State v. Superior Court, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354.

Appointment of receiver to preserve status quo pending attachment proceedings. 38 L. R. A. (N. S.) 232.

§ 662. Sale Before Judgment—Perishable Property.

If any of the property attached be perishable, or in danger of serious and immediate waste or decay, the sheriff shall sell the same in the manner in which such property is sold on execution. Whenever it shall be made to appear satisfactorily to the court or judge that the interest of the parties to the action will be subserved by a sale of any attached property, the court or judge may order such property to be sold in the same manner as like property is sold under execution. Such order shall be made only upon notice to the adverse party or his attorney, in case such party shall have been personally served with a summons in the action. [L. '86, p. 42, § 16; 2 H. C., § 303.]

The last part of this section omitted as repealed. See note to § 659.

Cited in 5 Wash. 690.

PROPERTY ATTACHED: See Remington's Digest, Attach., §§ 27, 28. Custody and care: State ex rel. Arthur Mach. Co. v. Superior Court, 7 Wash. 77, 34 Pac. 430; State ex rel. Hunt v. Superior Court,

8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; Sanders v. Main, 9 Wash. 46, 36 Pac. 1049. Expense of keeping property and compensation of custodian: Barnett v. O'Loughlin, 8 Wash. 260, 35 Pac. 1099.

§ 663. Custody of Money Received.

All moneys received by the sheriff under the provisions of this chapter and all other attached property shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. [L. '86, p. 43, § 17; 2 H. C., § 304.]

Cited in 23 Wash. 697.

§ 664. Attachment of Moneys in Hands of Officer.

A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk, and by him minuted as an assignment on the margin of the execution docket, and also an executor or administrator may be garnished for money due from the decedent to the defendant. [L. '86, p. 43, § 19; 2 H. C., § 306.]

Cited in 3 Wash. 375; 14 Wash. 177; 16 Wash. 127; 20 Wash. 215; 30 Wash. 273; 94 Wash. 576.

This section was not repealed by the later enactment on the subject of garnishments: Pierce v. Commercial Inv. Co., 30 Wash. 272, 70 Pac. 496.

Under this section a garnishment is superior to an assignment of the judgment which was not filed until three hours after the writ was served: Mottet v. Stafford, 94 Wash. 572, 162 Pac. 1001.

Property in Custody of the Law: See Remington's Digest, Attach., § 9; Thompson v. Huron Lumber Co., 4 Wash. 600.

30 Pac. 741, 31 Pac. 25; Conover v. Hull, 10 Wash. 673, 39 Pac. 166, 45 Am. St. Rep. 810; McKay v. Elwood, 12 Wash. 579, 41 Pac. 919; Compton v. Schwabacher Bros. Co., 15 Wash. 306, 46 Pac. 338; State ex rel. Krisch v. Superior Court, 36 Wash. 91, 78 Pac. 461; Traders' Bank of Tacoma v. Van Wagenen, 2 Wash. 172, 26 Pac. 253; Hamilton Brown Shoe Co. v. Adams, 5 Wash. 333, 32 Pac. 92; Mansfield v. First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999; Eidson v. Woolery, 10 Wash. 225, 38 Pac. 1025.

Attachment of proceeds of execution sale in the hands of the sheriff. 43 L. R. A. (N. S.) 571.

Right to attach fund in the hands of officer of court after he has been ordered to pay the same to the

party. 13 L. R. A. (N. S.) 758; 30 L. R. A. (N. S.) 720.

§ 665. Attachment of Moneys in Court.

When the property to be attached is a fund in court, the execution of a writ of attachment shall be by leaving with the clerk of the court [a copy] thereof, with notice in writing specifying the fund. [L. '86, p. 43, § 20; 2 H. C., § 307.]

Cited in 3 Wash. 375; 16 Wash. 127; 20 Wash. 216; 30 Wash. 273.

§ 666. Inventory of Sheriff.

The sheriff shall make a full inventory of the property attached, and return the same with the writ. [L. '86, p. 43, § 21; 2 H. C., § 308.]

The last part of this section is repealed. See note to § 659.

§ 667. Subjection of Attached Property to Judgment.

If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant as in this chapter provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose,—

1. By applying on the execution issued on said judgment the proceeds of all sales of perishable or other property sold by him, or so much as shall be necessary to satisfy the judgment;

2. If any balance remain due, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands.

Notice of the sale shall be given and the sale conducted as in other cases of sales on execution. [L. '86, p. 44, § 25; 2 H. C., § 312.]

Cited in 6 Wash. 62; 23 Wash. 697.

Sale or Other Disposition of Property and Proceedings: See Remington's Digest, Attach., §§ 29, 30; Byrd v. Forbes, 3 W. T. 318, 13 Pac. 715; Bradley v. Gotzian, 12 Wash. 71, 40 Pac. 623.

Transfers of Property Pending or Subject to Attachment: See Remington's Digest, Attach., § 23; Baxter v. Smith, 2 W. T. 97, 4 Pac. 35; Langert v. Brown, 3 W. T. 102, 13 Pac. 704; First Nat. Bank v. Carter, 6 Wash. 494, 33 Pac. 824; Johnson v. Irwin, 16 Wash. 652, 48 Pac.

345; Clerf v. Montgomery, 15 Wash. 483, 46 Pac. 1028, 48 Pac. 733; Hacker v. White, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. Rep. 945; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

Judgment, Form and Sufficiency: See Remington's Digest, Attach., § 32; Nesqually Mill Co. v. Taylor, 1 W. T. 1; Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759; Pennsylvania Mtg. Inv. Co. v. Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43; Roznik v. Becker, 68 Wash. 63, 122 Pac. 593.

§ 668. Collection When Property Attached Insufficient—Surplus.

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands and any proceeds of the property attached unapplied on the judgment. [L. '86, p. 44, § 26; 2 H. C., § 313.]

See note to § 659, omission of portion of section explained.

Cited in 23 Wash. 697; 71 Wash. 668.

§ 669. Procedure in Case Execution Returned Unsatisfied.

If the execution be returned unsatisfied, in whole or in part, the plaintiff may proceed as in other cases upon the return of an execution. [L. '86, p. 45, § 27; 2 H. C., § 314.]

§ 670. Judgment for Defendant, Effect of.

If the defendant recover judgment against the plaintiff, all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands, shall be delivered to the defendant or his agent. The order of attachment shall be discharged, and the property released therefrom. [L. '86, p. 45, § 28; 2 H. C., § 315.]

Cited in 23 Wash. 697.

§ 671. Discharge of Attachment on Counter-bond.

If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the attachment, or after the return thereof, by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be deemed an appearance of such defendant to the action. [L. '86, p. 45, § 29; 2 H. C., § 316.]

Cited in 1 Wash. 463; 2 Wash. 151; 37 Wash. 485, 487—489; 99 Wash. 606.

Discharge of Attachment on Security: See Remington's Digest, Attach., § 42;

Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004; Truax v. Title Guaranty & Surety Co., 94 Wash. 472, 162 Pac. 586; Petri v. Manny, 99 Wash. 601, 170 Pac. 127.

§ 672. Judgment on Bond.

Such bond shall be part of the record, and if judgment go against the defendant, the same shall be entered against him and sureties. [L. '86, p. 45, § 30; 2 H. C., § 317.]

Cited in 37 Wash. 485, 488; 99 Wash. 606.

Liability of Sureties—Notice: See Remington's Digest, Attach., § 54; Park v.

Mighell, 3 Wash. 737, 29 Pac. 556; Seattle Crocker Co. v. Haley, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

§ 673. Motion to Discharge Attachment.

The defendant may at any time after he has appeared in the action, either before or after the release of the attached property, or before any attachment shall have been actually levied, apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, that the writ of attachment be discharged on the ground that the same was improperly or irregularly issued. [L. '86, p. 45, § 31; 2 H. C., § 318.]

Cited in 1 Wash. 463; 2 Wash. 151; 15 Wash. 311; 19 Wash. 284; 23 Wash. 597; 25 Wash. 191; 37 Wash. 489; 48 Wash. 26; 68 Wash. 69; 105 Wash. 88.

QUASHING, VACATING, DISSOLUTION OR ABANDONMENT—Grounds for Quashing, Vacating or Dissolving: See Remington's Digest, Attach., § 33; Alexander v. Hemrich, 4 Wash. 727, 31 Pac. 21; Carter v. Davis, 6 Wash. 327, 33

Pac. 833; Zelinsky v. Price, 8 Wash. 256, 36 Pac. 28; Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748; Roznik v. Becker, 68 Wash. 63, 122 Pac. 593; Wentworth v. Moore, 64 Wash. 451, 117 Pac. 251; Holman v. Cooper, 48 Wash. 24, 92 Pac. 781.

See, also, Fawcner, Currie & Co. v. Sanitary Fish Co., 105 Wash. 88, 177 Pac. 708.

PROCEEDINGS TO DISSOLVE: See Remington's Digest, Attach., §§ 36—39-1; **On motion in general:** Turpin v. Whitney, 6 Wash. 61, 32 Pac. 1022, 34 Pac. 151. **Affidavits** in support of application: Windt v. Banniza, 2 Wash. 147, 26 Pac. 189. **Opposing** and rebutting affidavits: Hansen v. Doherty, 1 Wash. 461, 25 Pac. 297; Washington Liquor Co. v. Alladio Cafe Co., 28 Wash. 176, 68 Pac. 444; Nettleton v. Howe, 81 Wash. 32, 142 Pac. 450. **Issues and questions** considered: Bender v. Rinker, 21 Wash. 633, 59 Pac. 503; Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 759; Bingham v. Keylor, 25 Wash. 156, 64 Pac. 942; Hanson v. Tompkins, 2 Wash. 508, 27 Pac. 73; Cox v. Dawson, 2 Wash. 381, 26 Pac. 973; Blackinton v. Rumpf, 12 Wash. 279, 40 Pac. 1063; Nettleton v. Howe, 81 Wash. 32, 142 Pac. 450. **Evidence and effect of affidavits:** Nichoson v. Erickson, 56 Wash. 419, 105 Pac. 836; Watson v. Shelton, 56 Wash. 426, 105 Pac. 850; Gordon v. Gillespie, 58 Wash. 627, 109 Pac. 109.

See, also, Fawkner, Currie & Co., v. Sanitary Fish Co., 105 Wash. 88, 177 Pac. 708.

Persons Entitled to Move: See Remington's Digest, Attach., § 34; Nesqually Mill Co. v. Taylor, 1 W. T. 1; Windt v. Banniza, 2 Wash. 147, 26 Pac. 189; Holman v. Cooper, 48 Wash. 24, 92 Pac. 781; Roznik v. Becker, 68 Wash. 63, 122 Pac. 593.

Time for Attacking Attachment: See Remington's Digest, Attach., § 35; Rodolph v. Mayer, 1 W. T. 133; Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004; Godefroy v. Hupp, 93 Wash. 371, 160 Pac. 1056.

Right of defendant to move to dissolve attachment. **Ann. Cas.** 1916D, 476.

Nonownership of attached property as ground for dissolution. 47 **L. R. A. (N. S.)** 1127.

Possibility of appeal from dismissal of attachment as affecting right to withhold property from debtor. **L. R. A.** 1917B, 591.

Power of attorney to bind client by release of attachment. **L. R. A.** 1918D, 809.

Dissolution of attachment by death of defendant. **Ann. Cas.** 1917A, 149, 163.

§ 674. Hearing of Motion to Discharge—Affidavits.

If the motion be made upon affidavits upon the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence in addition to those on which the attachment was issued. [L. '86, p. 45, § 32; 2 H. C., § 319.]

Cited in 1 Wash. 463; 2 Wash. 151; 105 Wash. 91.

• **TRIAL:** See Remington's Digest, Attach., §§ 40—41½. **Hearing and determination:** Gehres v. Orlowski, 36 Wash. 156, 78 Pac. 792; Hansen v. Doherty, 1 Wash. 461, 25 Pac. 297; Windt v. Banniza, 2 Wash. 147, 26 Pac. 189; Nichoson v. Erickson, 56 Wash. 419, 105 Pac. 836; Hendelman v. Kahan, 48 Wash. 549, 93 Pac. 1074; Nettleton v. Howe, 81 Wash. 32, 142 Pac. 450. **Judgment or order:** Anderson v. Land, 5 Wash. 493, 32 Pac.

107, 34 Am. St. Rep. 875; Williams v. Miller, 1 W. T. 88. **Effect of decision denying motion:** Sheppard v. Guisler, 10 Wash. 41, 38 Pac. 739; Turpin v. Whitney, 6 Wash. 61, 32 Pac. 1022, 34 Pac. 151.

The fact that an order of court is made refusing to dissolve an attachment does not establish the validity of such attachment as against creditors, but it may be attacked by the receiver: Compton v. Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338.

§ 675. Discharge of Writ.

If upon application it satisfactorily appears that the writ of attachment was improperly or irregularly issued, it must be discharged. [L. '86, p. 45, § 33; 2 H. C., § 320.]

Effect of Dissolution: See Remington's Digest, Attach., § 44; Dixon v. Barnett, 3 Wash. 645, 29 Pac. 209; Ephraim v. Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; Sloan v. Langert, 6 Wash. 26, 32 Pac. 1015; Pennsylvania Mtg. Inv. Co. v. Gilbert, 18 Wash. 667, 52 Pac. 246; Augir v. Foresman, 23 Wash. 595, 63 Pac. 201; Bingham v. Keylor, 25 Wash.

156, 64 Pac. 942; Brady v. Onffroy, 37 Wash. 482, 79 Pac. 1004; Carstens v. Milo, 40 Wash. 335, 82 Pac. 410.

Damages and Costs on Dissolution: See Remington's Digest, Attach., § 45; Kratz v. Dawson, 3 W. T. 100, 13 Pac. 663; Compton v. Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338; Maxwell v. Griffith, 20 Wash. 106, 54 Pac. 938.

§ 676. Return of Sheriff.

The sheriff must return the writ of attachment with the summons, if issued at the same time, otherwise, within twenty days after its receipt, with a certificate of his proceedings indorsed thereon or attached thereto, and whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order may be filed in the offices of the county auditors in which the notices of attachment have been filed, and be indexed in like manner. [L. '86, p. 45, § 34; 2 H. C., § 321.]

§ 677. Liberal Construction—Amendments.

This chapter shall be liberally construed, and the plaintiff, at any time when objection is made thereto, shall be permitted to amend any defect in the complaint, affidavit, bond, writ, or other proceeding; and no attachment shall be quashed or dismissed, or the property attached released, if the defect in any of the proceedings has been or can be amended so as to show that a legal cause for the attachment existed at the time it was issued, and the court shall give the plaintiff a reasonable time to perfect such defective proceedings. The causes for attachment shall not be stated in the alternative. [L. '86, p. 46, § 35; 2 H. C., § 322.]

Cited in 16 Wash. 127; 17 Wash. 296; 19 Wash. 557; 21 Wash. 635; 25 Wash. 184; 40 Wash. 339.

A defective affidavit may be amended: *Nesqually Mill Co. v. Taylor*, 1 W. T. 1.

Under this section, a bond may be amended to cover "all costs," as required by section 652: *Roznik v. Becker*, 68 Wash. 63, 122 Pac. 593.

An affidavit may be amended to set forth grounds unknown to plaintiff at the time, or subsequently discovered, if they existed at the time of filing the original writ, and a dissolution of the writ is not *res judicata* as to a new ground: *Bingham v. Keylor*, 25 Wash. 156, 64 Pac. 942.

§ 678. Power of Judge at Chambers.

The judge of any superior court shall have power to make every order which, by the provisions of this chapter, may be made by the court. [L. '86, p. 46, § 36; 2 H. C., § 323.]

§ 679. Sheriff, Defined—Proceedings in Justices' Courts.

The word "sheriff," as used in this chapter, is meant to apply to constables, when the proceedings are in a justice's court; and when the proceedings are in a justice's court, the justice is to be regarded as the clerk of the court for all purposes herein contemplated: Provided, that nothing contained in this chapter shall be construed to confer upon a justice of the peace power to issue a writ of attachment to be served out of the county in which such justice shall have his office, or to confer upon a sheriff, constable, or other officer power or authority to serve a writ of attachment issued out of justice's court beyond the limits of the county in which such justice shall have his office, except in cases provided for in section 658. And provided further, that nothing contained in this chapter shall be construed or held to authorize the attachment of real estate, or of any interest therein, under a writ of attachment issued out of any justice's court. [L. '86, p. 46, § 37; 2 H. C., § 324.]

See *supra*, § 44, subd. 8, jurisdiction of justices of the peace in attachments.
See *supra*, § 647 note.

Cited in 71 Wash. 597.

CHAPTER II. GARNISHMENTS.

§ 680. Writ, Grounds for Issuance of.

The clerks of the superior courts in the various counties in the state may issue writs of garnishment returnable to their respective courts in the following cases:—

1. Where an original attachment has been issued in accordance with the statutes in relation to attachments;

2. Where the plaintiff sues for a debt and makes affidavit that such debt is just, due and unpaid, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee;

3. Where the plaintiff has a judgment wholly or partially unsatisfied in the court from which he seeks to have a writ of garnishment issued. [L. '93, p. 95, § 1.]

For former laws on the subject of garnishment, see 2 Hill's Code, §§ 497, 498, and notes to §§ 647 and 659, *supra*.

Cited in 8 Wash. 537; 10 Wash. 162; 16 Wash. 127; 17 Wash. 369; 30 Wash. 273; 105 Wash. 677; 107 Wash. 467; 108 Wash. 184.

NATURE AND GROUNDS: See Remington's Digest, Garn., §§ 1—4. **Nature and purpose of remedy:** Coombs v. Davis, 2 W. T. 466, 7 Pac. 860; Kelly v. Ryan, 8 Wash. 536, 36 Pac. 478; Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505; Title Guarantee & Trust Co. v. Seattle Theater Co., 23 Wash. 517, 63 Pac. 212; Tatum v. Geist, 40 Wash. 575, 82 Pac. 912; Continental Distributing Co. v. Swanson, 79 Wash. 128, 139 Pac. 865; Morris & Co. v. Canadian Bank of Commerce, 95 Wash. 418, 163 Pac. 1139.

Under this section authorizing a garnishment (1) where an original attachment has been issued, and (2) where plaintiff sues for a "debt," the term "debt" is not limited to sums due on express contract, but is as broad as the term "indebtedness" in the attachment law, construing the statutes as in *pari materia* and tracing the history of legislation on the subject. *State ex rel. American*

Piano Co. v. Superior Court, 105 Wash. 676, 178 Pac. 827.

Actions in Which Garnishment is Authorized: *Rothchild Bros. v. Trewella*, 36 Wash. 679, 79 Pac. 480, 104 Am. St. Rep. 973, 68 L. R. A. 281.

Garnishment lies in an action to set aside a preference under the bankruptcy act, since the tort may be waived and the action based upon implied contract to repay the money obtained, the taking of which was a conversion: *State ex rel. American Piano Co. v. Superior Court*, 105 Wash. 676, 178 Pac. 827.

Return of Execution Unsatisfied: *Timm v. Stegman*, 6 Wash. 13, 32 Pac. 1004. Existence of or resort to other remedy: *Gaffney v. McGrath*, 23 Wash. 476, 63 Pac. 520.

A garnishment is merely an ancillary proceeding which immediately dies on termination of the original action: *State ex rel. Pioneer Mining & Ditch Co. v. Superior Court*, 108 Wash. 183, 183 Pac. 74.

For text treatment of "Garnishment," see 12 B. C. L. 771.

§ 680-1. Municipal Corporations Subject to After Judgment.

Counties, cities, towns, school districts and other municipal corporations shall be subject to garnishment in the superior and justice courts, but only after judgment shall have been entered against the defendant in the main action. [L. '15, p. 357, § 1.]

Cited in 92 Wash. 426, 429.

§ 680-2. Enforcement Against Municipal Corporations.

No regular judgment in garnishment shall be entered against any municipal corporation, but the judge of the superior court, or justice of the peace shall by written order command the auditing officer, or body of

such municipal corporation to audit and pay to the judgment creditor the amount due from the garnishee to the principal defendant, not exceeding the amount of the judgment in the main action, whereupon the same shall be paid by the garnishee, provided, nothing in this act shall be construed to impair the rights of defendants to claim exemptions of wages as provided by law. [L. '15, p. 357, § 2.]

§ 681. Bond to be Executed.

In the case mentioned in subdivision two of the preceding section the plaintiff shall execute a bond with two or more good and sufficient sureties, to be approved by the clerk issuing the writ, payable to the defendant in the suit, in double the amount of the debt claimed therein, conditioned that he will prosecute his suit and pay all damages and costs that may be adjudged against him for wrongfully suing out such garnishment. [L. '93, p. 95, § 2.]

"Preceding section," refers to § 680.

Cited in 107 Wash. 467; 108 Wash. 184.

A writ of garnishment is properly quashed where it was sued out to collect unpaid alimony, for which there was no judgment in any specific amount, and the

plaintiff failed to give any bond, as required by this section, in case the garnishment was based on *Id.*, § 680, subdiv. 2: *Liebig v. Liebig*, 107 Wash. 464, 182 Pac. 605.

§ 682. Application for Writ—Affidavit.

Before the issuance of the writ of garnishment the plaintiff or someone in his behalf shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that the plaintiff has reason to believe, and does believe, that the garnishee, stating his name and residence, is indebted to the defendant, or that he has in his possession, or under his control, personal property or effects belonging to the defendant, or that the garnishee is an incorporated or joint stock company, and that the defendant is the owner of shares in such company or has an interest therein. [L. '93, p. 95, § 3.]

Cited in 70 Wash. 30.

PERSONS AND PROPERTY SUBJECT TO GARNISHMENT: See Remington's Digest, Garn., §§ 5, 6. **Corporations in general:** *Dittenhaefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660; *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287. **Municipal corporations and officers:** *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207; *Eureka Sandstone Co. v. Pierce County*, 8 Wash. 236, 35 Pac. 1081; *Flood v. Libby*, 38 Wash. 366, 80 Pac. 533, 107 Am. St. Rep. 851.

This section carries the necessary implication that the act applies to officers and employees engaged in the public service, and abrogates the common-law immunity of officers' salaries from garnishment: *Hanson v. Hodge*, 92 Wash. 425, 159 Pac. 388.

This section subjecting the salary of county officers to garnishment does not diminish their salaries after election, in violation of constitution, article XI, section 8: *Hanson v. Hodge*, 92 Wash. 425, 159 Pac. 388.

Property in Custody of the Law: See Remington's Digest, Garn., §§ 19—21. In general: *McAlmond v. Bevington*, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597; *Pierce v. Commercial Inv. Co.*, 30 Wash. 272, 70 Pac. 496.

Cash accepted by a justice of the peace in lieu of bail, without any legal authority so to do, is not in custodia legis, and is subject to garnishment: *Kellogg v. Witte*, 107 Wash. 691, 182 Pac. 570.

Property Held by Receivers: *Russell v. Millett*, 20 Wash. 212, 55 Pac. 44. Property assigned for creditors: *Smith v. Cullen*, 18 Wash. 398, 51 Pac. 1040; *Merwin v. Fowler*, 20 Wash. 587, 56 Pac. 374; *Heermans v. Blakeslee*, 97 Wash. 647, 167 Pac. 128.

Joint or Several Property or Rights—Debt Due Defendant and Others Jointly: See Remington's Digest, Garn., § 22; Moore v. Gilmore, 16 Wash. 123, 47 Pac. 239, 58 Am. St. Rep. 20.

INTERESTS IN PROPERTY: See Remington's Digest, Garn., §§ 7—12-1. **Property leased:** Drake v. Catlin, 18 Wash. 316, 51 Pac. 396. **Property pledged:** Hardin v. White Swan Min. & Mill. Co., 26 Wash. 583, 67 Pac. 236; First National Bank of Everett v. Neilsen, 92 Wash. 84, 159 Pac. 113. **Rights or interests secured by liens:** Cooms v. Davis, 2 W. T. 466, 7 Pac. 860; Weisbach v. Arnold, 3 W. T. 111, 13 Pac. 417; Searle v. Bird, 94 Wash. 21, 161 Pac. 838; Mottet v. Stafford, 94 Wash. 572, 162 Pac. 1001. **Trust estates and equitable claims:** Millar & Co. v. Plass, 11 Wash. 237, 39 Pac. 956; Smith v. Gruber Lumber Co., 81 Wash. 111, 142 Pac. 493. **Interests under contracts in general:** Kohn v. Fishback, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; Holford v. Trewella, 36 Wash. 654, 79 Pac. 308. **Interests under insurance policies:** Winsor v. McLachlin, 12 Wash. 154, 40 Pac. 727. **Instruments and securities for payment of money and liabilities thereon in general:** Washington Brick, Lime & Mfg. Co. v. Traders' Nat. Bank, 46 Wash. 23, 89 Pac. 157, 123 Am. St. Rep. 912.

Demands not Matured and Contingent Liabilities: See Remington's Digest, Garn., §§ 13, 14; Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004; Eureka Sandstone Co. v. Pierce County, 8 Wash. 236, 35 Pac. 1081; Barkley v. Kerfoot, 77 Wash. 556, 137 Pac. 1046.

DEPOSITS: See Remington's Digest, Garn., §§ 17, 18. **Deposits in bank:** Commercial Bank of Tacoma v. Chilberg, 14 Wash. 247, 44 Pac. 264, 53 Am. St. Rep. 873; Beaston v. Portland Trust & Savings Bank, 89 Wash. 627, 155 Pac. 162, Ann. Cas. 1917B, 488; Morris & Co. v. Canadian Bank of Commerce, 95 Wash. 418, 163 Pac. 1139. **Capacity of depositor:** Marx v. Parker, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849.

See, also, Hallock v. National Bank of Commerce, 110 Wash. 385, 188 Pac. 479; Vickers v. Machinery Warehouse & Sales Co., 111 Wash. 576, 191 Pac. 869.

Payment to Defendant by Garnishee Before Garnishment—By Bill, Note or Check: See Remington's Digest, Garn., § 14-1; Larsen v. Allan Line Steamship Co., 45 Wash. 406, 88 Pac. 753, 122 Am. St. Rep. 926, 9 L. R. A. (N. S.) 1258.

Ownership or Possession of Property or Rights: See Remington's Digest, Garn., §§ 15, 16. **Possession wrongfully obtained:** Wooding v. Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223. **Property or funds held by agent, broker or factor:**

Washington Brick, Lime & Mfg. Co. v. Traders' Nat. Bank, 46 Wash. 23, 89 Pac. 157, 123 Am. St. Rep. 912. **Property in possession of bailee in general:** Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

PROCEEDINGS TO PROCURE: See Remington's Digest, Guar., §§ 23—26. **Jurisdiction in general—Authority of courts in general:** Neufelder v. German Amer. Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287; Neufelder v. North British etc. Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793. **Jurisdiction of person of garnishee—Nonresidents and foreign corporations:** Neufelder v. German American Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287.

Jurisdiction of a nonresident garnishee cannot be acquired by the garnishment of a fund in which it was not interested, and a default judgment in such case would be invalid: Hallock v. National Bank of Commerce of Seattle, 110 Wash. 385, 188 Pac. 479.

Place of Bringing Proceedings: Title Guarantee & T. Co. v. Seattle Theatre Co., 23 Wash. 517, 63 Pac. 212. **Change of venue:** State ex rel. Wyman etc. v. Superior Court, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568.

Garnishment of guardian for debt of ward. 13 Ann. Cas. 500; 11 L. R. A. (N. S.) 706.

Garnishment of funds held by executors and administrators. 2 Ann. Cas. 921; 47 L. R. A. 346.

Garnishment of contents of safety deposit box. 11 A. L. R. 225; Ann. Cas. 1914A, 968.

Garnishment of contents of sealed package or locked receptacle as garnishable. 41 L. R. A. (N. S.) 764.

Property in hands of receiver as garnishable. 15 Ann. Cas. 131; 26 L. R. A. 218.

Cars of foreign railroad as subject to garnishment. 2 Ann. Cas. 349; 9 Ann. Cas. 440; 11 Ann. Cas. 910; 64 L. R. A. 501; 16 L. R. A. (N. S.) 1026; L. R. A. 1915D, 838.

Money in escrow as subject of garnishment. 10 A. L. R. 741.

Seat in chamber of commerce, board of trade, or stock exchange as subject to garnishment. 14 A. L. R. 284.

Money due only on further performance of contract by debtor as subject to garnishment. 2 A. L. R. 506.

§ 683. Writ, When and How Issued.

When the foregoing requisites have been complied with the clerk shall docket the case in the name of the plaintiff as plaintiff and of the garnishee as defendant, and shall immediately issue a writ of garnishment directed to the garnishee, commanding him to appear before the court from which it is issued within twenty days after the service of the writ upon him, if the same be served upon him within the county in which the same is issued, or within thirty days if served in any other county in this state, and to answer on oath what, if anything, he is indebted to the defendant, and was when such writ was served, and what personal property or effects, if any, of the defendant he has in his possession or under his control, or had when such writ was served. [L. '93, p. 96, § 4.]

Cited in 8 Wash. 537; 23 Wash. 68; 40 Wash. 578; 79 Wash. 495.

§ 684. Writ Against Incorporated Companies—Service.

Where it appears from the plaintiff's affidavit that the garnishee is an incorporated or joint stock company, in which the defendant is the owner of shares, or is interested therein, the writ of garnishment shall further require the garnishee to answer upon oath what number of shares, if any, the defendant owns in such company, or owned when such writ was served. [L. '93, p. 96, § 5.]

§ 685. Writ, Form of.

Said writ may be substantially in the following form:—

State of Washington, to A B, Greeting:

Whereas, in the superior court of the State of Washington, in and for — county, in a certain cause wherein C D is plaintiff and E F is defendant, the plaintiff claiming an indebtedness against the said E F of — dollars, besides interest and cost of suit, has applied for a writ of garnishment against you:

Now, therefore, you are hereby commanded to be and appear before the said court within twenty days after the service upon you of this writ, if served within — county, and within thirty days after the service of this writ upon you if served in any other county of this state, then and there to answer upon oath what, if anything, you are indebted to the said E F, and were when this writ was served upon you, and what effects, if any, of the said E F you have in your possession or under your control, and had when this writ was served (and if the garnishee be an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares, or interested therein, then the writ shall proceed; and further, to answer what number of shares, if any, the said E F owns in such company, and owned when this writ was served upon you). [L. '93, p. 96, § 6.]

Cited in 40 Wash. 578; 79 Wash. 496.

§ 686. Dating and Attestation.

The writ of garnishment shall be dated and tested [attested] in like manner as the writ of attachment and the name and office address of the plaintiff's attorney shall be indorsed thereon or in case the plaintiff has no attorney, then the name and address of the plaintiff shall be indorsed

thereon and delivered by the clerk who issues it to the plaintiff or his attorney. [L. '93, p. 97, § 7; L. '03, p. 91, § 1.]

§ 687. Service of Writ—Return and Proof.

The writ of garnishment may be served by the sheriff or any constable of the county in which the garnishee lives or it may be served by any citizen of the state of Washington over the age of twenty-one years and not a party to the action in which it is issued in the same manner as a summons in an action is served. And in case such writ is served by an officer, such officer shall make his return thereon showing the time, place and manner of service and noting thereon his fees for making such service and shall sign his name to such return. In case such service is made by any person other than an officer, such person shall attach to the original writ his affidavit showing his qualifications to make such service and the time, place and manner of making service, but no fee shall be allowed for the service of such writ unless the same is served by an officer. [L. '93, p. 97, § 8; L. '03, p. 91, § 2.]

Cited in 43 Wash. 375; 79 Wash. 491.

WRIT OR SUMMONS AND NOTICE AND SERVICE: See Remington's Digest, Garn., §§ 27—29. Service and levy: Madison v. Madison, 1 W. T. 60. Necessity and nature in general: Holford v. Trewella, 36 Wash. 654, 79 Pac. 308. Service: Russell v. Millett, 20 Wash. 212, 55 Pac. 44.

The service of a writ of garnishment upon a local manager of a foreign corporation is sufficient, in view of this section and section 226, providing for service upon nonresident corporations by

delivery to any agent, cashier or secretary thereof: Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

The court acquires jurisdiction of non-resident defendants on service of summons by publication and the garnishment of assigned claims, where the assignment was not completed by delivery and acceptance before the issuance of the garnishment: Nixon v. Hendy Machine Works, 51 Wash. 419, 99 Pac. 11.

Service on foreign corporation in garnishment cases. 23 L. R. A. 500.

§ 688. Effect of Service.

From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt or to deliver to him any effects, nor shall the garnishee if an incorporated or joint stock company, in which the defendant is alleged to be the owner of shares or to have an interest, permit or recognize any sale or transfer of such shares or interest; and any such payment, delivery, sale or transfer shall be void and of no effect as to so much of said debt, effects, shares, or interest as may be necessary to satisfy the plaintiff's demand. [L. '93, p. 97, § 9.]

Cited in 23 Wash. 68; 26 Wash. 587; 40 Wash. 578; 79 Wash. 496; 98 Wash. 36.

§ 689. Bond to Discharge Writ.

If the defendant in the principal action, shall at any time before the entry of final judgment in said principal action, cause a bond to be executed to the plaintiff with sufficient sureties, to be approved by the officer having the writ of garnishment, or after the return of said writ, by the clerk of the court out of which said writ was issued, to the effect that he will perform the judgment of the court: The writ of garnishment shall, upon the filing of said bond with the clerk, be immediately discharged, and all proceedings had thereunder shall be vacated: Provided, that the garnishee shall not be thereby deprived from recovering any costs in said proceeding, to which he would otherwise be entitled under this act. [L. '03, p. 282, § 1.]

§ 690. Answer and Service of.

The answer of the garnishee shall be under oath in writing and signed by him, and shall make true answers to the several matters inquired of in the writ of garnishment, and shall be served upon the plaintiff or his attorney and filed with the clerk of the superior court. [L. '93, p. 97, § 10.]

Cited in 23 Wash. 69; 79 Wash. 494; 110 Wash. 388.

PROCEEDINGS TO SUPPORT OR ENFORCE: See Remington's Digest, Garn., §§ 37—39. **Grounds of objection** and defenses by garnishee—In general: Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238. **Pendency of other proceedings:** Dittenhoefer v. Coeur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660; Neufelder v. German Am. Ins. Co., 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287. **Limitations:** Wooding v. Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223.

The statute (§ 209, supra), in regard to change of venue is applicable to garnishment proceedings: State ex rel. Wyman etc. Co. v. Superior Court, 40 Wash. 443, 32 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568.

Appearance of Garnishee: See Remington's Digest, Garn., § 36; Dittenhoefer v. Coeur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660; Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

ANSWER OF GARNISHEE: See Remington's Digest, Garn., §§ 40-1—45. **Mode and form:** Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

The sufficiency of an unsworn garnishee's answer can be tested only by motion to strike and not by motion for judgment on the pleadings: Hallock v. National Bk. of Commerce of Seattle, 110 Wash. 385, 188 Pac. 479.

A garnishee's answer verified in the usual form sufficiently complies with this section, requiring the same to be under oath, in writing and signed: Hallock v. National Bank of Commerce of Seattle, 110 Wash. 385, 188 Pac. 479.

Requisites and Sufficiency of Disclosure: Timm v. Stegman, 6 Wash. 13, 32 Pac. 1004; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204. **Requisites and sufficiency as defense:** Connor v. Scott, 16 Wash. 371, 47 Pac. 761. **Amended answers:** McAvoy v. Jennings, 39 Wash. 109, 81 Pac. 77. **Conclusiveness and effect in general:** Green v. Moore, 24 Wash. 241, 64 Pac. 151. **Disclosure of no property:** Everton v. Parker, 3 Wash. 331, 28 Pac. 536.

See, also, Hallock v. National Bank of Commerce, 110 Wash. 385, 188 Pac. 479.

Effect of general appearance by garnishee. 21 Ann. Cas. 1130.

§ 691. Discharge of Garnishee.

Should it appear from the answer of the garnishee that he is not indebted to the defendant, and was not so indebted when the writ of garnishment was served on him, and that he has not in his possession or under his control any personal property or effects of the defendant, and had not when the writ was served; and when the garnishee is an incorporated or joint stock company in which the defendant is alleged to be the owner of shares of stock or interested therein, if it shall further appear from such answer that the defendant is not, and was not when the writ was served, the owner of any of such shares or interested in such company, and should the answer of the garnishee not be controverted as hereinafter provided, and within the time hereinafter provided, the court shall enter judgment discharging the garnishee. [L. '93, p. 98, § 11.]

QUASHING, VACATING OR DISSOLUTION: See Remington's Digest, Garn., §§ 55—58. **Grounds for quashing, vacating, or dissolving:** Prussian Nat. Ins. Co. v. Northwest F. & M. Ins. Co., 19 Wash. 281, 53 Pac. 158; Sully v. Bushell, 50 Wash. 389, 97 Pac. 445; Allen v. Allen, 96 Wash. 689, 165 Pac. 889.

See, also, Liebig v. Liebig, 107 Wash. 464, 182 Pac. 605.

Motions and Proceedings Thereon:

Gaffney v. McGrath, 23 Wash. 476, 63 Pac. 520. **Dissolution by causes subsequent to garnishment:** Wooding v. Puget Sound Nat. Bank, 11 Wash. 527, 40 Pac. 223. **Operation and effect:** Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505; Benjamin v. Ernst, 83 Wash. 59, 145 Pac. 79.

Effect upon garnishment proceedings of satisfaction of judgment in principal case. 6 Ann. Cas. 752.

§ 692. Judgment by Default.

Should the garnishee fail to make answer to the writ within the time prescribed therein, it shall be lawful for the court, and on or after the time to answer such writ has expired, to render judgment by default against such garnishee for the full amount claimed by the plaintiff against the defendant, or in case plaintiff has a judgment against defendant, for the full amount of such judgment with all accruing interest and costs. [L. '93, p. 98, § 12.]

Cited in 40 Wash. 578; 79 Wash. 496.

§ 693. Judgment Against Garnishee, Enforcement of.

Should it appear from the answer of the garnishee or should it be otherwise made to appear, as hereinafter provided, that the garnishee is indebted to the defendant in any amount, or was so indebted when the writ of garnishment was served, the court shall render judgment for the plaintiff against such garnishee for the amount so admitted or found to be due to the defendant from the garnishee, unless such amount shall exceed the amount of plaintiff's claim or demand against the defendant with interest and costs, in which case it shall be for the amount of such claim or demand, interest and costs: Provided, however, if it shall appear from the answer of the garnishee and the same is not controverted, or if it shall appear from the trial hereinafter provided for, that the garnishee is indebted to the principal defendant in any sum, but that such indebtedness is not matured and is not due and payable, the court shall make an order requiring the garnishee to pay such sum into court when the same becomes due, the date when such payment is to be made to be specified in said order, and in default thereof that judgment shall be entered against the garnishee for the amount of such indebtedness so admitted or found due. In case the garnishee shall pay said sum at the time specified in said order, said payment shall operate as a discharge, otherwise judgment shall be entered against him for the amount of such indebtedness, which judgment shall have the same force and effect, and be enforced in like manner as other judgments provided for in this chapter: Provided further, that if judgment shall be rendered in favor of the principal defendant, or if any judgment rendered against him be satisfied prior to the date of payment specified in said order, the garnishee shall not be required to make the payment hereinbefore provided for, nor shall any judgment in such case be entered against him. [L. '93, p. 98, § 13.]

Cited in 18 Wash. 318; 24 Wash. 243; 40 Wash. 579; 77 Wash. 557; 79 Wash. 496; 108 Wash. 185.

LIABILITY OF GARNISHEE: See Remington's Digest, Garn., §§ 32-1—36. **Grounds and extent in general:** Ford v. Aetna Life Ins. Co., 70 Wash. 29, 126 Pac. 69. **Offset by payment of liens:** Puget Sound Machinery Depot v. Pearson, 99 Wash. 362, 169 Pac. 847. **Payment of indebtedness after garnishment:** Anderson v. Garrison, 86 Wash. 307, 156 Pac. 419. **Liabilities as to property of defendant:** Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep.

806, 54 L. R. A. 204; Lemagie v. Acme Stamp Works, 98 Wash. 34, 167 Pac. 60. **Liability as to indebtedness to defendant:** Belond v. Rayburn, 38 Wash. 406, 80 Pac. 553; Frieze v. Powell, 79 Wash. 483, 140 Pac. 690. **Liability for interest:** Bellingham Bay Boom Co. v. Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238.

OPERATION AND EFFECT OF GARNISHMENT OR PAYMENT: See Remington's Digest, Garn., §§ 60-1—63. **As between plaintiff and defendant:** Armour v. Seixas, 80 Wash. 181, 141 Pac. 308. **As between plaintiff and garnishee:** Bellingham Bay Boom Co. v.

Brisbois, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; Merwin v. Fowler, 20 Wash. 587, 56 Pac. 374; McAlmond v. Bevington, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597; State ex rel. Summerfield v. Tyler, 14 Wash. 495, 45 Pac. 31, 53 Am. St. Rep. 878, 37 L. R. A. 207; Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505. **As between defendant and garnishee**—Voluntary or premature payment: Ward v. Ward, 14 Wash. 640, 45 Pac. 312. Effect of judgment against garnishee and payment or other satisfaction thereof: State ex rel. Tatum v. Fitzhenry, 48 Wash. 130, 92 Pac. 898; Wise v. Reed, 79 Wash. 134, 139 Pac. 753.

LIEN OF GARNISHMENT AND LIABILITY OF GARNISHEE: See Remington's Digest, Garn., §§ 31, 32. **Priorities** between garnishments: Dittenhoeffer v. Coeur d'Alene Clothing Co., 4 Wash. 519,

30 Pac. 660. **Transfers of property** or rights pending garnishment: Eidenmiller v. Elder, 32 Wash. 605, 73 Pac. 687; DuBois Lumber Co. v. Dietderich, 97 Wash. 1, 165 Pac. 884.

See, also, Oberleitner v. Moore, 112 Wash. 592, 192 Pac. 904.

Appeal: See Remington's Digest, Garn., § 52; Dittenhoeffer v. Coeur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660; Seattle Trust Co. v. Pitner, 17 Wash. 365, 49 Pac. 505; Eidenmiller v. Elder, 32 Wash. 605, 73 Pac. 687; Tatum v. Giest, 40 Wash. 575, 82 Pac. 912; Durk v. Scully, 41 Wash. 357, 83 Pac. 426.

Effect of judgment against garnishee to merge or satisfy liability of principal debtor. 47 **L. R. A.** 131.

Lien created by prosecution of garnishment proceedings. 18 **Ann. Cas.** 382.

§ 694. Execution.

Execution may be issued on the judgment against the garnishee herein provided for in like manner as upon any other judgment. The amount made upon any such execution shall be paid by the officer executing the same to the clerk of the superior court from which such execution was issued; and in cases where judgment has been rendered against the defendant the amount made on the execution shall be applied to the satisfaction of the judgment, interests and costs against the defendant. In case judgment has not been rendered against the defendant at the time execution issued against the garnishee is returned, any amount made on said execution shall be paid to the clerk of the court from which such execution issued who shall retain the same until judgment be rendered in the action between the plaintiff and defendant. In case judgment be rendered therein in favor of the plaintiff, the amount made on the execution against the garnishee shall be applied to the satisfaction of such judgment and the surplus, if any there be, shall be paid to the defendant. In case judgment be rendered in such action in favor of the defendant, the amount made on said execution against the garnishee shall be paid to the defendant. [L. '93, p. 99, § 14.]

Cited in 48 Wash. 131; 95 Wash. 426.

§ 695. Decree to Deliver Effects.

Should it appear from the garnishee's answer or otherwise that the garnishee has in his possession or under his control, or had when the writ was served any personal property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the sheriff on demand such personal property or effects or so much of them as may be necessary to satisfy the plaintiff's claim. In cases where a judgment has been rendered in favor of the plaintiff against the defendant, such personal property or effects may be sold in like manner as any other property is sold upon an execution issued on said judgment. In cases where judgment has not been rendered in the principal action, the sheriff shall retain said personal property or effects in his possession until

the rendition of judgment therein, and in case judgment is rendered in said principal action in favor of the plaintiff, said goods or effects, or sufficient of them to satisfy such judgment, may be sold in like manner as other property is sold on execution, by virtue of an execution issuing on said judgment. In case judgment shall be rendered in said action against the plaintiff and in favor of the defendant, such effects and personal property shall be by the sheriff returned to the defendant: Provided, however, that in cases where such effects or personal property are of a perishable nature, or the interests of the parties will be subserved by making a sale thereof before judgment, the court may order a sale thereof by the sheriff in like manner as sales upon execution are made and the proceeds of such sale shall be paid to the clerk of the superior court, and like disposition shall be made of such proceeds at the termination of the action as would have been made of such personal property or effects under the provisions of this section, in case such sale had not been made. [L. '93, p. 100, § 15.]

Cited in 10 Wash. 162; 18 Wash. 318; 23 Wash. 68; 108 Wash. 185.

Judgment Against Garnishee: See Remington's Digest, Garn., §§ 53, 53-1. Delivery of property or other subject matter: Campbell v. Simpkins, 10 Wash. 160, 38 Pac. 1039; Wise v. Reed, 86 Wash. 11, 149 Pac. 325. Opening and vacating: Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

See, also, Oberleitner v. Moore, 112 Wash. 592, 192 Pac. 904.

A corporation which conducts a safe deposit vault business by renting to individuals boxes in the vault which can only be opened by the use of two keys—one a master key, in the possession of the corporation, and the other a private key in the possession of the renter of the box—is subject to garnishment under this section: See Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204.

§ 696. Procedure on Failure of Garnishee to Surrender Effects.

Should the garnishee adjudged to have effects or personal property of the defendant in his possession or under his control as provided in the [last] preceding article [section], fail or refuse to deliver them to the sheriff on such demand, the officer shall immediately make return of such failure or refusal, whereupon, on motion of the plaintiff, the garnishee shall be cited to show cause why he should not be attached for contempt of court for such failure or refusal, and should the garnishee fail to show some good and sufficient excuse for such failure and refusal, he shall be fined for such contempt and imprisoned until he shall deliver such personal property or effects. [L. '93, p. 101, § 16.]

Cited in 10 Wash. 162; 32 Wash. 609.

§ 697. Sale of Shares of Stock.

Where the garnishee is an incorporated or joint stock company, and it appears by the answer or otherwise that the defendant is or was, when the writ of garnishment was served, the owner of any shares of stock in such company or any interest therein, the court shall render a decree ordering the sale under execution in favor of the plaintiff, against the defendant, of such shares or interest of the defendant in such company, or so much thereof as may be necessary to satisfy such execution. [L. '93, p. 101, § 17.]

Cited in 26 Wash. 587.

Shares may be sold on execution to the extent of the judgment debtor's interest, although held either under a pledge or a

pooling agreement: Hardin v. White Swan Min. etc. Co., 26 Wash. 583, 67 Pac. 236.

§ 698. Sale, How Made.

The sale so ordered shall be conducted in all respects as other sales of personal property under execution, and the sheriff making such sales shall execute a transfer of such shares or interest to the purchaser with a brief recital of the judgment of the court under which the same was sold. [L. '93, p. 101, § 18.]

§ 699. Effect of Sale.

Such sale shall be valid and effectual to pass to the purchaser all the right, title and interest which the defendant had in such shares of stock, or in such company, and the proper officers of such company shall enter such sale and transfer on the books of the company in the same manner as if the sale had been made by the defendant himself. [L. '93, p. 101, § 19.]

§ 700. Answer Controverted by Plaintiff.

If the plaintiff should not be satisfied with the answer of the garnishee he may controvert the same by affidavit in writing signed by him, stating that he has good reason to believe and does believe that the answer of the garnishee is incorrect, stating in what particulars he believes the same is incorrect. [L. '93, p. 101, § 20.]

Cited in 11 Wash. 242; 23 Wash. 68; 30 Wash. 551.

Traverse of Answer and Issues Thereon: See Remington's Digest, Garn., § 46; *McDaniels v. Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 94 Am. St. Rep. 889, 60 L. R. A. 947.

See, also, *Gordon v. Hillman*, 107 Wash. 490, 182 Pac. 574; *Oberleitner v. Moore*, 112 Wash. 592, 192 Pac. 904.

Right of garnishee to question validity of attachment. 35 L. R. A. 769.

Necessity that garnishee plead specially defense of setoff. 13 Ann. Cas. 706.

Claims maturing after service of garnishment as subject to setoff. 18 Ann. Cas. 214.

§ 701. Answer Controverted by Defendant.

The defendant may also in like manner controvert the answer of the garnishee. [L. '93, p. 101, § 21.]

Cited in 51 Wash. 329.

A claim of a personal property exemption from moneys garnished to satisfy a judgment must be made within a reasonable time, and is waived where the debtor had notice of the issuance of the execution and garnishment and made no

answer to the garnishment, nor any claim to the exemption until after trial in the garnishment proceedings and announcement of the judgment against the garnishee: *United States Fid. & Guar. Co. v. Hollenshead*, 51 Wash. 326, 98 Pac. 749.

§ 702. Issue and Trial.

If the answer of the garnishee is controverted, as provided in the two preceding sections, an issue shall be formed, under the direction of the court, and tried as other cases: Provided, however, no pleadings shall be necessary on such issue other than the affidavit of the plaintiff, the answer of the garnishee and the reply of the plaintiff or defendant controverting such answer, unless otherwise ordered by the court. [L. '93, p. 101, § 22.]

Cited in 11 Wash. 242; 23 Wash. 519; 71 Wash. 54; 107 Wash. 492.

Trial of Issues Between Plaintiff and Garnishee: See Remington's Digest, Garn., § 50; *Title Guarantee & T. Co. v. Seattle Theater*, 23 Wash. 517, 63 Pac. 212.

A garnishee's answer that it held, as trustee, a note belonging to the judgment debtor for \$94,777, pledged to it as security for \$14,338, and alleging that the maker of the note claimed an offset amounting to \$70,000, is controverted, within this section, where the debtor

answered alleging fraud and collusion between the plaintiff and the maker of the note to obtain an unfair sale at public auction to the debtor's loss; and it is error to order a sale before the issue is tried and the offset of the maker is determined: *Gordon v. Hillman*, 107 Wash. 490, 182 Pac. 574.

EVIDENCE: See *Remington's Digest*, Garn., §§ 47—49. **Presumptions** and burden of proof: *McAlmond v. Bevington*, 23 Wash. 315, 63 Pac. 251, 53 L. R. A. 597; *Wise v. Reed*, 79 Wash. 134, 139 Pac. 753. **Admissibility:** *Millar & Co. v. Plass*, 11 Wash. 237, 39 Pac. 956; *Freize v. Powell*, 79 Wash. 483, 140 Pac. 690. **Weight and sufficiency:** *Hardin v. White*

Swan Min. & Mill. Co., 26 Wash. 283, 67 Pac. 236.

CLAIMS BY THIRD PERSONS: See *Remington's Digest*, Garn., §§ 59, 60. Nature and form of remedy: *Coombs v. Davis*, 2 W. T. 466, 7 Pac. 860; *Weisbach v. Arnold*, 3 W. T. 111, 13 Pac. 417. Parties: *Hardin v. White Swan Min. etc. Co.*, 26 Wash. 583, 67 Pac. 236.

Bringing in New Parties: See *Remington's Digest*, Garn., § 40; *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849; *State ex rel. Nolte v. Superior Court*, 15 Wash. 500, 46 Pac. 1031; *Moore v. Gilmore*, 16 Wash. 123, 47 Pac. 239, 58 Am. St. Rep. 20; *Mottet v. Stafford*, 94 Wash. 572, 162 Pac. 1001.

§ 703. Exemption of Wages and Family Necessaries.

Current wages or salary to the amount of one hundred dollars (\$100) for personal services rendered by any person having a family dependent upon him for support, shall be exempt from garnishment, and where it appears upon the trial, or by answer of the garnishee, when not controverted as hereinafter provided, that the garnishee is indebted to the defendant for such current wages or salary for an amount not exceeding one hundred dollars (\$100), the garnishee shall be discharged as to such indebtedness: Provided, that if the garnishment be founded upon a debt for actual necessities furnished to the defendant or his family or his dependents, no exemption shall be allowed in excess of ten dollars (\$10) out of each week's wages or salary, whether said wages or salary are paid, or to be paid, weekly, bi-weekly, monthly or at other intervals, and whether there be due the defendant wages for one week or a longer period: Provided, however, that said exemption shall in no event be allowed out of wages or salary for a longer period than four (4) consecutive weeks: And provided further, that no money due or earned as wages or salary shall be exempt from garnishment in lieu of any other property. The provisions of this section shall apply to actions in the superior court or before justice of the peace, and shall govern exemption of wages or salary to the exclusion of all other statutes or parts of statutes. [L. '07, p. 477, § 1. Cf. L. '93, p. 102, § 23; L. '97, p. 24, § 1; L. '01, p. 294, § 1.]

See *supra*, § 563, specification of exempt property.

See *supra*, § 564, property not exempt from wages of clerks, laborers, etc.

Cited in 79 Wash. 497; 80 Wash. 359, 363; 98 Wash. 36.

This section is not unconstitutional in that its title fails to refer to § 563, of the general exemption law: *Creditors' Collection Ass'n v. Bisbee*, 80 Wash. 358, 141 Pac. 886.

Laborers whose earnings are exempt from attachment or garnishment. 18 L. R. A. 309.

Amount of wages exempt from successive garnishments. L. R. A. 1917D, 899.

§ 704. Costs and Attorney's Fees.

Where the garnishee is discharged upon his answer, the costs of the proceeding, including a reasonable compensation to the garnishee for attorney's fees, shall be taxed against the plaintiff; where the answer of the garnishee has not been controverted and the garnishee is held thereon such costs shall be taxed against the defendant and included in the judgment. Where the answer is controverted the costs shall abide the issue of such contest. [L. '93, p. 102, § 24.]

Cited in 43 Wash. 178; 91 Wash. 112; 96 Wash. 697.

Costs and Attorney's Fees: See Remington's Digest, Garn., § 54; Kelly v. Ryan, 8 Wash. 536, 36 Pac. 478; Durk v. Scully, 41 Wash. 357, 83 Pac. 426; Whitehouse v. Nelson, 43 Wash. 174, 86 Pac.

174; Puget Sound Iron & Steel Works v. First International Bank, 91 Wash. 109, 157 Pac. 212; Allen v. Allen, 96 Wash. 689, 165 Pac. 889.

See, also, Oberleitner v. Moore, 112 Wash. 592, 192 Pac. 904.

§ 705. Answer—Sufficiency Against Defendant.

It shall be a sufficient answer to any claim of the defendant against the garnishee founded on any indebtedness of such garnishee or on the possession by him of any personal property or effects, or where the garnishee is an incorporated or joint stock company, in which the defendant was the owner of shares of stock or other interest therein for the garnishee to show that such indebtedness was paid or such effects delivered, or such shares of stock or other interest in such company were sold under the judgment of the court in accordance with the provisions of this chapter. [L. '93, p. 102, § 25.]

Cited in 67 Wash. 493.

§ 706. Provisions Inapplicable to Justices of the Peace.

The provisions of this chapter shall not apply to actions and proceedings before justices of the peace, but garnishments shall be made in such actions and proceedings in the manner now provided by existing laws. [L. '93, p. 102, § 26.]

CHAPTER III.

CLAIM AND DELIVERY (REPLEVIN).

§ 707. Plaintiff may Claim Immediate Delivery.

The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property as herein provided. [L. '54, p. 150, § 100; L. '69, p. 35, § 140; Cd. '81, § 142; 2 H. C., § 255.]

Cited in 10 Wash. 227; 21 Wash. 95; 54 Wash. 669; 70 Wash. 687.

RIGHT OF ACTION AND DEFENSES—Nature and Scope of Remedy: See Remington's Digest, Replev., § 1; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; Chapin v. Bokee, 4 Wash. 1, 29 Pac. 926; Meeker v. Johnson, 3 Wash. 247, 28 Pac. 542.

Property Subject to Replevin: See Remington's Digest, Replev., §§ 2—4. Personality: Page v. Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924; Hennig v. Claussen Brewing Assn., 44 Wash. 116, 86 Pac. 1134. Property attached to or severed from realty: Laurendeau v. Fugelli, 5 Wash. 632, 32 Pac. 466; Churchill v. Ackerman, 22 Wash. 227, 60 Pac. 406; Clarke v. Clyde, 25 Wash. 661, 66 Pac. 46; Myers v. Gerhart, 54 Wash. 657, 103 Pac. 1114. Property taken under execution: Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; Nasser v. Gaston, 70 Wash. 685, 127 Pac. 470.

Title and Right to Possession of Plaintiff—Title, in General: See Remington's Digest, Replev., §§ 6, 9; Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836; Sayward v. Nunan, 6 Wash. 87, 32 Pac. 1022; Kerron v. North Pacific Lumber etc. Co., 1 Wash. 241, 24 Pac. 445; Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 Pac. 1111; Reynolds v. Dexter Horton & Co., 2 Wash. 185, 26 Pac. 221; Carney v. Simpson, 15 Wash. 227, 46 Pac. 233; Pacific Lounge etc. Co. v. Rudebeck, 15 Wash. 336, 46 Pac. 392.

See, also, Hays v. Bashor, 108 Wash. 491, 185 Pac. 814.

Tenants in Common: Vermont L. & T. Co. v. Cardin, 19 Wash. 304, 53 Pac. 164.

Right to Possession: See Remington's Digest, Replev., § 7; Sires v. Newton, 1 W. T. 356; Laurendeau v. Fugelli, 5 Wash. 94, 31 Pac. 421; Laurendeau v. Fugelli, 5 Wash. 632, 32 Pac. 466; Coey v. Low, 36 Wash. 10, 77 Pac. 1077;

Carabin v. Wilhelm, 87 Wash. 52, 151 Pac. 87.

Strength of Plaintiff's Title as Basis of Recovery: See Remington's Digest, Replev., § 8; Second Nat. Bank of Colfax, v. Hatch, 24 Wash. 421, 64 Pac. 727; Carabin v. Wilhelm, 87 Wash. 52, 151 Pac. 87.

Possession of Defendant: See Remington's Digest, Replev., §§ 10, 11; Laurendeau v. Fugelli, 5 Wash. 632, 32 Pac. 466; Harris v. Hayfield, 5 Wash. 230, 31 Pac. 601; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355; Andrews v. Hoeslich, 47 Wash. 220, 91 Pac. 772, 125 Am. St. Rep. 896, 14 Ann. Cas. 1118, 18 L. R. A. (N. S.) 1265.

Conditions Precedent: See Remington's Digest, Replev., §§ 12, 13; Tender: Moran Bros. Co. v. Northern Pac. R. Co., 19 Wash. 266, 53 Pac. 49, 1101; Andrews v. Hoeslich, 47 Wash. 220, 91 Pac. 772, 125 Am. St. Rep. 896, 14 Ann. Cas. 1118, 18 L. R. A. (N. S.) 1265. Demand: Seattle National Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813; Armour v. Seixas, 80 Wash. 181, 141 Pac. 308.

DEFENSES: See Remington's Digest, Replev., §§ 14, 15. Title of defendant: Rumpf v. Barto, 10 Wash. 382, 38 Pac. 1129; Benney v. Clein, 15 Wash. 581, 46 Pac. 1037; Masterson v. Union Bank & Trust Co., 86 Wash. 60, 150 Pac. 1126, L. R. A. 1918A, 531. Pendency of other action or proceeding: Carney v. Simpson, 15 Wash. 227, 46 Pac. 233.

Persons Entitled to Sue: See Remington's Digest, Replev., § 16; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; Page v. Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924; Meyers v. Gerhart, 54 Wash. 657, 103 Pac. 1114.

Persons Against Whom Replevin may be Brought: See Remington's Digest, Replev., § 17; Pacific Lounge etc. Co. v. Rudebeck, 15 Wash. 336, 46 Pac. 392; Rumpf v. Barto, 10 Wash. 382, 38 Pac. 1129; American Packing Co. v. Luketa, 98 Wash. 6, 167 Pac. 87.

Parties Defendant: See Remington's Digest, Replev., § 18; Scott v. McGraw, 3 Wash. 675, 29 Pac. 260; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763.

Issues, Proof and Variance: See Remington's Digest, Replev., § 26; Laurendeau v. Fugelli, 1 Wash. 599, 21 Pac. 29; Standard Gold Mining Co. v. Byers, 31 Wash. 100, 71 Pac. 766.

Evidence Admissible Under General Issue or General Denial: See Remington's Digest, Replev., § 27; Chamberlin v. Winn, 1 Wash. 501, 20 Pac. 780; Chamberlin v. Winn, 1 Wash. 259, 24 Pac. 446; Kerron v. North Pac. L. & Mfg.

Co., 1 Wash. 241, 24 Pac. 445; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725; Coey v. Low, 36 Wash. 10, 77 Pac. 1077; Shine v. Culver, 42 Wash. 484, 85 Pac. 271.

Variance: See Remington's Digest, Replev., § 28; Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836; Kerron v. North Pac. etc. Mfg. Co., 1 Wash. 241, 24 Pac. 445; Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355; Meyers v. Gerhart, 54 Wash. 657, 103 Pac. 1114.

See, also, Peterson v. Woolery, 9 Wash. 390, 37 Pac. 416.

Presumptions and Burden of Proof—Title and Right to Possession: See Remington's Digest, Replev., §§ 29, 30; Peterson v. Woolery, 9 Wash. 390, 37 Pac. 416; Johnston v. McCart, 24 Wash. 19, 63 Pac. 1121; Dodd & Co. v. Williams-Smithson Co., 27 Wash. 89, 67 Pac. 382; Moore v. Marsh, 59 Wash. 151, 109 Pac. 606.

EVIDENCE: See Remington's Digest, Replev., §§ 31—33. Admissibility of evidence: Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648; Shine v. Culver, 42 Wash. 484, 85 Pac. 271; Warehime v. Schweitzer, 51 Wash. 299, 98 Pac. 747. Value of property and damages: Levy v. Sheehan, 3 Wash. 420, 28 Pac. 748; Glass v. Buttner, 39 Wash. 296, 81 Pac. 699; Armour v. Seixas, 80 Wash. 181, 141 Pac. 308. Title and right of possession in general: Marsh v. Wade, 1 Wash. 538, 20 Pac. 578.

Weight and Sufficiency of Evidence: See Remington's Digest, Replev., §§ 34, 35. In general: Kehoe v. McConaghy, 29 Wash. 175, 69 Pac. 742; Goodyear Rubber Co. v. Schreiber, 29 Wash. 94, 69 Pac. 648; Fries v. Lockwood, 64 Wash. 221, 116 Pac. 640; Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 Pac. 21.

See, also, Pacific Exploitation Co. v. Strickland, 110 Wash. 646, 188 Pac. 766.

Title and Right to Possession: Dodd & Co. v. Williams-Smithson Co., 27 Wash. 89, 67 Pac. 352; Hyde v. Clausin, 82 Wash. 218, 144 Pac. 50; Masterson v. Union Bank & Trust Co., 86 Wash. 560, 150 Pac. 1126, L. R. A. 1918A, 531; American Packing Co. v. Luketa, 98 Wash. 6, 167 Pac. 87; Hartford v. Stout, 102 Wash. 241, 172 Pac. 1168.

See, also, Kulzer v. Simonton, 41 Wash. 587, 84 Pac. 582.

Damages — Measure and Amount Awarded: See Remington's Digest, Replev., § 36; Doe v. Tenino Coal & Iron Co., 43 Wash. 523, 86 Pac. 938; MacKenzie v. Steeves, 97 Wash. 17, 167 Pac. 50. See, also, Esmond v. Richards, 112 Wash. 641, 192 Pac. 917.

Instructions: See Remington's Digest, Replev., §§ 38—41. In general: Carstens

v. Earles, 26 Wash. 676, 67 Pac. 404; Eicholtz v. Holmes, 8 Wash. 71, 35 Pac. 607; Lillie v. Shaw, 22 Wash. 234, 60 Pac. 406. Demand: Dow v. Dempsey, 21 Wash. 86, 57 Pac. 355; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404. Title and right to possession: Chamberlin v. Winn, 1 Wash. 501, 20 Pac. 780; Chamberlin v. Winn, 1 Wash. 259, 24 Pac. 446; Lillie v. Shaw, 22 Wash. 234, 60 Pac. 406. Detention of property: Chamberlin v. Winn, 1 Wash. 501, 20 Pac. 780; Chamberlin v. Winn, 1 Wash. 259, 24 Pac. 446.

New Trial: See Remington's Digest, Replev., § 43; Casey v. Malidore, 19 Wash. 279, 53 Pac. 60; Harvey v. Ivory, 35 Wash. 397, 77 Pac. 725.

Appeal and Error: See Remington's Digest, Replev., §§ 52—54. In general: Freeburger v. Caldwell, 5 Wash. 769, 32 Pac. 732; Graves v. Thompson, 35 Wash. 282, 77 Pac. 384; First Nat. Bank of Aberdeen v. Carter, 10 Wash. 11, 38 Pac. 877.

See, also, Hartford v. Stout, 105 Wash. 46, 177 Pac. 666.

Presentation and Reservation in Lower Court of Grounds of Review: Rawson v. Ellsworth, 13 Wash. 667, 43 Pac. 934. Review of questions of fact, verdicts and findings: Second Nat. Bank of Colfax v. Hatch, 24 Wash. 421, 64 Pac. 727.

For text treatment of "Replevin," see 23 B. C. L. 850.

Necessity and sufficiency of allegation in complaint in replevin as to ownership and right of possession of property. 11 Ann. Cas. 1150; Ann. Cas. 1912A, 333.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property. 2 A. L. R. 200.

Right to damages as distinguished from interest for loss of use of property taken in replevin. 6 A. L. R. 478.

Right to recover property held by public authorities as evidence for use in a criminal trial. 11 A. L. R. 681; 13 A. L. R. 1168.

§ 708. Affidavit for Delivery.

When a delivery is claimed, an affidavit shall be made by the plaintiff, or by someone in its behalf, showing,—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof, by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by defendant;

3. That the same has not been taken for a tax, assessment, or fine pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by law exempt from such seizure; and

4. The actual value of the property. [Cf. L. '54, p. 150, § 101; L. '69, p. 35, § 141; Cd. '81, § 143; 2 H. C., § 256.]

Cited in 3 Wash. 678, 21 Wash. 95; 54 Wash. 669; 70 Wash. 688; 73 Wash. 404.

PLEADING AND EVIDENCE—Complaint: See Remington's Digest, Replev., §§ 21—24. Form and requisites in general: Phillipos v. Mihran, 38 Wash. 402, 80 Pac. 527; Gourley v. Smith, 78 Wash. 286, 130 Pac. 58. Venue: Stiles v. James, 2 W. T. 194, 2 Pac. 188; Standard Furniture Co. v. Anderson, 38 Wash. 582, 80 Pac. 813,

See, also, Pacific Exploitation Co. v. Strickland, 110 Wash. 646, 188 Pac. 766; Western Farquhar Mach. Co. v. Pierce, 108 Wash. 621, 185 Pac. 570.

Title and Right to Possession of Plaintiff: Freeburger v. Caldwell, 5 Wash. 769, 32 Pac. 732; Brookman v. State Ins. Co., 15 Wash. 29, 45 Pac. 655, 46 Pac. 243. Description and value of property: Hall v. Law Guarantee & T. Soc., 22 Wash. 305, 60 Pac. 643, 79 Am. St. Rep. 935; Casey v. Malidore, 19 Wash. 279, 53 Pac. 50; Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 Pac. 21.

Necessity and sufficiency of officer's jurat or certificate to affidavit for replevin. 1 A. L. R. 1568.

§ 709. Bond—Service of Bond and Affidavit.

Upon the receipt of the affidavit, and a bond to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the

effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit and bond by delivering the same to him personally, if he can be found, or his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the postoffice, directed to the defendant, at the postoffice nearest his place of residence. [Cf. L. '54, p. 150, § 102; L. '69, p. 35, § 142; Cd. '81, § 144; 2 H. C., § 257.]

Cited in 32 Wash. 553; 73 Wash. 404, 407.

Proceedings: See Remington's Digest, Replev., §§ 19, 19-1. Mode and course of proceeding: *Edison v. Woolery*, 10 Wash. 225, 38 Pac. 1025. Service of summons or other process in action: *Hoffman v. Spokane Jobbers' Assn.*, 54 Wash. 179, 102 Pac. 1045.

LIABILITIES ON BONDS AND UNDERTAKINGS: See Remington's Digest, Replev., §§ 55—60.

Accrual or Release of Liability by Breach or Fulfillment of Conditions: *Boyer v. Fowler*, 1 W. T. 101; *Ihrig v. Bussell*, 68 Wash. 70, 122 Pac. 608, L. R. A. 1917A, 1188.

Failure to Prosecute Replevin Action:

Boyer v. Fowler, 1 W. T. 101; *Meigs v. Keach*, 1 W. T. 305. Discharge of sureties: *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24. Impossibility of performing condition: *Arthur v. Sherman*, 11 Wash. 254, 39 Pac. 670. Extent of liability: *Boyer v. Fowler*, 1 W. T. 101; *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24.

Actions: See Remington's Digest, Replev., §§ 61—63. Pleading: *Meigs v. Keach*, 1 W. T. 305.

See, also, *Western Farquhar Mach. Co. v. Pierce*, 113 Wash. 141, 193 Pac. 708.

Evidence: *Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co.*, 73 Wash. 403, 131 Pac. 1156, 45 L. R. A. (N. S.) 40. Damages: *Meigs v. Keach*, 1 W. T. 305.

§ 710. Objections to Bond—Justification of Sureties.

The defendant may, within three days after the service of a copy of the affidavit and bond, give notice to the sheriff that he excepts to the sufficiency of the sureties; if he fail to do so he shall be deemed to have waived all objections to them. When the defendant excepts, the sureties shall justify on notice in like manner as bail on arrest, and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they shall justify, or new sureties shall be substituted and justify. If the defendant except to the sureties, he cannot reclaim the property, as provided in the next section. [Cf. L. '54, p. 150, § 103; L. '69, p. 36, § 143; Cd. '81, § 145; 2 H. C., § 258.]

Cited in 70 Wash. 688.

§ 711. Redelivery Bond.

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a bond, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff,

for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within three days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section 716. [Cf. L. '54, p. 151, § 104; L. '69, p. 36, § 144; Cd. '81, § 146; 2 H. C., § 259.]

Cited in 32 Wash. 553; 70 Wash. 688; 73 Wash. 404, 407.

Proceedings for Redelivery of Property to Defendant—Redelivery and Effect: See Remington's Digest, Replev., § 20; Arthur v. Sherman, 11 Wash. 254, 39 Pac. 670.

The plaintiff in replevin is entitled to its return in substantially as good condition as when delivered to the defendant, under this section, although the statute does not in terms require its return in such condition; in view of section 434, authorizing either party to insist upon a judgment in the alternative: Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co., 73 Wash. 403, 131 Pac. 1156, 45 L. R. A. (N. S.) 40.

Plea or Answer in General: See Remington's Digest, Replev., § 25; Seattle Nat. Bank v. Meerwaldt, 8 Wash. 630, 36 Pac. 763; Munson v. Baldwin, 88 Wash. 379, 153 Pac. 338.

Cross-complaint and Answer Thereto: See Remington's Digest, Replev., § 25-1; Grote-Rankin Co. v. Brownell, 76 Wash. 335, 136 Pac. 145.

Liability on Redelivery Bonds or Undertakings: See Remington's Digest, Replev., § 57; Arthur v. Sherman, 11 Wash. 254, 39 Pac. 670; Hallidie Machinery Co. v. Whidbey Island Sand & Gravel Co., 73 Wash. 403, 131 Pac. 1156, 45 L. R. A. (N. S.) 40.

§ 712. Justification of Defendant's Sureties.

The defendant's sureties, upon a notice to the plaintiff or his attorney of not less than two nor more than six days, shall justify in the same manner as bail upon arrest; upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff. [Cf. L. '54, p. 151, § 105; L. '69, p. 36, § 145; Cd. '81, § 147; 2 H. C., § 260.]

Cited in 14 Wash. 46.

Under this section it is not necessary in an action against the sheriff for failure to take a good bond, to plead and prove the value of the property released by him, but he is liable for the value of the property as determined in the

prior proceeding in which the bond has been given: Magnus v. Woolery, 14 Wash. 43, 44 Pac. 130.

Plaintiff's undertaking in replevin as insuring to benefit of third person adjudged to be entitled to the property. *Ann. Cas.* 1913D, 1106.

§ 713. Qualifications of Sureties.

The qualification of sureties and their justification shall be as prescribed in respect to bail upon an order of arrest. [L. '54, p. 151, § 106; Cd. '81, § 148; 2 H. C., § 261.]

§ 714. Buildings may be Broken Open.

If the property, or any part thereof, be concealed in the building or inclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or inclosure to be broken open, and take the property into his possession, and if necessary, he may

call to his aid the power of his county. [L. '54, p. 151, § 107; Cd. '81, § 149; 2 H. C., § 262.]

Cited in 44 Wash. 516.

§ 715. Sheriff must Safely Keep Property.

When the sheriff shall have taken the property as herein provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same. [L. '54, p. 151, § 108; Cd. '81, § 150; 2 H. C., § 263.]

§ 716. Claims by Third Person—Proceedings.

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand [of him or his agent], indemnify the sheriff against such claim by a bond, executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless made as aforesaid; and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity. [L. '54, p. 151, § 109; Cd. '81, § 151; 2 H. C., § 264.]

Cited in 70 Wash. 687, 688.

§ 717. Return of Sheriff.

The sheriff shall file the affidavit, with the proceedings thereon, with the clerk of the court in which the action is pending within twenty days after taking the property mentioned therein. [Cf. L. '54, p. 152, § 110; Cd. '81, § 152; L. '91, p. 72, § 1; 2 H. C., § 265.]

CHAPTER IV.

INJUNCTIONS.

§ 718. By Whom Granted.

Restraining orders and injunctions may be granted by the superior court, or by any judge thereof. [L. '54, p. 152, § 111; Cd. '81, § 153; 2 H. C., § 266.]

That portion of this section as originally enacted providing for the granting of injunctions by judges of the supreme court is omitted as abrogated by § 4, article IV, of the constitution.

The words "injunction" and "restraining order," as used in this chapter, are to be taken as substantially synonymous. The terms permit the court to put its

order in the shape of a formal injunction, or it may issue simply an order restraining the acts complained of: *State ex rel. Miller v. Lichtenberg*, 4 Wash. 407, 30 Pac. 716.

Although the legislature may not, by express enactment, have declared the commission of certain acts illegal, a statute empowering the courts to restrain

by injunction the commission of such acts would not be unconstitutional on that ground, inasmuch as a law authorizing the enjoining of an act is equivalent to declaring that such act is illegal:

Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

For text treatment of "Injunction," see 14 B. C. L. 298.

§ 719. Grounds for Injunctions.

When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatens [threatened], or is about to do, or is procuring, or is suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment,—an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. And where it appears, in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property. [L. '54, p. 152, § 112; Cd. '81, § 154; 2 H. C., § 267.]

Cited in 18 Wash. 86; 43 Wash. 326; 69 Wash. 557.

NATURE AND FORM OF REMEDY: See Remington's Digest, Inj., §§ 1—3; In general: State ex rel. Miller v. Lichtenberg, 4 Wash. 407, 30 Pac. 716; Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088. Statute authorizing not unconstitutional: Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345. Preventive and protective remedy: Preston-Parton Mill Co. v. Dexter Horton & Co., 22 Wash. 236, 60 Pac. 412, 79 Am. St. Rep. 928.

GROUND OF RELIEF: See Remington's Digest, Inj., §§ 4, 5. Injury sustained or anticipated: Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186; Winsor v. Hanson, 40 Wash. 423, 82 Pac. 710. Substantial character of right or of injury: Tift Co. v. State Medical Institute, 53 Wash. 365, 101 Pac. 1081. Irreparable injury: Wintermute v. Tacoma L. & W. Co., 3 Wash. 727, 29 Pac. 444; Morse v. O'Connell, 7 Wash. 117, 34 Pac. 426; Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213.

Inadequacy of Remedy at Law: See Remington's Digest, Inj., §§ 6—9. In general: Wilkes v. Hunt, 4 Wash. 100, 29 Pac. 830; Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088; Seattle Wharf Co. v. Callvert, 42 Wash. 390, 85 Pac. 16; Phelan v. Smith, 22 Wash. 397, 61 Pac. 31; Grant v. Cole,

23 Wash. 542, 63 Pac. 263; Silver v. Washington Inv. Co., 65 Wash. 541, 118 Pac. 748; Davies v. Seattle, 67 Wash. 532, 121 Pac. 987; Calvin Phillips & Co. v. Fishback, 84 Wash. 124, 146 Pac. 181; Meakin v. Ludwig, 99 Wash. 180, 169 Pac. 24. **Recovery of damages:** Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213; Lawrence v. Times Printing Co., 22 Wash. 482, 61 Pac. 166; Peters v. Lewis, 28 Wash. 366, 68 Pac. 869.

See, also, Gardiner v. Gyorog, 109 Wash. 660, 187 Pac. 318.

Insolvency of Defendant: Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213; State ex rel. Young v. Superior Court, 43 Wash. 34, 85 Pac. 989. **Criminal prosecutions:** Walker v. Stone, 17 Wash. 578, 50 Pac. 488; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35; City Cab, Carriage & Transfer Co. v. Hayden, 73 Wash. 24, 131 Pac. 472, Ann. Cas. 1914D, 731, L. R. A. 1915F, 726.

Defenses or Objections to Relief: See Remington's Digest, Inj., §§ 10, 11; Wintermute v. Tacoma L. & W. Co., 3 Wash. 727, 29 Pac. 444; Turner v. Bellingham Bay Lumber & Mfg. Co., 9 Wash. 484, 37 Pac. 674; Baasch v. Cooks Union, Local No. 33, 99 Wash. 378, 169 Pac. 843.

Particular Proceedings or Remedies in Civil Actions: See Remington's Digest,

Inj., § 12; Meacham Arms Co. v. Swartz, 2 W. T. 412, 7 Pac. 859; First Nat. Bank of Seattle v. Woolery, 6 Wash. 215, 33 Pac. 357; Turner v. Bellingham Bay Lum. Co., 9 Wash. 484, 37 Pac. 674; Schoonover v. Condon, 12 Wash. 475, 41 Pac. 195; Tacoma v. Sperry & Hutchinson Co., 82 Wash. 393, 144 Pac. 544.

RELIEF GRANTED: See Remington's Digest, Inj., §§ 13—15. Special proceedings other than actions: Bingham v. Walla Walla, 3 W. T. 68, 13 Pac. 408. Actions or proceedings in same court: Sibson v. Hamilton & Rourke Co., 21 Wash. 362, 58 Pac. 219. Actions or proceedings in other states: Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20.

INTERESTS PROTECTED: See Remington's Digest, Inj., §§ 16—18. Property and rights protected in general: Morse v. O'Connell, 7 Wash. 117, 34 Pac. 426; Walker v. Stone, 17 Wash. 578, 50 Pac. 488; Bouckaert v. State Board of Land Commrs., 84 Wash. 356, 16 Pac. 848; Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A, 739.

Equity will grant an injunction against the solicitation by a former manager, of the customers of a loan, real estate, and insurance agency, where he used his personal acquaintance with the customers and his knowledge of the agency's business and confidential matters as a reason for transferring their patronage to a competitor: Davis & Co. v. Miller, 104 Wash. 444, 177 Pac. 323.

Protection Pending Litigation as to Title or Right: Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088. Conveyance or disposition in general: Quinby v. Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899; Cady v. Case, 11 Wash. 124, 39 Pac. 375; Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213.

Trespass or Other Injury to Real Property: See Remington's Digest, Inj., §§ 19—19-4; Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 90; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607; Olson v. Seattle, 30 Wash. 687, 71 Pac. 201; Cogswell v. Cogswell, 70 Wash. 184, 126 Pac. 433; Morse v. O'Connell, 7 Wash. 117, 34 Pac. 426; West Coast Imp. & Inv. Co. v. Winsor, 8 Wash. 490, 30 Pac. 441; Colby v. Spokane, 12 Wash. 690, 42 Pac. 112; Hubenthal v. Spokane etc. R. Co., 43 Wash. 677, 86 Pac. 955; Bank of Edwall v. Bateman, 98 Wash. 447, 167 Pac. 1102. **Protection against ouster:** Colwell v. Smith, 1 W. T. 92; West Coast Improvement Co. v. Winsor, 8 Wash. 490, 36 Pac. 441. **Claim of right:** Reeves v.

Flath, 59 Wash. 299, 109 Pac. 796; Cogswell v. Cogswell, 70 Wash. 184, 126 Pac. 433. **Repeated or continuing trespasses:** Sequim Bay Canning Co. v. Bugge, 49 Wash. 127, 94 Pac. 922, 16 Ann. Cas. 196; Western Academy of Beaux Arts v. De Bit, 101 Wash. 42, 171 Pac. 1036.

Spite Fences: See Remington's Digest, Inj., § 20; Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; Winsor v. German Sav. & L. Soc., 31 Wash. 365, 72 Pac. 66.

Cutting or Removal of Timber or Crops: See Remington's Digest, Inj., §§ 21, 22; Arment v. Hensel, 5 Wash. 152, 31 Pac. 464; Seymour v. La Furgey, 47 Wash. 450, 92 Pac. 267; O'Connor v. Oliver, 45 Wash. 549, 88 Pac. 1025.

CONTRACTS: See Remington's Digest, Inj., §§ 23—26. Contracts enforceable in general: Rand, McNally & Co. v. Hartmanft, 29 Wash. 591, 70 Pac. 77. Breaches of contract which may be restrained in general: Barber Asphalt Paving Co. v. Hamilton, 80 Wash. 51, 141 Pac. 199. Contracts for personal services: Columbia College of Music v. Tunberg, 64 Wash. 19, 116 Pac. 280. Contracts in restraint of trade: Columbia College of Music v. Tunberg, 64 Wash. 19, 116 Pac. 280.

CORPORATE FRANCHISES AND DEALINGS—Dealings With Corporate Property: See Remington's Digest, Inj., § 27; Jenkins v. Columbia Land etc. Co., 13 Wash. 502, 43 Pac. 328; Steel v. Gordon, 14 Wash. 521, 45 Pac. 151.

PUBLIC OFFICERS AND BOARDS: See Remington's Digest, Inj., §§ 28—30. State officers: Wilkes v. Hunt, 4 Wash. 100, 29 Pac. 830. **County boards** and officers: Northern Pac. R. Co. v. Whalen, 3 W. T. 452, 17 Pac. 890; Andrews v. King County, 1 Wash. 46, 23 Pac. 409, 22 Am. St. Rep. 136; Phelan v. Smith, 22 Wash. 397, 61 Pac. 31. **Municipal officers in general:** State ex rel. Pub. Co. v. Milligan, 3 Wash. 144, 28 Pac. 369; Times Publishing Co. v. Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865; Wilton v. Pierce County, 61 Wash. 386, 112 Pac. 386.

Appointment or Removal of Officers: See Remington's Digest, Inj., §§ 31, 32; Mullen v. Tacoma, 16 Wash. 82, 47 Pac. 215; State ex rel. Fairbanks v. Superior Court, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893.

Enforcement of Ordinances or Regulations: See Remington's Digest, Inj., § 33; Hillman v. Seattle, 33 Wash. 14, 73 Pac. 791; Schlumpf v. Seattle, 85 Wash. 192, 152 Pac. 673; Seattle Taxicab & Transfer Co. v. Seattle, 86 Wash. 594, 150 Pac. 1134.

Removal of County Seat: See Remington's Digest, Inj., § 34; Rickey v. Williams, 8 Wash. 479, 36 Pac. 480; Krieschal v. County Commrs., 12 Wash. 428, 41 Pac. 186; Heffner v. County Commrs., 16 Wash. 273, 47 Pac. 430.

Payment or Other Disposition of Public Money: See Remington's Digest, Inj., § 35; Travis v. Ward, 2 Wash. 30, 25 Pac. 908; State ex rel. Stopper v. Hunter, 4 Wash. 712, 30 Pac. 1055.

PUBLIC WELFARE AND RIGHTS: See Remington's Digest, Inj., §§ 36, 37; Protection of public in general: Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055; Obstruction of highways: Johnson v. Maxwell, 2 Wash. 482, 27 Pac. 1071; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; Lincoln County v. Fish, 38 Wash. 105, 80 Pac. 435.

PERSONAL RIGHTS AND DUTIES—Interference With Occupation in General: See Remington's Digest, Inj., § 38; Northern Pac. R. Co. v. Whalen, 3 W. T. 452, 17 Pac. 890; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; MacMartin v. Stevens, 37 Wash. 616, 79 Pac. 1099; Puget Sound Tr. L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504.

Boycotts and Other Combinations: See Remington's Digest, Inj., § 39; Jensen v. Cooks' and Waiters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302; Commercial Bindery & Printing Co. v. Tacoma Typographical Union No. 173, 85 Wash. 234, 147 Pac. 1143; St. Germain v. Bakery & Confectionery Workers' Union No. 9 of Seattle, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F, 824.

Criminal Prosecutions: See Remington's Digest, Inj., § 40; Brown v. State, 59 Wash. 195, 109 Pac. 802; Huntworth v. Tanner, 87 Wash. 670, 152 Pac. 523, Ann. Cas. 1917D, 676.

ACTIONS FOR INJUNCTIONS. See Remington's Digest, Inj., §§ 41—43. **Jurisdiction:** Jones v. Reed, 3 Wash. 57, 27 Pac. 1067; Krieschel v. County Commrs., 12 Wash. 428, 41 Pac. 186; State ex rel. Murphy v. Tallman, 82 Wash. 141, 143 Pac. 874. **Venue:** North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1053. **Defenses:** Colby v. Spokane, 12 Wash. 690, 42 Pac. 112; Kakeldy v. Columbia & Puget Sound R. Co., 37 Wash. 675, 80 Pac. 205; State v. Nicoll, 40 Wash. 517, 82 Pac. 895; Puget Sound Tr. L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504.

PARTIES: See Remington's Digest, Inj., §§ 44—48. **Complainants:** Times Pub. Co. v. Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865; Forster v. Razink, 46 Wash. 692, 91 Pac. 252. **Persons interested and aggrieved:** Jones v. Reed, 3 Wash. 57, 27 Pac. 1067; Krieschel v.

County Commrs., 12 Wash. 428, 41 Pac. 186; Rand, McNally & Co. v. Hartranft, 29 Wash. 591, 70 Pac. 77; Birmingham v. Cheetham, 19 Wash. 657, 54 Pac. 37; Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186; Mitchell v. Lea Lum. Co., 43 Wash. 195, 86 Pac. 405, 10 Ann. Cas. 231, 9 L. R. A. (N. S.) 900; Gottstein v. Lister, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008. **Attorney general or other public officer:** Jones v. Reed, 3 Wash. 57, 27 Pac. 1067; Rickey v. Williams, 8 Wash. 479, 36 Pac. 480. **Defendants:** Stallcup v. Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25; Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; State ex rel. Victor Room Co. v. Peterson, 29 Wash. 571, 70 Pac. 71; State ex rel. Reed v. Gormley, 40 Wash. 601, 82 Pac. 929, 5 Ann. Cas. 856, 3 L. R. A. (N. S.) 256; Buzzell v. Ross, 60 Wash. 344, 111 Pac. 165; Maryland Casualty Co. v. Hill, 100 Wash. 289, 170 Pac. 594.

Pleading: See Remington's Digest, Inj., §§ 49—51. **Complaint:** Meeker v. Gilbert, 3 W. T. 369, 19 Pac. 18; Spokane St. R. Co. v. Spokane, 5 Wash. 634, 32 Pac. 456; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Colby v. Spokane, 12 Wash. 690, 42 Pac. 112; Ross v. Howard, 25 Wash. 1, 64 Pac. 794; Woodcock v. Guy, 33 Wash. 234, 74 Pac. 358; Loutzenhiser v. Peck, 89 Wash. 435, 154 Pac. 814.

A complaint for an injunction is sufficient where, although somewhat meager, it alleges that the defendant wrongfully refuses to allow the plaintiff to enter defendant's apartment house for the purpose of making delivery of goods sold to tenants in the building: Konick v. Champneys, 108 Wash. 35, 183 Pac. 75, 6 A. L. R. 459.

Supplemental Pleading: Meacham Arms Co. v. Swartz, 2 W. T. 412, 7 Pac. 859. **Issues, proof and variance:** Olson v. Seattle, 30 Wash. 687, 71 Pac. 201.

Evidence, Trial and Hearing: See Remington's Digest, Inj., §§ 52—54; Baxter v. Seattle, 3 Wash. 352, 28 Pac. 537; Davis v. Hinchcliffe, 7 Wash. 199, 34 Pac. 915; Wilkeson Coal & Coke Co. v. Driver, 9 Wash. 177, 37 Pac. 307; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; Lynn v. Waldron, 38 Wash. 82, 80 Pac. 292.

See, also, Davis & Co. v. Miller, 104 Wash. 444, 177 Pac. 323.

PERMANENT INJUNCTION AND OTHER RELIEF: See Remington's Digest, Inj., §§ 71, 72; Stay or suspension of injunction: State ex rel. Burrows v. Superior Court, 43 Wash. 225, 86 Pac. 632. **Alternative, additional or incidental equitable relief:** Farnsworth v. Wilbur, 49 Wash. 416, 95 Pac. 642, 19 L. R. A. (N. S.) 320.

Injunction to protect personal rights. 14 **A. L. R.** 295.

Injunction as remedy for past injuries. **Ann. Cas.** 1913D, 968.

Injunction to prevent one person associating with another. 5 **A. L. R.** 1044.

Right to injunctive relief where claimant has remedy by force. 16 **Ann. Cas.** 730.

Injunction to restrain threatened or apprehended nuisance. 2 **Ann. Cas.** 250; 20 **Ann. Cas.** 933; 7 **A. L. R.** 749.

Injunctive relief to parties as affected by doctrine of comparative injury. 14 **Ann. Cas.** 19; **Ann. Cas.** 1913A, 248; 31 **L. R. A. (N. S.)** 881; 39 **L. R. A. (N. S.)** 580; **L. R. A.** 1916C, 1269; 9 **A. L. R.** 1482.

§ 720. Injunction for Malicious Erection of Structures.

An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure, or annoy an adjoining proprietor. And where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal. [L. '83, p. 44, § 1; 2 H. C., § 268.]

Cited in 22 Wash. 423; 31 Wash. 368; 56 Wash. 593.

Spite Fences: See Remington's Digest, Injunctions, § 20; Karasek v. Peier, 22 Wash. 619, 61 Pac. 33, 50 L. R. A. 345; Winsor v. German Sav. & L. Soc., 31 Wash. 365, 72 Pac. 66.

"STRUCTURES," UNDER THIS SECTION: See Remington's Digest, Adj. Land, § 2; Karasek v. Peier, 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345; Winsor v. German Sav. etc. Society, 31 Wash.

365, 72 Pac. 66; Sally v. Whitney Co., 89 Wash. 674, 154 Pac. 1089, L. R. A. 1916D, 764.

Right to enjoin adjoining land owner from maliciously erecting or maintaining fence of unusual height. 9 **Ann. Cas.** 734; **Ann. Cas.** 1915A, 718.

Mandatory injunction to compel removal of encroachments by adjoining owner. 14 **A. L. R.** 831; 36 **L. R. A. (N. S.)** 402.

§ 721. Time for Granting.

The injunction may be granted at the time of commencing the action, or at any time afterward, before judgment in that proceeding. [L. '54, p. 163, § 113; Cd. '81, § 155; 2 H. C., § 269.]

§ 722. Notice—Emergency.

No injunction shall be granted until it shall appear to the court or judge granting it that some one or more of the opposite party concerned has had reasonable notice of the time and place of making application, except that in cases of emergency, to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing had thereon. [L. '54, p. 153, § 114; Cd. '81, § 156; 2 H. C., § 270.]

Cited in 4 Wash. 410, 413; 11 Wash. 588; 12 Wash. 649; 14 Wash. 110; 22 Wash. 55; 43 Wash. 326; 45 Wash. 4.

PRELIMINARY AND INTERLOCUTORY INJUNCTIONS: See Remington's Digest, Inj., §§ 55—60. Right to temporary injunction in general: Cady v. Case, 11 Wash. 124, 39 Pac. 375. Grounds for denial or temporary injunction: Gordon v. Parke & Lacy Mach. Co., 10 Wash. 18, 38 Pac. 755; Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213; Hart v. Seattle, 42 Wash. 113, 84 Pac. 640. **Time for application:** State v. Nicoll, 40 Wash. 517, 82 Pac. 895.

Notice of application: State ex rel. Miller v. Lichtenberg, 4 Wash. 407, 30 Pac. 716; State ex rel. Boardman v. Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866; Groen, In re, 22 Wash. 53, 60 Pac. 123; Coleman v. Columbia etc. R. Co., 8 Wash. 227, 35 Pac. 1077; Rockford Watch Co. v. Rumpf, 12 Wash. 647, 42 Pac. 213; Larsen v. Winder, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864; State v. Nicoll, 40 Wash. 517, 82 Pac. 895; Meier v. Fidelity Nat. Bank, 43 Wash. 324, 86 Pac. 574; Hemen v. Rinehart, 45 Wash. 1, 87 Pac. 953; State ex rel. Waughop v. Superior Court, 72 Wash.

535, 130 Pac. 1139. Use and effect of answer: *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112.

Right to grant temporary injunction before institution of action. *Ann. Cas.* 1913E, 462.

Necessity of hearing before granting temporary injunction. 9 *L. R. A. (N. S.)* 885.

Destruction between temporary restraining order and temporary injunction. *Ann. Cas.* 1917B, 123.

§ 723. Affidavits on Hearing of Application.

On the hearing of an application for an injunction, each party may read affidavits. [L. '54, p. 153, § 115; Cd. '81, § 157; 2 H. C., § 271.]

§ 724. Terms and Conditions Imposed.

Upon the granting or continuing an injunction, such terms and conditions may be imposed upon the party obtaining it as may be deemed equitable. [L. '54, p. 153, § 116; Cd. '81, § 158; 2 H. C., § 272.]

Restraining order pending hearing of application: See *Remington's Digest*, Inj., § 62; *Coleman v. Columbia & P. S. R. Co.*, 8 Wash. 227, 35 Pac. 1077.

Conditions on Granting or Refusing: See *Remington's Digest*, Inj., §§ 63, 64; *Hathaway v. Yakima Water etc. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. Rep. 874; *Everett Water Co. v. Powers*, 37 Wash. 143, 79 Pac. 617; *St. Martin v. Skamania Boom Co.*, 79 Wash. 393, 140 Pac. 355; *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393.

Order on Application—Operation and Effect: See *Remington's Digest*, Inj., § 65; *State ex rel. Commercial El. etc. Co. v. Stalleup*, 15 Wash. 263, 46 Pac. 251; *State ex rel. Byers v. Superior Court*, 28 Wash. 403, 68 Pac. 865; *State ex rel. Flaherty v. Superior Court*, 35 Wash. 200, 77 Pac. 33; *State ex rel. Gibson v. Superior Court*, 39 Wash. 115, 80 Pac. 1108, 109 Am. St. Rep. 862, 4 *Ann. Cas.* 229, 1 *L. R. A. (N. S.)* 554; *Collins v. Huffman*, 48 Wash. 184, 93 Pac. 220; *Drainage Dist. No. 1 v. Costello*, 53 Wash. 67, 101 Pac. 497.

§ 725. Bond for Injunction.

No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order, with surety to the satisfaction of the clerk of the superior court, to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order. The sureties shall, if required by the clerk, justify in like manner as bail upon an arrest, and until they so justify, the clerk shall be responsible for their sufficiency. [L. '54, p. 153, § 117; Cd. '81, § 159; 2 H. C., § 273.]

Cited in 10 Wash. 421; 11 Wash. 588; 35 Wash. 77; 101 Wash. 45.

Bond or Undertaking: See *Remington's Digest*, Inj., § 61; *Keeler v. White*, 10 Wash. 420, 38 Pac. 1134; *Cherry v. Western Washington etc. Co.*, 11 Wash. 586, 40 Pac. 136; *Swope v. Seattle*, 35 Wash. 69, 76 Pac. 517; *Western Academy of Beaux Arts v. De Bit*, 101 Wash. 42, 171 Pac. 1036.

LIABILITIES ON BONDS OR UNDERTAKINGS: See *Remington's Digest*, Inj., §§ 74—76. Discharge of bond or release of liability thereon: *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733. Extent of liability: *Steel v. Gordon*, 14 Wash. 521, 45 Pac. 151; *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185; *Northern Pac. R. Co. v. Fidelity & Deposit Co.*, 74 Wash. 543, 134 Pac. 498; *Costello v. Bridges*, 81

Wash. 192, 142 Pac. 687, *L. R. A.* 1915A, 853.

Actions—Rights of Action: See *Remington's Digest*, Inj., § 77; *White v. Brooke*, 11 Wash. 99, 39 Pac. 237; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 *L. R. A.* 199; *Yarwood v. Cedar Canyon Consol. Min. Co.*, 37 Wash. 56, 79 Pac. 483; *Tacoma v. Sperry & Hutchinson Co.*, 82 Wash. 393, 144 Pac. 544; *Mann v. Becker*, 90 Wash. 534, 156 Pac. 396.

Parties: See *Remington's Digest*, Inj., § 77-1; *Sampson v. Woldenberg*, 62 Wash. 483, 114 Pac. 162.

Pleading and Defenses: See *Remington's Digest*, Inj., § 71-2; *Mead v. Kalberg*, 70 Wash. 517, 127 Pac. 185; *Kitsap County Bank v. United States Fidelity & Guaranty Co.*, 90 Wash. 12, 155 Pac. 411;

Costello v. Bridges, 81 Wash. 192, 142 Pac. 687, L. R. A. 1915A, 853.

— **Evidence:** See Remington's Digest, Inj., § 78; White Pine Lum. Co. v. Aetna Indemnity Co., 42 Wash. 569, 85 Pac. 52; Collins v. Huffman, 48 Wash. 184, 93 Pac. 220.

— **Damages:** See Remington's Digest, Inj., § 79; Donahue v. Johnson, 9 Wash. 187, 37 Pac. 322; White v. Brooke, 11 Wash. 99, 39 Pac. 237; Steel v. Gordon, 14 Wash. 521, 45 Pac. 151; Ridpath v. Merriam, 22 Wash. 311, 60 Pac. 1120; Collins v. Huffman, 48 Wash. 184, 93 Pac. 220; Maughlin Mill Co. v. Hamilton, 61 Wash. 66, 111 Pac. 1067; Mead v. Kalberg, 70 Wash. 517, 127 Pac. 185; Tacoma v. Sperry & Hutchinson Co., 82 Wash. 393, 144 Pac. 544; Kitsap County Bank v. United States Fid. & Guar. Co., 90 Wash. 12, 155 Pac. 411.

— **Attorneys' Fees:** See Remington's Digest, Inj., § 80; Donahue v. Johnson, 9 Wash. 187, 37 Pac. 322; Steel v. Gordon, 14 Wash. 521, 45 Pac. 151; Thompson v. Benson, 41 Wash. 70, 82 Pac. 1049; White Pine Lumber Co. v. Aetna Indemnity Co., 42 Wash. 569, 85 Pac. 52; Collins v. Huffman, 48 Wash. 184, 93 Pac. 220; Berne v. Maxham, 82 Wash. 235, 144 Pac. 23; Kitsap County Bank v. United

States Fidelity & Guaranty Co., 90 Wash. 12, 155 Pac. 411; Mann v. Becker, 90 Wash. 534, 156 Pac. 396; Puget Sound Harbor No. 16 v. Aetna Accident & Liability Co., 97 Wash. 413, 166 Pac. 785.

WRONGFUL INJUNCTION: See Remington's Digest, Inj., §§ 82, 83. Persons entitled to damages: Anderson v. Provident Life & Trust Co., 26 Wash. 192, 66 Pac. 415. Actions for damages: Anderson v. Provident Life & Trust Co., 26 Wash. 192, 66 Pac. 415; Stone v. Hunter Tract Improvement Co., 68 Wash. 28, 122 Pac. 370, 39 L. R. A. (N. S.) 180.

Effect of insertion of unauthorized provisions in injunction bond. **L. R. A.** 1917B, 990.

Recovery on injunction bond of damages after injunction made permanent. 16 **Ann. Cas.** 1123; **Ann. Cas.** 1913C, 1277.

Entry of summary judgment against surety on injunction bond. **Ann. Cas.** 1918C, 97.

Right of action on injunction bond by stranger to injunction bond or suit. 6 **Ann. Cas.** 904.

Leave of court as prerequisite to action on injunction bond. 2 **A. L. R.** 575.

§ 726. Second Bond When First Insufficient.

When an injunction is granted upon the hearing, after a temporary restraining order, the plaintiff shall not be required to enter into a second bond, unless the former shall be deemed insufficient, but the plaintiff and his surety shall remain liable upon his original bond. [L. '54, p. 153, § 18; Cd. '81, § 160; 2 H. C., § 274.]

Cited in 4 Wash. 409; 48 Wash. 428.

§ 727. Copy of Order Sufficient Writ.

It shall not be necessary to issue a writ of injunction, but the clerk shall issue a copy of the order of injunction duly certified by him, which shall be forthwith served by delivering the same to the adverse party. [L. '54, p. 153, § 119; Cd. '81, § 161; 2 H. C., § 275.]

§ 728. Stay of Judgment—Release of Errors.

In application to stay proceedings after judgment, the plaintiff shall indorse upon his complaint a release of errors in the judgment whenever required to do so by the judge or court. [L. '54, p. 153, § 120; Cd. '81, § 162; 2 H. C., § 276.]

§ 729. Who Bound by.

An order of injunction shall bind every person and officer restrained from the time he is informed thereof. [L. '54, p. 153, § 121; Cd. '81, § 163; 2 H. C., § 277.]

Cited in 22 Wash. 382; 66 Wash. 641.

Under this section, a defendant contractor is chargeable with notice of an

injunctive order from the time of oral announcement thereof in open court, and is guilty of contempt if his employees

disobey the order prior to the formal entry: *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104.

An injunction restraining a corporation from doing business operates as against a receiver subsequently appointed: *Steel v. Gordon*, 14 Wash. 521, 45 Pac. 151.

A person not a party to a suit, or in privity with, or sustaining any relation to the parties, is not bound by an injunction issued therein: *Savage v. Stern-*

berg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 571, 70 Pac. 71.

Where a restraining order has been served upon the city officers, enjoining the holding of an election, it is their duty to stop the election: *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895. See *Jennings v. Rocky Bar Gold Mining Co.*, 29 Wash. 726, 70 Pac. 136.

§ 730. Notice—Effect.

When notice of the application for an injunction has been served upon the adverse party, it shall not be necessary to serve the order upon him, but he shall be bound by the injunction as soon as the bond required of the plaintiff is executed and delivered to the proper officer. [L. '54, p. 154, § 122; Cd. '81, § 164; 2 H. C., § 278.]

§ 731. Money Collected on Enjoined Judgment to be Paid into Court.

Money collected upon a judgment afterward enjoined, remaining in the hands of the collecting officer, shall be paid to the clerk of the court granting the injunction, subject to the order of the court. [L. '54, p. 154, § 123; Cd. '81, § 165; 2 H. C., § 279.]

§ 732. Order Disobeyed—Contempt.

Whenever it shall appear to any court granting an order of injunction, or judge thereof, by affidavit, that any person has willfully disobeyed the order after notice thereof, such court or judge shall award an attachment for contempt against the party charged, or a rule to show cause why it should not issue. The attachment or rule shall be issued by the clerk of the court, and directed to the sheriff, and shall be served by him. [L. '54, p. 154, § 124; Cd. '81, § 166; 2 H. C., § 280.]

VIOLATION—Writ of Mandate Violated—Validity and Regularity: See *Remington's Digest*, Inj., § 73; *State ex rel. Publishing Co. v. Mulligan*, 3 Wash. 144, 28 Pac. 369; *Savage v. Sternberg*, 19

Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 571, 70 Pac. 71; *Groen, In re*, 22 Wash. 53, 60 Pac. 123.

§ 733. Arrest and Indemnity.

The attachment for contempt shall be immediately served by arresting the party charged, and bringing him into court, if in session, to be dealt with as in other cases of contempt; and the court shall also take all necessary measures to secure and indemnify the plaintiff against damages in the premises. [L. '54, p. 154, § 125; Cd. '81, § 167; 2 H. C., § 281.]

§ 734. Bond for Appearance.

If the court is not in session the officer making the arrest shall cause the person to enter into a bond, with surety, to be approved by the officer, conditioned that he personally appear in open court whenever his appearance shall be required, to answer such contempt, and that he will pay to the plaintiff all his damages and costs occasioned by the breach of the order; and in default thereof, he shall be committed to the jail of the

county until he shall enter into such bond with surety, or be otherwise legally discharged. [Cf. L. '54, p. 154, § 126; Cd. '81, § 168; L. '91, p. 97, § 1; 2 H. C., § 282.]

§ 735. Motion to Vacate or Modify.

Motions to dissolve or modify injunctions may be made in open court, or before a judge of the superior court, at any time after reasonable notice to the adverse party. [L. '54, p. 154, § 127; Cd. '81, § 169; L. '91, p. 74, § 1; 2 H. C., § 283.]

Cited in 12 Wash. 655.

MODIFYING, VACATING OR DISSOLVING: See Remington's Digest, Inj., §§ 66—70; Grounds for vacating or dissolving: *De Mers v. Sandy Spit Fish Co.*, 24 Wash. 582, 64 Pac. 799. Order dissolving: *Donahue v. Johnson*, 9 Wash. 187, 37 Pac. 322; *Mann v. Becker*, 90 Wash. 534, 156 Pac. 396. Dissolution by causes subsequent to grant of injunc-

tion—Dismissal or other termination of action: *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73. Effect of dissolution or discharge: *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Thompson v. Benson*, 41 Wash. 70, 82 Pac. 1040. Costs on dissolution: *Anderson v. Provident Life & Trust Co.*, 26 Wash. 192, 66 Pac. 415.

§ 736. Damages upon Dissolution of Injunction to Stay Proceedings.

When an injunction to stay proceedings after judgment for debt or damages shall be dissolved, the court shall award such damages, not exceeding ten per cent, on the judgment, as the court may deem right, against the party in whose favor the injunction issued. [L. '54, p. 154, § 128; Cd. '81, § 170; 2 H. C., § 284.]

§ 737. Damages for Waste and Rents.

If an injunction to stay proceedings after verdict or judgment in an action for the recovery of real estate, or the possession thereof, be dissolved, the damages assessed against the party obtaining the injunction shall include the reasonable rents and profits of the land recovered, and all waste committed after granting injunction. [L. '54, p. 154, § 129; Cd. '81, § 171; 2 H. C., § 285.]

§ 738. Motion to Reinstate.

Upon an order being made dissolving or modifying an order of injunction, the plaintiff may move the court to reinstate the order, and the court may, in its discretion, allow the motion, and appoint a time for hearing the same before the court, or a time and place for hearing before some judge thereof, and upon the hearing, the parties may produce such additional affidavits or depositions as the court shall direct, and the order of injunction shall be dissolved, modified, or reinstated, as the court or judge may deem right. Until the hearing of the motion to reinstate the order of injunction, the order to dissolve or modify it shall be suspended. [L. '54, p. 154, § 130; Cd. '81, § 172; 2 H. C., § 286.]

§ 739. Power of Judge or Court.

The judge of the superior court shall have power to make every order which, by the provisions of this chapter, may be made by the court. [L. '69, p. 41, § 171; Cd. '81, § 173; 2 H. C., § 287.]

CHAPTER V.

RECEIVERS.

§ 740. Receiver, Defined.

A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the court or officer may direct. [L. '91, p. 90, § 1; 2 H. C., § 325.]

Cited in 15 Wash. 151; 22 Wash. 376; 47 Wash. 184; 86 Wash. 586; 97 Wash. 83; 112 Wash. 553.

Nature and Purpose of Remedy: See Remington's Digest, Rec., § 1; Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26; Wales v. Dennis, 9 Wash. 308, 37 Pac. 450; Brundage v. Home Sav. & L. Assn., 11 Wash. 277, 39 Pac. 666; Sengfelder v. Hill, 16 Wash. 355, 47 Pac. 757; 58 Am. St. Rep. 36; Spokane v. Amsterdamsh Trustees Kantoor, 18 Wash. 81, 50 Pac.

1088; Ridpath v. Sans Poil etc. Transp. Co., 26 Wash. 427, 67 Pac. 229; Bergman Clay Mfg. Co. v. Bergman, 73 Wash. 144, 131 Pac. 485.

Under this section, any person appointed by the court to take charge of mortgaged chattels during the pendency of foreclosure proceedings is a receiver: Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

For text treatment of "Receivers," see 23 R. C. L. 1.

§ 741. Appointment—Grounds.

A receiver may be appointed by the court in the following cases:—

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim;
2. In an action between partners, or other persons jointly interested in any property or fund;
3. In all actions where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed or materially injured;
4. In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; [or when such property is insufficient to discharge the debt, to secure the application of the rents and profits accruing, before a sale can be had];
5. When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;
6. And in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties: Provided, that no party or attorney or other person interested in an action shall be appointed receiver therein. [L. '54, p. 162, §§ 171, 172; Cd. '81, § 193; 2 H. C., § 326.]

The last part of subdivision 4 in brackets superseded by § 804, *infra*.

See *supra*, § 613 et seq., receivers in proceedings supplemental to executions.

See, *supra*, § 661, receiver in attachments.

Cited in 3 Wash. 589; 4 Wash. 605; 15 Wash. 152, 675; 19 Wash. 452; 20 Wash. 15, 551; 28 Wash. 562; 31 Wash. 225; 33 Wash. 151; 47 Wash. 184; 50 Wash. 389; 51 Wash. 517, 518; 55 Wash. 176; 86 Wash. 586; 95 Wash. 491; 97 Wash. 381; 98 Wash. 684; 103 Wash. 276; 107 Wash. 447; 113 Wash. 422.

Actions and Proceedings in Which Receiver may be Appointed: See Remington's Digest, Rec., § 2; Lammon v. Giles, 3 W. T. 117, 13 Pac. 417; Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009; Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; Sengfelder v. Hill, 16 Wash.

355, 47 Pac. 757, 58 Am. St. Rep. 36; Norfor v. Busby, 19 Wash. 450, 53 Pac. 715; Balfour-Guthrie Ins. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370.

See, also, Jonhson v. Rose, 113 Wash. 272, 193 Pac. 700.

Discretion of Court: See Remington's Digest, Rec., § 3; Ridpath v. Sans Poil & C. R. etc. Co., 26 Wash. 427, 67 Pac. 229; Cameron v. Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26; Union Boom Co. v. Samish Boom Co., 33 Wash. 144, 74 Pac. 53.

See, also, Beeler v. Standard Inv. Co., 107 Wash. 442, 181 Pac. 896, 5 A. L. R. 313.

Persons Entitled to Appointment of Receiver: See Remington's Digest, Rec., § 4; Davis v. Edwards, 41 Wash. 480, 84 Pac. 22; Blum v. Rowe, 98 Wash. 683, 168 Pac. 781.

Property Which may be Subject of Receivership: See Remington's Digest, Rec., § 5; Cole v. Price, 22 Wash. 18, 60 Pac. 153.

Receivers of Mortgaged Property: See Remington's Digest, Mtg., §§ 186—189.

Appointment of Receiver: Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088; Norfor v. Busby, 19 Wash. 450, 53 Pac. 715; Balfour-Guthrie Ins. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370; Collins v. Gross, 51 Wash. 516, 99 Pac. 573.

— **Grounds:** Brundage v. Home Sav. & L. Assn., 11 Wash. 277, 39 Pac. 666; Sibson v. Hamilton & Rourke Co., 21 Wash. 362, 58 Pac. 219; Collins v. Gross, 51 Wash. 516, 99 Pac. 573; Newman v. Van Nortwick, 95 Wash. 489, 164 Pac. 61.

— **Operation and Effect:** Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370.

Rights, Powers and Duties of Receiver: Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860.

GROUND OF APPOINTMENT OF RECEIVER: See Remington's Digest, Rec., §§ 6—10.

Right or Interest in Property Requiring Protection: Union Boom Co. v. Samish Boom Co., 33 Wash. 144, 74 Pac. 53; Wroten v. Robbins, 103 Wash. 393, 174 Pac. 968.

Fraud in Obtaining Possession of Property: Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26.

Preservation of Property Pending Litigation—In General: Lammon v. Giles, 3 W. T. 117, 13 Pac. 417; Brundage v. Home Sav. & L. Assn., 11 Wash. 277, 39 Pac. 666; Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088; Euphrat v. Morrison, 39 Wash.

311, 81 Pac. 695; Womach v. Sandygren, 94 Wash. 256, 162 Pac. 354.

Controversy Between Parties Equally Entitled to Possession: Whipple v. Lee, 46 Wash. 266, 89 Pac. 712.

— **Insolvency or Misconduct of Party Entitled to Possession, as Against Party Claiming Equitable or Future Interest:** Clay v. Selah Valley Irr. Co., 14 Wash. 543, 45 Pac. 141; Spokane v. Amsterdamsch Trustees Kantoor, 18 Wash. 81, 50 Pac. 1088; Sibson v. Hamilton & Rourke Co., 21 Wash. 362, 58 Pac. 219; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Davis v. Edwards, 41 Wash. 480, 84 Pac. 22.

Under this section, it is the duty of the court to appoint a receiver for a corporation when a party shows that he is a creditor and that the corporation is insolvent: Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734; Davis v. Edwards, 41 Wash. 480, 84 Pac. 22.

The appointment of a receiver for an insolvent corporation is authorized under this section, subdivision 5: Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; New York Nat. Exchange Bank v. Metropolitan Savings Bank, 28 Wash. 553, 66 Pac. 905.

Security for Payment of Demand: Bauer v. Haggerty, 42 Wash. 313, 84 Pac. 871.

Defenses and Grounds of Opposition: See Remington's Digest, Rec., §§ 11—13.

In General: Davis v. Edwards, 41 Wash. 480, 84 Pac. 22; Grays Harbor Commercial Co. v. Fifer, 97 Wash. 380, 166 Pac. 770.

— **Title or Right in Doubt or Dispute:** Whitehouse v. Point Defiance etc. R. Co., 9 Wash. 558, 38 Pac. 152; Sengfelder v. Hill, 16 Wash. 355, 47 Pac. 757, 58 Am. St. Rep. 36; Belding v. Washington Cornice Co., 36 Wash. 549, 79 Pac. 37.

— **Title or Possession of Defendant or Third Person:** Brundage v. Home Sav. etc. Assn., 11 Wash. 277, 39 Pac. 666.

APPOINTMENT, QUALIFICATION AND TENURE—Jurisdiction and Authority of Court or Judge: See Remington's Digest, Rec., §§ 14, 15; State ex rel. Beaum v. Superior Court, 14 Wash. 324, 44 Pac. 542; State ex rel. Amsterdamsch Trustees K. v. Superior Court, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111; State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; French v. Ajax Oil & Development Co., 44 Wash. 305, 87 Pac. 359; Rice v. Ahlman, 70 Wash. 6, 126 Pac. 64; Crawford v. Gordon, 88 Wash. 553, 153 Pac. 363, L. R. A. 1916C, 516; Washington Iron Works v. Jensen, 3 Wash. 584, 28 Pac. 1019; Pierce County v. Merrill, 19 Wash. 175, 52 Pac. 854.

Appointment on Consent of Parties: See Remington's Digest, Rec., § 16; Davis v. Edwards, 41 Wash. 480, 84 Pac. 22.

Form and Requisites of Application for Appointment in General: See Remington's Digest, Rec., § 17; Wales v. Dennis, 9 Wash. 308, 37 Pac. 450; Whitehouse v. Point Defiance etc. R. Co., 9 Wash. 558, 38 Pac. 152.

Notice of Application—Necessity: See Remington's Digest, Rec., § 18; Larsen v. Winder, 14 Wash. 109, 44 Pac. 123, 53 Am. St. Rep. 864; State ex rel. Evans v. Winder, 14 Wash. 114, 44 Pac. 125; Cole v. Price, 22 Wash. 18, 60 Pac. 153; Haggard v. Sanglin, 31 Wash. 165, 71 Pac. 711; State ex rel. Washington Match Co. v. Superior Court, 34 Wash. 123, 74 Pac. 1070; Libert v. Unfried, 47 Wash. 182, 91 Pac. 774; State ex rel. Ridgely v. Superior Court, 86 Wash. 584, 150 Pac. 1153.

The appointment of a permanent receiver for an insolvent corporation without notice is without justification and void, whether appointed prior or subsequent to judgment: Gordon v. Hillman, 107 Wash. 628, 182 Pac. 591.

The service of a writ of garnishment upon a corporation does not dispense with or take the place of notice of application for the appointment of a receiver of the corporation, after judgment against it: Gordon v. Hillman, 107 Wash. 628, 182 Pac. 591.

Use and Effect of Pleadings on Application: See Remington's Digest, Rec., § 19; Whitehouse v. Point Defiance etc. R. Co., 9 Wash. 558, 38 Pac. 152; Cameron v. Groveland Imp. Co., 20 Wash. 169, 54 Pac. 1128, 72 Am. St. Rep. 26.

Affidavits for Appointment: See Remington's Digest, Rec., §§ 20, 21; Brundage v. Home Sav. & L. Assn., 11 Wash. 277, 39 Pac. 666; Whitehouse v. Point Defiance etc. R. Co., 9 Wash. 558, 38 Pac. 152.

Scope of Inquiry and Questions Considered on Application—Sufficiency of Showing: See Remington's Digest, Rec., § 22; Roberts v. Washington Nat. Bank, 9 Wash. 12, 37 Pac. 26; Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854; Seattle Brewing & Malting Co. v. Jensen, 36 Wash. 462, 78 Pac. 1007.

Hearing and Determination of Application: See Remington's Digest, Rec., § 23; Lammon v. Giles, 3 W. T. 117, 13 Pac. 417.

Extension of Receivership and Subsequent Appointments in Other Actions or Proceedings: See Remington's Digest,

Rec., § 24; Fernald v. Spokane & B. C. Tel. Co., 31 Wash. 219, 71 Pac. 731.

Effect of Irregular or Invalid Appointment: See Remington's Digest, Rec., § 25; Wooding v. Wooding & Co., 10 Wash. 531, 39 Pac. 137.

Persons Who may Question Validity of Appointment: See Remington's Digest, Rec., § 26; Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; Wooding v. Wooding & Co., 10 Wash. 531, 39 Pac. 137.

Estoppel to Attack Appointment: See Remington's Digest, Rec., § 27; Manhattan Trust Co. v. Seattle Coal & Iron Co., 16 Wash. 499, 49 Pac. 333, 737; State ex rel. Ridgely v. Superior Court, 86 Wash. 584, 150 Pac. 1153.

Revocation or Modification of Order of Appointment: See Remington's Digest, Rec., § 28; Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370.

Collateral Attack on Appointment: See Remington's Digest, Rec., § 29; Elderkin v. Peterson, 8 Wash. 674, 36 Pac. 1089; Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854; Carroll v. Pacific Nat. Bank, 19 Wash. 639, 54 Pac. 32; Jones v. North Pac. Fish & Oil Co., 42 Wash. 332, 84 Pac. 1122, 114 Am. St. Rep. 131, 6 L. R. A. (N. S.) 940.

Removal—Proceedings: See Remington's Digest, Rec., § 30; Balfour-Guthrie Inv. Co. v. Geiger, 20 Wash. 579, 56 Pac. 370; Wooding v. Wooding & Co., 10 Wash. 531, 39 Pac. 137.

Bonds—Liability of Sureties: See Remington's Digest, Rec., § 30-1; Williams v. Hitchcock, 86 Wash. 536, 150 Pac. 1143; Southwestern Surety Ins. Co. v. Pacific Coast Cas. Co., 92 Wash. 654, 159 Pac. 788.

Appointment of receiver of corporation because of criminal conduct not peculiar to corporations. 10 **A. L. R.** 157.

Appointment of receiver as excuse for nonperformance of contract. 12 **A. L. R.** 1079; 3 **A. L. R.** 627.

Affidavit or verified bill as essential to appointment of receiver. **Ann. Cas.** 1913A, 608.

Provision in mortgage authorizing appointment of receiver for rents and profits. 4 **A. L. R.** 1415.

Equitable right to appointment of receiver in action maintained solely for such relief. 4 **Ann. Cas.** 66; 20 **L. R. A.** 211.

§ 742. Oath and Bond.

Before entering upon his duties, the receiver must be sworn to perform them faithfully, and, with one or more sureties approved by the

court, execute a bond to such person as the court may direct, conditioned that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein. [L. '54, p. 162, § 173; Cd. '81, § 194; 2 H. C., § 327.]

§ 743. Powers of Receiver.

The receiver shall have power, under control of the court, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally to do such acts respecting the property as the court may authorize. [L. '54, p. 163, § 177; Cd. '81, § 198; 2 H. C., § 331.]

TITLE TO AND POSSESSION OF PROPERTY: See Remington's Digest, Rec., §§ 31—45.

Effect of Appointment and Qualification of Receiver: Radebaugh v. Tacoma & Puyallup R. Co., 8 Wash. 570, 36 Pac. 460.

§ 32. **Property Vesting in Receiver in General:** Watterson v. Masterson, 15 Wash. 511, 46 Pac. 1041; Degginger v. Seattle Brewing & Malting Co., 41 Wash. 385, 83 Pac. 89, 4 L. R. A. (N. S.) 626; Martin v. Wilson, 84 Wash. 625, 147 Pac. 404.

§ 33. **Realty and Rents and Profits Thereof:** Griffith v. Burlingame, 18 Wash. 429, 51 Pac. 1059.

§ 34. **Rights of Action:** Cole v. Satsop R. Co., 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; Whitman v. Mast, Buford etc. Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874.

§ 35. **Property Fraudulently Conveyed:** Smith v. Hopkins, 10 Wash. 77, 38 Pac. 854; Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734; Compton v. Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338; Washington Mill Co. v. Sprague Lumber Co., 19 Wash. 165, 52 Pac. 1067.

§ 36. **Title or Right Acquired by Receiver in General:** Puget Sound Nat. Bank of Seattle v. Levy, 10 Wash. 499, 39 Wash. 142, 45 Am. St. Rep. 803; Willamette Casket Co. v. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729; Woodward v. Winchill, 14 Wash. 394, 44 Pac. 860.

See, also, Union Machinery & Supply Co. v. McCush, 104 Wash. 62, 175 Pac. 559.

§ 37. **Time of Vesting of Title or Right:** Steel v. Gordon, 14 Wash. 521, 45 Pac. 151; State ex rel. Kirsch v. Superior Court, 36 Wash. 91, 78 Pac. 461; North Coast Dry Kiln Co. v. Montecoma Inv. Co., 82 Wash. 247, 144 Pac. 58.

§ 38. **Remedies and Proceedings of Receiver to Obtain Possession:** State ex rel. Arthur Mach. Co. v. Superior Court, 7 Wash. 77, 34 Pac. 430; State ex rel. Baruch v. Moore, 21 Wash. 628, 59 Pac. 487;

Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819; Cherry v. Western Washington etc. Co., 11 Wash. 586, 40 Pac. 136.

§ 39. **Contempt Proceedings:** State ex rel. Boardman v. Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866; State ex rel. Evans v. Winder, 14 Wash. 114, 44 Pac. 125; State v. Denham, 30 Wash. 643, 71 Pac. 196.

§ 40. **Setoffs and Counterclaims Against Receiver:** Sheafe v. Hastie, 16 Wash. 563, 48 Pac. 246.

§ 40-1. **Liens on and Adverse Claims to Property in General:** Sumner Iron Works v. Walten, 61 Wash. 689, 112 Pac. 1109.

Where an insolvent held property under a conditional bill of sale, the vendor may make demand on the receiver and file a petition in the receivership proceedings for return of the property: Mentzer v. Commercial Lumber Co., 110 Wash. 155, 188 Pac. 9.

§ 41. — **Judgments:** Cherry v. Western Washington etc. Co., 11 Wash. 586, 40 Pac. 136.

§ 42. — **Attachment and Garnishment:** State ex rel. Arthur Mach. Co. v. Superior Court, 7 Wash. 77, 34 Pac. 430; State ex rel. Schwabacher Bros. Co. v. Superior Court, 11 Wash. 63, 39 Pac. 244; State ex rel. Hunt v. Superior Court, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; State ex rel. Shelly v. Superior Court, 8 Wash. 659, 35 Pac. 1092; State ex rel. Perkins v. Graham, 9 Wash. 528, 36 Pac. 1085.

§ 43. **Mortgages:** Meeker v. Sprague, 5 Wash. 242, 31 Pac. 628; Woodward v. Winchill, 14 Wash. 394, 44 Pac. 860; Pickering v. Richardson, 57 Wash. 117, 106 Pac. 614.

§ 44. **Remedies of General Creditors as Against Property:** Allen v. Olympia Light & P. Co., 13 Wash. 307, 43 Pac. 55.

§ 45. **Effect of Appointment and Rights of Receiver, as to Pending Actions:** State ex rel. Schwabacher Bros. & Co. v. Superior Court, 13 Wash. 638, 43 Pac. 877.

MANAGEMENT AND DISPOSITION OF PROPERTY: See Remington's Digest, Rec., §§ 46—55. Representation by re-

ceiver of court and of parties: *Radebaugh v. Tacoma & Puyallup R. Co.*, 8 Wash. 570, 36 Pac. 460; *Woodward v. Winehill*, 14 Wash. 394, 44 Pac. 860.

§ 46-1. Contracts of Receiver in General: *Crawford v. Gordon*, 88 Wash. 553, 153 Pac. 363, L. R. A. 1916C, 516; *Island Gun Club v. National Surety Co.*, 101 Wash. 185, 172 Pac. 209.

§ 47. Collection of Assets: *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1038; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405.

§ 48. Assumption and Performance of Obligations—Executory Contracts: *Casey v. Northern Pac. R. Co.*, 15 Wash. 450, 48 Pac. 53; *Scott v. Rainier Power & R. Co.*, 13 Wash. 108, 42 Pac. 531.

§ 49. Acceptance of Rent: *Groveland Imp. Co. v. Farmers' Supply Co.*, 25 Wash. 344, 65 Pac. 529, 87 Am. St. Rep. 755.

§ 50. Continuance and Conduct of Business: *Steel v. Gordon*, 14 Wash. 521, 45 Pac. 151.

§ 51. Employees of Receiver: *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548; *Oudin & Bergman Fire Clay Min. Co. v. Cole*, 35 Wash. 647, 77 Pac. 1066.

§ 52. Disposition of Property, Funds and Income, in General: *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548.

See, also, *Union Machinery & Supply Co. v. McCush*, 104 Wash. 62, 175 Pac. 559.

§ 53. Expenditures: *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548.

§ 54. Loss of Property: *Chandler v. Cushing-Young Co.*, 13 Wash. 89, 42 Pac. 548.

§ 54-1. Conversion by Receiver: *Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 92 Wash. 654, 159 Pac. 788.

§ 55. Instructions of Authority to Receiver to Act—Operation and Effect: *Cannon v. Snipes*, 24 Wash. 166, 64 Pac. 167.

SALE AND CONVEYANCE OF PROPERTY: See *Remington's Digest, Rec.*, §§ 56-61. Power to authorize sale by receiver: *State ex rel. Sanglin v. Superior Court*, 30 Wash. 232, 70 Pac. 484.

§ 57. Notice of Sale: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15; *Fryar v. Hazelwood Holstein Farms*, 97 Wash. 78, 165 Pac. 1084.

§ 58. Manner and Terms of Sale: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15; *Bidwell v. Rice*, 19 Wash. 146, 52 Pac. 1019.

A receiver, ordered to make a sale at public auction, who was unable to consummate the sale to the highest bidder,

cannot by private arrangement sell to the low bidder, but must proceed against the highest bidder or take steps for a resale: *Meador v. Stephens*, 106 Wash. 145, 179 Pac. 95.

§ 59. Confirmation of Sale: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15; *National Bank of Commerce v. Kilsheimer & Co.*, 59 Wash. 460, 110 Pac. 15.

§ 60. Validity of Sale and Title of Purchaser: *Chandler v. Cushing-Young Co.*, 13 Wash. 89, 42 Pac. 548; *North Coast Dry Kiln Co. v. Montecoma Investment Co.*, 82 Wash. 247, 144 Pac. 58; *Fryar v. Hazelwood Holstein Farms*, 97 Wash. 78, 165 Pac. 1084.

A receiver's sale is defective where the return is not made within the time limited: *Meador v. Stephens*, 106 Wash. 145, 179 Pac. 95.

See, also, *Womach v. Stuermer*, 105 Wash. 625, 178 Pac. 801.

§ 61. Opening or Vacating Sale: *Dibble v. Washington Food Co.*, 57 Wash. 176, 106 Pac. 760; *Fryar v. Hazelwood Holstein Farms*, 97 Wash. 78, 165 Pac. 1084.

RECEIVER'S CERTIFICATES—Lien and Priorities: *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15.

ALLOWANCE AND PAYMENT OF CLAIMS: See *Remington's Digest, Rec.*, §§ 62-70.

§ 62. Liabilities of Property or Funds in Hands of Receiver: *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165, 52 Pac. 1067; *Cannon v. Snipes*, 24 Wash. 106, 64 Pac. 167.

§ 63. Presentation and Filing of Claims: *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Biddle Purchasing Co. v. Port Townsend Steel etc. Co.*, 16 Wash. 681, 48 Pac. 407.

§ 64. Objections to Claims and Proceedings Thereon: *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *Eilers Music House v. Ritner*, 88 Wash. 218, 152 Pac. 1008, 154 Pac. 787; *Crawford v. Seattle, Renton & Southern R. Co.*, 97 Wash. 651, 167 Pac. 44.

§ 65. Allowance or Disallowance—Review: *State ex rel. Schloss v. Superior Court*, 3 Wash. 696, 29 Pac. 202.

§ 66. Priorities in General: *Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co.*, 17 Wash. 371, 49 Pac. 514; *Davis v. Foster*, 29 Wash. 363, 69 Pac. 1102; *Crawford v. Seattle, Renton & Southern R. Co.*, 97 Wash. 651, 167 Pac. 44.

§ 67. **Taxes:** *Baker v. King County*, 17 Wash. 622, 50 Pac. 481; *Hewitt v. Traders' Bank*, 18 Wash. 326, 51 Pac. 468.

§ 68. **Expenses of Continuance of Business by Receiver:** *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737.

§ 69. **Priority of Unsecured Debts, Incurred Before Receivership, to Pre-existing Liens:** *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 19 Wash. 493, 53 Pac. 951.

§ 70. **Payment:** *Bartlett v. Reichen-ecker*, 11 Wash. 692, 40 Pac. 239; *Gustav v. Esary*, 94 Wash. 248, 161 Pac. 1188.

ACTIONS: See *Remington's Digest*, Rec., §§ 71—88.

§ 71. **Capacity to Sue and be Sued in General:** *Titlow v. Cascade Oat Meal Co.*, 15 Wash. 652, 46 Pac. 19; *Fletcher v. Murray Commercial Co.*, 72 Wash. 525, 130 Pac. 1140.

§ 72. **Remedies of Receiver in Receivership Proceeding:** *Cherry v. Western Washington etc. Co.*, 11 Wash. 586, 40 Pac. 136; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405; *Johnson v. Shuey*, 40 Wash. 22, 82 Pac. 123.

See, also, *Wirkkala v. Wirkkala Bros. Lumber & Box Co.*, 109 Wash. 137, 186 Pac. 315.

§ 73. **Remedies Against Receiver in Receivership Proceeding:** *Meeker v. Sprague*, 5 Wash. 242, 34 Pac. 628; *Blake v. State Sav. Bank*, 12 Wash. 619, 41 Pac. 909; *McGill v. Brown*, 72 Wash. 514, 130 Pac. 1142; *National City Bank v. Shelton Elec. Co.*, 96 Wash. 74, 164 Pac. 933.

§ 74. **Rights of Actions by Receivers:** *Cole v. Satsop R. Co.*, 9 Wash. 487, 37 Pac. 700, 43 Am. St. Rep. 858; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940; *Whitman v. Mast, Buford etc. Co.*, 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874.

§ 75. **Rights of Action Against Receivers:** *Flynn v. Furth*, 25 Wash. 105, 64 Pac. 904; *Casey v. Northern Pac. R. Co.*, 15 Wash. 450, 48 Pac. 53; *Washington Trust Co. v. Local & Long Distance Telephone Co.*, 73 Wash. 627, 132 Pac. 398.

Upon charges of fraud and collusion in the appointment of a receiver, challenging the validity of the receivership and all the orders made therein, involving others not parties, it is discretionary with the trial court to refuse to entertain a petition in the receivership and to regulate the petitioner to an independent action: *Nevin v. Pacific Coast & Norway Packing Co.*, 105 Wash. 192, 177 Pac. 739.

§ 76. **Defenses Against Receivers:** *Shuey v. Holmes*, 20 Wash. 13, 54 Pac. 540; *Smith v. Hopkins*, 10 Wash. 77, 38

Pac. 854; *Thomson Estate v. Washington Investment Co.*, 84 Wash. 326, 146 Pac. 617.

§ 77. **Conditions Precedent in General:** *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Woodward v. Winchill*, 14 Wash. 394, 44 Pac. 860; *Kidder v. Whittier-Corbin Mach. Co.*, 38 Wash. 179, 80 Pac. 301.

§ 78. **Leave of Court to Receiver to Sue:** *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338; *Allen v. Baxter*, 42 Wash. 434, 85 Pac. 26.

§ 79. **Leave of Court to Sue Receiver —Necessity:** *Brown v. Rauch*, 1 Wash. 497, 20 Pac. 785 (overruled); *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763; *Bennett v. Northern Pac. R. R. Co.*, 17 Wash. 534, 50 Pac. 496; *Oldfield v. Angeles Brewing & Malt-ing Co.*, 72 Wash. 168, 129 Pac. 1098.

§ 80. **Grounds for Grant or Refusal of Leave:** *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628; *Schwabacher Bros. & Co. v. Schade & Parshall Co.*, 99 Wash. 271, 169 Pac. 783.

§ 81. **Waiver of Right to Object to Lack of Leave.**—Leave to sue a receiver is jurisdictional and cannot be waived by him, and under Code of Washington Township, section 81, the question may be raised at any stage of the case in the district or supreme court: *Brown v. Rauch*, 1 Wash. 497, 20 Pac. 785 (overruled).

The objection that leave to sue a receiver was not obtained by plaintiff is waived if not raised in the court below: *Sligh v. Shelton Southwestern R. Co.*, 20 Wash. 16, 54 Pac. 763; *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429.

The objection that leave of court to sue a receiver was not first obtained, is waived if not raised by the receiver upon filing a general appearance, and cannot thereafter be raised by other parties: *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691; *Washington Trust Co. v. Local & Long Distance Tel. Co.*, 73 Wash. 627, 132 Pac. 398; *Southwestern Surety Ins. Co. v. Pacific Coast Casualty Co.*, 92 Wash. 654, 159 Pac. 788.

§ 82. — **Presumption as to Leave:** *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429; *Schwabacher Brothers & Co. v. Schade & Parshall Co.*, 99 Wash. 271, 169 Pac. 783.

§ 83. **Parties:** *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940; *Springer v. Ayer*, 50 Wash. 642, 97 Pac. 774.

§ 84. **Joinder or Intervention of Receiver in Actions by Others:** *Denton v. Merchants' Nat. Bank*, 18 Wash. 387, 51

Pac. 473; *Muhlenberg v. Tacoma*, 25 Wash. 36, 64 Pac. 925; *Childs v. Blethen*, 40 Wash. 340, 82 Pac. 405.

§ 85. **Attachment and Garnishment:** *Russell v. Millett*, 20 Wash. 212, 55 Pac. 44.

§ 86. **Injunction:** *Keeler v. White*, 10 Wash. 420, 38 Pac. 1134.

§ 87. **Pleading—Complaint:** *Shuey v. Holmes*, 20 Wash. 13, 54 Pac. 540; *Allen v. Baxter*, 42 Wash. 434, 85 Pac. 26; *Vasele v. Grant St. Elec. R. Co.*, 16 Wash. 602, 48 Pac. 249; *Casey v. Oakes*, 17 Wash. 409, 50 Pac. 53.

§ 88. **Costs:** *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338.

ACCOUNTING AND COMPENSATION: See *Remington's Digest*, Rec., §§ 88-1—97. Duty to account in general: *Seattle Hardware Co. v. Waugh*, 56 Wash. 478, 106 Pac. 471.

§ 89. **Credits in General:** *Hewitt v. Traders' Bank*, 18 Wash. 326, 51 Pac. 468; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548.

§ 90. **Reimbursement of Expenditures:** *Chandler v. Cushion-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548.

§ 91. **Counsel Fees and Costs:** *Brundage v. Home Sav. & L. Assn.*, 11 Wash. 288, 39 Pac. 669; *Oudin & Bergman Fire Clay Min. Co. v. Cole*, 35 Wash. 647, 77 Pac. 1066; *Clumpner v. Spokane-Columbia River R. & Nav. Co.*, 79 Wash. 278, 140 Pac. 365; *Pacific Coast Coal Co. v. Esary*, 92 Wash. 203, 158 Pac. 1003; *Willett & Oleson v. Janecke*, 85 Wash. 654, 149 Pac. 17, Ann. Cas. 1917B, 351.

§ 92. **Compensation for Services—Allowance of Compensation:** *Van Brocklin v. Queen City Printing Co.*, 21 Wash. 447, 58 Pac. 575; *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536; *Pacific Coast Coal Co. v. Esary*, 92 Wash. 203,

158 Pac. 1003; *Colkett v. Hammond*, 101 Wash. 416, 172 Pac. 548.

§ 93. **Amount:** *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536; *Chandler v. Cushing-Young Co.*, 13 Wash. 89, 42 Pac. 548; *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15; *Spokane-Columbia River R. & Nav. Co.*, In re, 70 Wash. 142, 126 Pac. 418; *Pacific Coast Coal Co. v. Esary*, 92 Wash. 203, 158 Pac. 1003; *Crawford v. Seattle R. & So. R. Co.*, 102 Wash. 386, 173 Pac. 32; *Wroten v. Robbins*, 103 Wash. 393, 174 Pac. 968.

See, also, *Holland v. Silver Basin Min. Co.*, 113 Wash. 63, 193 Pac. 500, 502.

§ 94. **Discretion of Court:** *Tompson v. Huron Lumber Co.*, 5 Wash. 527, 32 Pac. 536; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548.

§ 95. **Liabilities of Parties, Property or Funds for Compensation and Expenses:** *Lammon v. Giles*, 3 W. T. 117, 13 Pac. 417; *Cannon v. Snipes*, 24 Wash. 166, 64 Pac. 167; *Cannon v. Snipes*, 32 Wash. 243, 73 Pac. 379.

§ 96. — **Improper Appointment of Receiver:** *Lammon v. Giles*, 3 W. T. 117, 13 Pac. 417; *Brundage v. Home Sav. Assn.*, 11 Wash. 288, 39 Pac. 669; *Lohman v. Claussen*, 55 Wash. 408, 104 Pac. 624.

§ 97. **Discharge of Receiver:** State ex rel. *Oudin v. Superior Court*, 31 Wash. 481, 71 Pac. 1095.

Duty and power of receiver with respect to existing contracts. Ann. Cas. 1912C, 949.

Continuance of business by receiver at loss. 12 A. L. R. 292.

Power of receiver to sue out of jurisdiction of appointment. 4 L. R. A. (N. S.) 824.

Power of railway receiver to contract for transportation beyond own line. 31 L. R. A. (N. S.) 33.

§ 744. Order When Part of Claim Admitted.

When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order by execution or attachment. [L. '54, p. 153, § 178; Cd. '81, § 199; 2 H. C., § 332.]

Cited in 86 Wash. 586.

CHAPTER VI.

DEPOSITS IN COURTS.

§ 745. Deposits in Court.

When it is admitted by the pleading or examination of a party that he has in his possession, or under his control, any money, or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another

party. the court may order the same to be deposited in court, or delivered to such party, with or without security, subject to the further direction of the court. [L. '54, p. 163, § 174; Cd. '81, § 195; 2 H. C., § 328.]

Cited in 28 Wash. 406; 31 Wash. 103.

In General: See Remington's Digest, Dep. in Court, §§ 1—4. Nature and purpose of remedy: State ex rel. Byers v. Superior Court, 28 Wash. 403, 68 Pac. 865. Custody and deposit of funds: State ex rel. Schwabacher Bros. v. Superior Court, 13 Wash. 638, 43 Pac. 877. Rights and liabilities of parties: Mansfield v. First Nat. Bank, 6 Wash. 603, 34 Pac.

143; Munroe v. Sedro Lumber & Shingle Co., 16 Wash. 694, 48 Pac. 405; State ex rel. Grass v. White, 40 Wash. 560, 82 Pac. 907, 2 L. R. A. (N. S.) 563. Disposition under judgment or order of court: Lazier v. Cady, 44 Wash. 339, 87 Pac. 344.

Who bears loss of funds deposited in court awaiting outcome of litigation. 2 A. L. R. 463.

§ 746. Manner of Enforcing Order.

Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or thing, and deposit or deliver it, in conformity with the direction of the court. [L. '54, p. 163, § 175; Cd. '81, § 196; 2 H. C., § 329.]

Cited in 71 Wash. 497.

§ 747. Custody of Money Deposited.

Money deposited or paid into a court in an action shall not be loaned out, unless with the consent of all parties having an interest in or making claim to the same. [L. '54, p. 163, § 176; Cd. '81, § 197; 2 H. C., § 330.]

CHAPTER VII.

ARREST AND BAIL.

§ 748. No Arrest Except as Provided by Statute.

No person shall be arrested or held to bail in any civil action except upon the order of the court where the action is brought, or a judge of the supreme court. [L. '54, p. 145, § 73; Cd. '81, § 115; 2 H. C., § 228.]

Although most of this chapter is violative of Const., Art. I, § 17 (see note to next section), it is retained; since certain of its provisions have been adopted by reference in other matters.

Cited in 78 Wash. 695.

Authority to arrest without warrant: See Mitchell v. Hughes, 104 Wash. 231, 176 Pac. 26.

In attempting to make an arrest for a misdemeanor, police officers have no warrant to maim or kill a person who attempts to escape: Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599.

REMEDY IN CIVIL ACTIONS: See Remington's Digest, Arrest, §§ 1, 2. Nature and purpose of remedy: Cline v. Harmon, 2 Wash. 155, 26 Pac. 191, 269; Cline v. Tacoma Stove Co., 2 Wash. 164, 26 Pac. 192; Cline v. Burrichter, 2 Wash. 165, 26 Pac. 192. Constitutionality

of imprisonment for debt: Burrichter v. Cline, 3 Wash. 135, 28 Pac. 367; Colby v. Backus, 19 Wash. 347, 53 Pac. 367, 67 Am. St. Rep. 732.

Const., Art. I, § 17, abates the rights of arrest given by this chapter, except in the case of absconding debtors; and as the constitution is not self-executing, this procedure cannot apply to absconding debtors without express statutory enactment: Hamilton v. Pacific Drug Co., 78 Wash. 689, 139 Pac. 642.

For text treatment of "Arrest," see 2 R. C. L. 443.

For text treatment of "Bail and Recognizance," see 3 R. C. L. 1.

§ 749. Defendant, When Subject to Arrest.

The defendant may be arrested in the following cases:—

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is a nonresident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property;

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof;

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;

6. When the action is to prevent threatened injury to or destruction of property, in which the party bringing the action has some right, interest, or title, which will be impaired or destroyed by such injury or destruction, and the danger is imminent that such property will be destroyed or its value impaired, to the injury of the plaintiff;

7. On the final judgment or order of any court in this state, while the same remains in force, when the defendant, having no property subject to execution, or not sufficient to satisfy such judgment, has money which he ought to apply in payment upon such judgment, which he refuses to apply, with intent to defraud the plaintiff, or when he refuses to comply with a legal order of the court, with intent to defraud the plaintiff; or when any one or more of the causes exist for which an arrest is allowed in the first class of cases mentioned in this section. [L. '54, p. 145, § 74; Cd. '81, § 116; 2 H. C., § 229.]

See notes to last section.

Cited in 3 Wash. 136; 81 Wash. 395, 397; 84 Wash. 60; 88 Wash. 266, 268, 270.

This section violates Const., Art. I, § 17, providing that there shall be no imprisonment for debt except in case of absconding debtors: *Bronson v. Syverson*, 88 Wash. 264, 152 Pac. 1039, Ann. Cas. 1917D, 833, L. R. A. 1916B, 993.

Grounds: See *Remington's Digest*, Arrest, §§ 3, 4. Absconding debtors: *Burrichter v. Cline*, 3 Wash. 135, 28 Pac.

367; *Hamilton v. Pacific Drug Co.*, 78 Wash. 689, 139 Pac. 642; *Hayes v. Hutchinson & Shields*, 81 Wash. 394, 142 Pac. 865; Affidavits for arrest: *Burrichter v. Cline*, 3 Wash. 135, 28 Pac. 367.

Right to arrest in breach of promise case. 59 L. R. A. 957.

Arrest under civil process for breach of warranty. 20 L. R. A. (N. S.) 844.

Right to arrest partner in civil action
or proceeding. 6 *Ann. Cas.* 109;
4 *L. R. A. (N. S.)* 130.

Place where order of arrest may be
executed in civil action. *Ann.*
Cas. 1912B, 1376.

§ 750. Proof Required to Obtain Order.

The court or judge making the order of arrest shall first be satisfied, by the affidavit of the party, or his agent or attorney, and other proof under oath, exclusive of the complaint, that the case is one in which an arrest is provided for in section 749, and that one or more of the prescribed causes exist, which proof shall be in writing, and, together with the order, be filed with the clerk before he shall issue any warrant for the arrest. [Cf. L. '54, p. 145, § 75; Cd. '81, § 117; L. '88, p. 31, § 1; 2 H. C., § 230.]

§ 751. Court or Judge must Fix Bail.

The court or judge making the order shall, in all cases, specify therein the amount in which the defendant shall be held to bail, which shall, in no case, exceed the demand of the plaintiff, and one hundred dollars in addition thereto, which amount the clerk shall indorse upon the writ, and the court shall also, in the order, fix the amount of the bond to be given by the plaintiff, as provided in the next succeeding section, which amount shall in no case be less than one hundred dollars. [L. '54, p. 146, § 76; Cd. '81, § 118; 2 H. C., § 231.]

§ 752. Bond Required of Plaintiff.

Before any clerk shall issue a warrant for the arrest of the defendant, he shall require the plaintiff to place on file in his office a copy of the order granting the warrant, unless the same was made in open court, and appears in the minutes, the original affidavit and proofs upon which the order was made, and a bond, on behalf of the plaintiff, in such an amount as the court or judge may have fixed in the order, with sureties to the satisfaction of the clerk, conditioned to pay to the defendant all damages which he shall suffer and all expenses he shall incur by reason of such arrest or imprisonment, if the order shall be vacated in the manner provided for in the next succeeding section, or if the plaintiff fail to recover in his action. [L. '54, p. 146, § 77; Cd. '81, § 119; 2 H. C., § 232.]

§ 753. Defendant may Move to Vacate Order—Proceedings Thereon.

The defendant may, on motion, apply to the court to vacate the order of arrest, on the ground of insufficiency of the proof, or he may show that the facts alleged upon which the order issued are untrue, or he may apply to have the amount of bail reduced. If the court, upon any such motion, shall vacate the order, the defendant shall be discharged from the arrest, and any bond he may have given shall be canceled, but the action, unless dismissed for other cause, shall be conducted in the same manner as in cases where complaint and notice were duly served and filed. [L. '54, p. 146, § 78; Cd. '81, § 120; 2 H. C., § 233.]

Discharge: See Remington's Digest, Arrest, § 5; Burrichter v. Cline, 3 Wash. 135, 28 Pac. 867; Tacoma Stove Co. v. Cline, 3 Wash. 431, 28 Pac. 368; Harmon v. Cline, 3 Wash. 432, 28 Pac. 368.

Surrender of principal by sureties on bail bond. 3 *A. L. R.* 180.

Induction of principal into military or naval service as exonerating his bail for his nonappearance: 8 *A. L. R.* 371.

Insanity of principal as relieving bail for his nonappearance. 7 *A. L. R.* 394.

§ 754. Warrant must not Issue Till Complaint is Filed.

When an order of arrest is granted prior to the filing of the complaint, the warrant shall not issue until the complaint is filed with the clerk, and a copy of said complaint shall be served on the defendant with the warrant; but an order of arrest may be granted at any time after the action is commenced, and before judgment is satisfied, when the party seeking the order shall comply with the preceding provisions in regard to arrests. [L. '54, p. 146, § 79; Cd. '81, § 121; 2 H. C., § 234.]

§ 755. Warrant must State Cause of Arrest.

The warrant shall, in all cases, contain a short statement of the alleged causes for which the order was granted, and also the amount for which bail is required. [L. '54, p. 146, § 83; Cd. '81, § 125; 2 H. C., § 235.]

§ 756. Defendant Entitled to Copy of Warrant.

The warrant must be delivered to the sheriff, who, upon arresting the defendant, must deliver to him a copy thereof. [L. '54, p. 146, § 80; Cd. '81, § 122; 2 H. C., § 236.]

§ 757. Execution of Warrant—Fees of Sheriff.

The sheriff shall execute the warrant by arresting the defendant, and keeping him in custody until discharged by law. And the plaintiff, in the first instance, shall be liable for the sheriff's fees, for the food and maintenance of any person under arrest, which, if required by the sheriff, shall be paid weekly in advance. And such fees so paid shall be added to the costs taxed or accruing in the case, and be collected as other costs. And if the plaintiff shall neglect to pay such fees for three days after a demand, in writing, upon the plaintiff or his attorney for payment, the sheriff may discharge defendant out of custody. [L. '54, p. 146, § 81; Cd. '81, § 123; 2 H. C., § 237.]

Cited in 78 Wash. 695; 88 Wash. 269.

§ 758. Conditions of Bail Bond.

The defendant may give bail by causing a bond to be executed by two or more sufficient sureties, stating their places of residence and occupations, conditioned that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment rendered therein; or if he be arrested for the cause mentioned in the third subdivision of section 749, it shall be further conditioned that the specific article of property, or instrument of writing which is the subject matter of the writ, shall be forthcoming, to abide any order which shall be made therein; or if he be arrested for the cause mentioned in the sixth subdivision of said section, it shall be further conditioned that he will not commit the injury or destruction alleged to be threatened in the affidavit or proofs on which the arrest is ordered. [L. '54, p. 147, § 82; Cd. '81, § 124; 2 H. C., § 238.]

§ 759. Surrender of Defendant.

At any time before a failure to comply with their bonds, the bail may surrender the defendant in their exoneration, or he may surrender

himself to the sheriff of the county where he was arrested, in the following manner:—

1. A certified copy of the bail bond shall be delivered to the sheriff, who shall retain the defendant in his custody thereon as upon an order of arrest, and by a certificate in writing, acknowledge the surrender;

2. Upon the production of a copy of the bail bond and sheriff's certificate a judge of the superior court may, upon a notice to the plaintiff of eight days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and the papers used on such application, they shall be exonerated accordingly. But this section does not apply to an arrest for the cause mentioned in the sixth subdivision of section 749. [L. '54, p. 147, § 84; Cd. '81, § 126; 2 H. C., § 239.]

§ 760. Bail may Arrest Defendant.

For the purpose of surrendering the defendant, the bail, at any time or place before they are finally discharged, may themselves arrest him, or, by written authority indorsed upon a certified copy of the bond, may empower any person of suitable age and discretion to do so. [L. '54, p. 147, § 85; Cd. '81, § 127; 2 H. C., § 240.]

Surrender of principal by sureties on bail bond. 3 **A. L. R.** 180.

§ 761. Proceeding Against Bail.

In case of failure to comply with the condition of the bond, the bail can be proceeded against by action only. [L. '54, p. 147, § 86; Cd. '81, § 128; 2 H. C., § 241.]

§ 762. Exoneration of Bail.

The bail may be exonerated either by the death of the defendant, or his imprisonment in the penitentiary, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in exoneration thereof, within twenty days after commencement of the action against the bail, or within such further time as may be granted by the court. [L. '54, p. 148, § 87; Cd. '81, § 129; 2 H. C., § 242.]

Induction of principal into military or naval service as exonerating his bail for his nonappearance. 8 **A. L. R.** 371.

Insanity of principal as relieving bail for his nonappearance. 7 **A. L. R.** 394.

§ 763. Return of Sheriff—Exceptions to Bail.

Within the time limited for that purpose, the sheriff must deliver the order of arrest to the clerk, with his return indorsed thereon, and the bond of the bail, or a copy thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he must be deemed to have accepted it, and the sheriff shall be exonerated from liability. [L. '54, p. 148, § 88; Cd. '81, § 130; 2 H. C., § 243.]

§ 764. Notice of Justification.

On the receipt of notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justi-

fication of the same, or their bail (specifying the places of residences and occupations of the latter), before judgment [the judge] of the court or justice of the peace, at a specified time and place, the time to be not less than five days nor more than ten thereafter. In case other bail be given, there must be a new bond in the form prescribed in section 758. [L. '54, p. 148, § 89; Cd. '81, § 131; 2 H. C., § 244.]

§ 765. Qualifications of Bail.

The qualifications of the bail shall be as follows:—

1. Each of them shall be a resident of the state; but no counselor or attorney at law, sheriff, clerk of the superior court, or other officer of such court, shall be permitted to become bail in any action;

2. Each of the bail shall be worth the amount specified in the order of arrest, or the amount to which the order may be reduced, as provided in this chapter, over and above all debts and liabilities, and exclusive of property exempt from execution; but the judge or justice, on justification, may allow more than two sureties to justify, severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail. [L. '54, p. 138, § 90; Cd. '81, § 132; 2 H. C., § 245.]

Cited in 16 Wash. 337.

§ 766. Justification, How Made.

For the purpose of justification, each of the bail must attend before the judge or justice of the peace at the time and place mentioned in the notice, and may be examined on oath on the part of the plaintiff touching his sufficiency, in such manner as the judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. [L. '54, p. 148, § 91; Cd. '81, § 133; 2 H. C., § 246.]

§ 767. Order When Bail Found Sufficient.

If the judge or justice find the bail sufficient, he shall indorse his allowance thereof on the bond, and cause it to be filed with the clerk, and the sheriff shall thereupon be exonerated from liability. [L. '54, p. 148, § 92; Cd. '81, § 134; 2 H. C., § 247.]

§ 768. Deposit of Money Instead of Bail.

The defendant may at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff must thereupon give the defendant a certificate of deposit, and the defendant shall be discharged from custody. [L. '54, p. 148, § 93; Cd. '81, § 135; 2 H. C., § 248.]

§ 769. Bail Money to be Paid into Court.

The sheriff shall within ten days after the deposit, pay the same into court, and take from the officer receiving the same two certificates of such payment, the one of which he must deliver to the plaintiff and the other to the defendant. For any default in making such payment, the same proceeding may be had on the official bond of the sheriff to collect the

sum deposited, as in case of delinquency. [L. '54, p. 149, § 94; Cd. '81, § 136; 2 H. C., § 249.]

§ 770. Bail may be Substituted for Money.

If the money be deposited, as provided in the last two sections, bail may be given and justified, upon notice as hereinbefore provided, at any time before judgment; and thereupon the judge before whom justification is had shall direct in the order of allowance that the money deposited be refunded by the sheriff or clerk to the defendant, and it shall be refunded accordingly. [L. '54, p. 149, § 95; Cd. '81, § 137; 2 H. C., § 250.]

§ 771. Disposition of Bail Money After Judgment.

When money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall, under the direction of the court, apply the same in the satisfaction thereof, and after satisfying judgment, refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied. [L. '54, p. 149, § 96; Cd. '81, § 138; 2 H. C., § 251.]

§ 772. Liability of Sheriff for Escape.

If, after being arrested, the defendant escapes or be rescued, the sheriff himself shall be liable as bail; but he may discharge himself from such liability by giving bail at any time before judgment. [L. '54, p. 149, § 97; Cd. '81, § 139; 2 H. C., § 252.]

§ 773. Judgment—Sheriff as Bail.

If the judgment be recovered against the sheriff upon his liability as bail, and an execution thereon be returned unsatisfied, the same proceedings may be had on the official bond of the sheriff to collect the deficiency as in other cases of delinquency. [L. '54, p. 149, § 98; Cd. '81, § 140; 2 H. C., § 253.]

§ 774. Bail Liable to Sheriff.

The bail taken on arrest shall, unless they justify, or other bail be given or justified, be liable to the sheriff, by action, for the damages which he may sustain by reason of such omission. [L. '54, p. 149, § 99; Cd. '81, § 141; 2 H. C., § 254.]

§ 775. Examination of Surety by Officer.

Every court and officer authorized to take any bail or surety shall have power to examine on oath the person offering to become such bail or surety concerning his property and sufficiency as such bail or surety. [L. '54, p. 219, § 488; Cd. '81, § 748; 2 H. C., § 799.]

§ 776. Money may be Deposited for Bail.

Any person required to give bail may deposit with the clerk the amount of money for which he is required to give bail, and thereupon be discharged from arrest. [L. '54, p. 220, § 493; Cd. '81, § 750; 2 H. C., § 801.]

§ 777. Bonds not to Fail for Want of Form.

No bond required by law, and intended as such bond, shall be void for want of form or substance, recital, or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond, the plaintiff may state its legal effect in the same manner as though it were a perfect bond. [L. '54, p. 219, § 489; Cd. '81, § 749; 2 H. C., § 800.]

Cited in 5 Wash. 587; 11 Wash. 166; 31 Wash. 492; 60 Wash. 647; 95 Wash. 249; 99 Wash. 376.

Sufficiency of statutory bonds and bonds taken by officers: See Remington's Digest, Bonds, § 9; Ihrig v. Scott, 5 Wash. 584, 32 Pac. 466; Sears v. Williams, 9 Wash. 428, 37 Pac. 665; Pacific Bridge Co. v. United States Fidelity etc. Co., 33 Wash. 47, 73 Pac. 772; Schmidt v. North Yakima, 12 Wash. 121, 40 Pac. 790; Armour & Co. v. Western Construc-

tion Co., 36 Wash. 529, 78 Pac. 1106; Baum v. Whatcom County, 19 Wash. 626, 54 Pac. 29.

See, also, Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599; School Dist. No. 75 v. Qualls, 95 Wash. 247, 163 Pac. 761.

This section providing that no bond shall be void for want of form or substance, etc., has no application where the bond has no surety upon it at all: Wenatchee Orchard & Irr. Co. v. Thompson, 60 Wash. 643, 111 Pac. 874.

CHAPTER VIII.**NE EXEAT.****§ 778. Affidavit for Writ.**

Actions may be commenced upon any agreement in writing before the time for the performance of the contract expires, when the plaintiff or his agent shall make and file an affidavit with the clerk of the proper court that the defendant is about to leave the state without performing or making provisions for the performance of the contract, taking with him property, moneys, credits, or effects subject to execution, with intent to defraud plaintiff. [L. '54, p. 209, § 418; Cd. '81, § 636; 2 H. C., § 747.]

For text treatment of "Ne exeat," see 19 R. C. L. 1340.

§ 779. Complaint—Bond—Order of Arrest.

At the time of filing the affidavit the plaintiff shall also file his complaint in the action, and thenceforth the action shall proceed as other actions at law, except as otherwise provided in this chapter. Upon such affidavit and complaint being filed, the clerk shall issue an order of arrest and bail, directed to the sheriff, which shall be issued, served, and returned in all respects as such orders in other cases; before such order shall issue, the plaintiff shall file in the office of the clerk a bond, with sufficient surety, to be approved by the clerk, conditioned that the plaintiff will pay the defendant such damages and costs as he shall wrongfully sustain by reason of the action, which sureties shall justify as bail upon an arrest. [Cf. L. '54, p. 209, § 419; Cd. '81, § 637; L. '91, p. 81, §§ 1, 2; 2 H. C., §§ 748, 749.]

§ 780. Recognizance—Commitment—Discharge.

The sheriff shall require the defendant to enter into a bond, with sufficient surety, personally to appear within the time allowed by law for

answering the complaint, and to abide the order of the court; and in default thereof the defendant shall be committed to prison until discharged in due course of law; such special bail shall be liable for the principal, and shall have a right to arrest and deliver him up, as in other cases, and the defendant may give other bail. Instead of giving special bail, as above provided, the defendant shall be entitled to his discharge from custody if he will secure the performance of the contract to the satisfaction of the plaintiff. [Cf. L. '54, pp. 209, 210, §§ 420, 421; Cd. '81, §§ 638, 639; L. '91, p. 81, § 3; 2 H. C., §§ 750, 751.]

§ 781. Persons Entitled to Writ.

This proceeding may be had in favor of any surety or other person jointly bound with the defendant. It may also be prosecuted by the person in whose favor the contract exists, against any one or more of the persons bound thereby, upon filing such affidavit, when the co-contractors are nonresident or probably insolvent, or at the request of any of them when they are residents and solvent. [L. '54, p. 210, § 422; Cd. '81, § 640; 2 H. C., § 752.]

A writ of ne exeat preventing an appellant in a divorce case from leaving the state pending the appeal will not be granted, in the absence of a sufficient showing that he is about to do so, and where he has given a supersedeas bond on appeal, and much of the property involved is real estate which cannot be conveyed without consent of the wife: *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091.

Power to issue writ of ne exeat to prevent decree for alimony from

becoming ineffective. 8 A. L. R. 327.

Ne exeat in suit by wife for support or for divorce and alimony. 3 Ann. Cas. 295.

Ne exeat as imprisonment for debt. 34 L. R. A. 671; L. R. A. 1915B, 651.

Ne exeat to prevent removal of property from state. L. R. A. 1916C, 407.

What constitutes breach of ne exeat bond. 20 L. R. A. (N. S.) 76.

§ 782. Habeas Corpus.

The defendant may have the same remedy by writ of habeas corpus as in other cases of arrest and bail. [L. '54, p. 210, § 423; Cd. '81, § 641; 2 H. C., § 753.]

§ 783. Before Justices.

The proceedings provided for in this chapter may be had before justices of the peace in all cases within their jurisdiction. [Cf. L. '54, p. 210, § 424; Cd. '81, § 642; L. '91, p. 82, § 4; 2 H. C., § 754.]

§ 784. Venue.

The affidavit and bond may be filed and proceedings had in any county where the defendants may be found. [L. '54, p. 210, § 425; Cd. '81, § 643; 2 H. C., § 755.]

Cited in 23 Wash. 578.

ACTIONS IN PARTICULAR CASES.

TITLE VI.

ACTIONS IN PARTICULAR CASES.

CHAPTER I.—ACTIONS FOR POSSESSION OF AND QUIETING TITLE TO REAL PROPERTY.

- | | |
|---|---|
| 785. Who may maintain—Service on non-resident defendant. | 798. Pleading, issue and trial on counterclaim. |
| 786. Limitation for bringing actions, seven years. | 799. Judgment on counterclaim — Payment. |
| 787. Rights of heirs, etc. | 800. Verdict after right of possession has expired. |
| 788. Legal owner, defined. | 801. Order for survey. |
| 789. Vacant and unoccupied lands. | 802. Contents, service and effect of order. |
| 790. Public lands and adverse title in infants, etc.—Except. | 803. Alienation pendente lite. |
| 791. Construction. | 804. Mortgagee cannot maintain ejectment. |
| 792. Substitution of landlord in action against tenant. | 805. Actions between cotenants. |
| 793. Pleadings—Superior title prevails. | 806. Judgment, conclusiveness of. |
| 794. Defendant must plead title—Judgment against landlord. | 807. Possession not affected by vacating judgment. |
| 795. Verdict. | 808. Conflicting claimants under donation law. |
| 796. Damages — Limitation — Use of improvements. | 809. Conflicting claims to real property generally. |
| 797. Betterments — Counterclaim for — Taxes and improvements. | |

CHAPTER II.—FORCIBLE ENTRY AND DETAINER.

- | | |
|--|---|
| 810. Forcible entry, defined. | 825. Proof required by plaintiff. |
| 811. Forcible detainer, defined. | 826. Amendment of complaint—Continuance. |
| 812. Unlawful detainer, defined. | 827. Verdict and judgment. |
| 813. Tenancy upon agricultural lands—Effect of holding over. | 828. Amendments allowed, when. |
| 814. Service of notice. | 829. Practice—General provisions applicable. |
| 815. Venue. | 830. Forfeiture, relief against. |
| 816. Parties defendant—Judgment. | 831. Appeal—Bond. |
| 817. Complaint—When summons must issue. | 832. Stay of proceedings pending appeal. |
| 818. Summons, form and service. | 833. Appeal suspends writ of restitution. |
| 819. Writ of restitution. | 834. Unlawful detainer of certain lands—What constitutes. |
| 820. Service of writ—Bond. | 835. Complaint and answer. |
| 821. Modification of amount of bond. | 836. Proof required by plaintiff—Trial. |
| 822. Judgment by default. | 837. Proof—Parties defendant—Trial of separate issues. |
| 823. Pleading by defendant. | |
| 824. Trial by jury. | |

CHAPTER III.—PARTITION.

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| 838. Persons entitled to bring actions for. | 849. Expenses taxed as costs. |
| 839. Complaint—All known interests must be stated. | 850. Decree of sale on referee's report. |
| 840. Parties—Lien creditors—Liens adjusted. | 851. Estate for life, how set off. |
| 841. Notice. | 852. Lien creditors not parties, how brought in. |
| 842. Service by publication. | 853. Unsatisfied liens—Reference. |
| 843. Answer, contents of. | 854. Ascertainment of liens and their priority. |
| 844. Issues to be tried. | 855. Notice to lienholders. |
| 845. Order of sale—Partial partition. | 856. Proceedings of referee on ascertaining liens. |
| 846. Partition, how made—Referees. | 857. Report of referee. |
| 847. Report of referees—Confirmation—Decree. | 858. Confirmation of report. |
| 848. Decree, rights affected by. | 859. Distribution of proceeds of sale. |

ACTIONS IN PARTICULAR CASES.

- | | |
|--|--|
| <p>860. Other securities to be first exhausted.</p> <p>861. Proceedings to ascertain and adjust liens do not delay sale.</p> <p>862. Proceeds of sale, disposition of.</p> <p>863. Continuance of action to determine rights of parties.</p> <p>864. Sales by referees may made by auction.</p> <p>865. Terms of sale may be directed by court.</p> <p>866. Securities to be taken by referee.</p> <p>867. Estate of tenant for life or for years may be sold.</p> <p>868. Tenant for life or years entitled to gross sum.</p> <p>869. Court to determine sum, if consent not given.</p> <p>870. Protection of unknown tenant.</p> <p>871. Inchoate and contingent interest.</p> <p>872. Terms of sale must be made known.</p> | <p>873. Referees or guardians not to be interested in purchase.</p> <p>874. Report of sale—Contents.</p> <p>875. Exceptions to report—Confirmation—Conveyance.</p> <p>876. Receipt of proceeds.</p> <p>877. Investment of proceeds of unknown owner.</p> <p>878. Investment in name of clerk.</p> <p>879. Securities to be taken in name of parties.</p> <p>880. Duties of clerk making investments.</p> <p>881. Unequal partition—Compensation adjudged.</p> <p>882. Share of infant may be paid to guardian.</p> <p>883. Guardian of insane, etc., may receive.</p> <p>884. Guardian may consent to partition.</p> <p>885. Costs, how apportioned.</p> |
|--|--|

CHAPTER IV.—ACTIONS AGAINST THE STATE.

- | | |
|---|---|
| <p>886. Manner of collecting claims against the state—Bond.</p> <p>887. Service, how made.</p> <p>888. Attorney general counsel for state—Procedure.</p> <p>889. Judgment, how satisfied.</p> | <p>890. Limitations.</p> <p>890-1. Action against state officers—Request for defense at expense of state.</p> <p>890-2. Expenses, from what fund payable.</p> |
|---|---|

CHAPTER V.—EMINENT DOMAIN.

- | | |
|--|---|
| <p>891. Appropriation of property by the state—Requisites of petition.</p> <p>892. Notice—Contents of—Service—Publication.</p> <p>893. Adjournment of Proceedings—Notice.</p> <p>894. Hearing of petition—Jury.</p> <p>895. Trial—Damages—Judgment.</p> <p>896. Judgment—Filing and recording of.</p> <p>897. Payment of damages, effect of—Appeal.</p> <p>898. Claimants, how paid—Conflicting claims, how determined.</p> <p>899. Appeal.</p> <p>900. Payment of award and costs.</p> <p>900-1. Condemnation for military purposes—Certificate of necessity—Proceedings.</p> <p>900-2. Application of act.</p> <p>901. Counties may appropriate land for public use.</p> <p>902. Tax levy to pay cost of condemnation.</p> <p>903. Eminent domain extended to counties.</p> <p>904. Indebtedness contracted, general county purpose.</p> <p>905. County purpose, defined.</p> <p>905-1. Condemnation for aerial transportation purposes.</p> <p>906. School districts may appropriate land.</p> <p>907. Petition to superior court.</p> <p>908. Notice of petition—Service.</p> <p>909. Adjournment of proceedings.</p> <p>910. Findings of necessity—Setting trial.</p> <p>911. Jury trial.</p> | <p>912. Trial—View by jury.</p> <p>913. Verdict for full value of property.</p> <p>914. Verdict by ten jurors.</p> <p>915. Waiver of jury.</p> <p>916. Judgment—Effect.</p> <p>917. Costs.</p> <p>918. Appeal to supreme court.</p> <p>919. Possession of premises.</p> <p>920. Parties—Designation—Fees of clerk.</p> <p>921. Eminent domain by corporations—Petition, requisites of.</p> <p>922. Notice—Contents and service.</p> <p>923. Service where state is party defendant.</p> <p>924. Adjournment of proceedings.</p> <p>925. Court to adjudicate necessity for appropriation—Calling jury.</p> <p>926. Trial, how conducted.</p> <p>927. Judgment and decree of appropriation.</p> <p>928. Decree against state lands—Filing with commissioner—Effect.</p> <p>929. Payment to petitioner—On appeal money to remain in court.</p> <p>930. Disposition of money—Conflicting claims.</p> <p>931. Appeal.</p> <p>932. Prosecution of work pending appeal.</p> <p>933. Appropriation of right of way through defiles, etc.</p> <p>934. Appropriation by electric power companies, etc.</p> <p>935. Right to enter lands for survey, etc.</p> <p>936. Procedure as in other cases.</p> |
|--|---|

ACTIONS IN PARTICULAR CASES.

CHAPTER VI.—WASTE, TRESPASS AND NUISANCE.

- | | |
|---|--|
| 937. Waste actionable. | 944. Who may maintain. |
| 938. Action against guardian or tenant
— Damages — Forfeiture — Evic-
tion. | 945. Warrant for abatement of nuisance. |
| 939. Trespass for cutting trees, etc.—
Damage. | 946. Stay of warrant. |
| 940. Casual or involuntary trespass—
Damages. | 946-1. Houses of prostitution to be abated. |
| 941. Injunction to prevent waste on
public lands. | 946-2. Actions—Temporary injunction. |
| 942. Action by occupant of unsurveyed
land. | 946-3. General reputation of place—Dis-
missal of action. |
| 943. Actionable nuisances, defined. | 946-4. Contempt—Punishment. |
| | 946-5. Order of abatement—Effect. |
| | 946-6. Proceeds of sale. |
| | 946-7. Voluntary abatement—Release. |
| | 946-8. Penalty—Tax lien. |

CHAPTER VII.—ESTABLISHMENT OF BOUNDARIES OF LANDS.

- | | |
|--|--|
| 947. Establishment of lost or uncertain
boundary lines. | 949. Proceedings, how conducted — De-
cree. |
| 948. Commissioners appointed — Duties
of. | |

CHAPTER VIII.—ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

- | | |
|---|--|
| 950. Actions by public corporations. | 954. Officer refusing to satisfy judgment
may be attached. |
| 951. Actions against public corporations. | 955. Tender condition precedent to ac-
tion to enjoin tax collection. |
| 952. Verification of pleadings by public
corporations. | 956. Complaint—Contents. |
| 953. Manner of enforcing judgments. | 957. Construction of act. |

CHAPTER IX.—ACTIONS ON OFFICIAL BONDS, FINES AND FORFEITURES

- | | |
|--|--|
| 958. Official bonds, to whom deemed se-
curity. | 962. Amount of judgment. |
| 959. Injured party may maintain action. | 963. Actions for fines and forfeitures. |
| 960. Leave to commence action. | 964. Amount of recovery. |
| 961. Judgment for delinquency no bar
to another action. | 965. Collusive judgment no bar. |
| | 966. Disposition of fines and forfeitures
—Venue. |

CHAPTER X.—ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

- | | |
|---|--|
| 967. What actions survive. | 971. No liability as executor de son tort. |
| 968. Several representatives regarded as
one. | 972. Executor of executor—Limit of
powers of. |
| 969. Judgment by default—Not evidence
of assets. | 973. Provisional remedies, when author-
ized. |
| 970. Inventory may be contradicted. | |

CHAPTER XI.—PROTECTION OF SUBETIES.

- | | |
|---|---|
| 974. Notice to creditor to institute ac-
tion. | 978. Subrogation of surety. |
| 975. Surety discharged. | 979. Contribution among sureties. |
| 976. Trial of suretyship. | 980. Surety shall not suffer judgment. |
| 977. Order to exhaust principal's prop-
erty. | 981. Provisions extended to heirs of
sureties. |

CHAPTER XII.—DIVORCE AND ALIMONY.

- | | |
|---|---|
| 982. Grounds for divorce. | 988. Interlocutory order — Powers of
court — Appeal within ninety
days. |
| 982-1. Nonsupport—Stay of proceedings
pending prosecution. | 988-1. Final decree after six months. |
| 983. Annulment of marriage. | 989. Decree—Disposition of property. |
| 984. Resident may apply. | 990. Divorce dissolves marriage as to
both parties. |
| 985. Proof required. | 994. Name of wife changed. |
| 986. Defendant may file cross-complaint. | |
| 987. Both parties deemed applying. | |

- | | |
|---|---|
| <p>995. Prosecuting attorney to resist un-defended actions—Associate shall not appear.</p> <p>995-1. Act not retroactive.</p> <p>995-2. Modification of order, judgment or decree relative to children.</p> | <p>995-3. Hearing on petition to modify.</p> <p>995-4. Filing of records and files in original action.</p> <p>996. Trial—Appeal—Proceedings.</p> <p>997. Practice—Trial without jury.</p> |
|---|---|

CHAPTER XIII.—CHANGE OF NAME.

998. Name may be changed upon petition.

CHAPTER I.

ACTIONS FOR POSSESSION OF AND QUIETING TITLE TO REAL PROPERTY.

§ 785. Who may Maintain Service on Nonresident Defendant.

Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title or some interest therein, and may have judgment in such action quieting or removing a cloud from plaintiff's title; an action to quiet title may be brought by the known heirs of any deceased person, or of any person presumed in law to be deceased, or by the successors in interest of such known heirs against the unknown heirs of such deceased person or against such person presumed to be deceased and his unknown heirs, and if it shall be made to appear in such action that the plaintiffs are heirs of the deceased person, or the person presumed in law to be deceased, or the successors in interest of such heirs, and have been in possession of the real property involved in such action for ten years preceding the time of the commencement of such action, and that during said time no person other than the plaintiff in the action or his grantors has claimed or asserted any right or title or interest in said property, the court may adjudge and decree the plaintiff or plaintiffs in such action to be the owners of such real property, free from all claims of any unknown heirs of such deceased person, or person presumed in law to be deceased; and an action to quiet title may be maintained by any person in the actual possession of real property against the unknown heirs of a person known to be dead, or against any person where it is not known whether such person is dead or not, and against the unknown heirs of such person, and if it shall thereafter transpire that such person was at the time of commencing such action dead the judgment or decree in such action shall be as binding and conclusive on the heirs of such person as though they had been known and named; and in all actions, under this section, to quiet or remove a cloud from the title to real property, if the defendant be absent or a nonresident of this state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, service may be made upon such defendant by publication of summons as provided by law; and the court may appoint a trustee for such absent or nonresident defendant, to make or cancel any deed or conveyance of whatsoever nature, or do any other act to carry into effect the judgment or the decree of the court. [L. '11, p. 383, § 1. Cf. L. '54, p. 205, § 398; L. '79, p. 134, § 1; Cd. '81, § 536; L. '90, p. 72, § 1; 2 H. C., § 529.]

Cited in 9 Wash. 157; 10 Wash. 359, 664; 11 Wash. 537; 12 Wash. 696; 19 Wash. 401; 20 Wash. 31; 21 Wash. 679; 22 Wash. 10; 25 Wash. 570; 26 Wash. 130, 670; 29 Wash. 112; 32 Wash. 456; 34 Wash. 179, 292, 309, 546; 37 Wash. 601; 38 Wash. 532; 42 Wash. 556; 46 Wash. 466; 47 Wash. 20, 617; 57 Wash. 673; 58 Wash. 693; 61 Wash. 694; 71 Wash. 447; 72 Wash. 231; 87 Wash. 188; 90 Wash. 366; 99 Wash. 86; 109 Wash. 443; 110 Wash. 244.

Nature and Scope of Remedy in General: See Remington's Digest, Eject., §§ 1, 2; Corporation of Catholic Bishop of Nesqually v. Gibson, 1 Wash. 592, 21 Pac. 315; Smith v. Wingard, 3 W. T. 291, 13 Pac. 717; Northern Pac. R. Co. v. Miller, 20 Wash. 21, 54 Pac. 603; Jeffries v. Spencer, 86 Wash. 133, 149 Pac. 651.

Under this section, an action will lie to recover possession of realty and at the same time remove a cloud upon its title: Reichenbach v. Washington etc. R. Co., 10 Wash. 357, 38 Pac. 1126; Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141; Povah v. Lee, 29 Wash. 108, 69 Pac. 639.

Questions Which may be Tried: See Remington's Digest, Eject., § 3; Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

Under this section, the court is to determine the title and grant relief according to the equities of the case; and defendants in possession, claiming that plaintiff's execution sale was void on the ground that the judgment had been paid, need not first substitute a direct proceeding to cancel the judgment before answering the complaint: McLiesh v. Ball, 58 Wash. 690, 109 Pac. 209, 137 Am. St. Rep. 1087.

Property Which may be Subject of Action: See Remington's Digest, Eject., § 4; Scurry v. Jones, 4 Wash. 468, 30 Pac. 726; Slaght v. Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062; Owen v. St. Paul & M. R. Co., 12 Wash. 313, 41 Pac. 44.

Under this section, an action to quiet title may be maintained to remove the cloud of a judgment lien against community property, although the judgment was against the husband for tort and not enforceable against the property. Wilson v. Stone, 90 Wash. 365, 156 Pac. 12.

Under this section, the action may be maintained by any or all of the tenants in common: Hannegan v. Roth, 12 Wash. 695, 44 Pac. 256.

Grounds of Action in General: See Remington's Digest, Eject., § 5; Mills v. Seattle & M. R. Co., 10 Wash. 520, 39 Pac. 246.

A lessee under a valid lease with the right to take possession has a valid subsisting interest in lands, within the meaning of this section, authorizing an action to recover possession from the tenant in possession; and may maintain the action before entry: Blanc's Cafe v. Corey, 110 Wash. 242, 188 Pac. 759.

Persons by and Against Whom Action may be Brought: See Remington's Digest, Eject., § 19; Ward v. Moorey, 1 W. T. 104; Mabie v. Whittaker, 10 Wash. 656, 39 Pac. 172; Brundage v. Home Sav. Assn., 11 Wash. 227, 39 Pac. 666.

An innocent purchaser for value, from the party holding the record title, may maintain an action to quiet his title as against an execution sale, under this section: White v. McSorley, 47 Wash. 18, 91 Pac. 243.

Ejectment may be maintained by the lessee of lands against the landlord who is in possession by its tenants to whom leases had also been made: Blanc's Cafe v. Corey, 110 Wash. 242, 188 Pac. 759.

PARTIES: See Remington's Digest, Eject., §§ 21-23. **Plaintiffs—Joinder:** Snyder v. Harding, 34 Wash. 286, 75 Pac. 812.

Defendants—In General: Reddish v. Smith, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503; Delacy v. Commercial Trust Co., 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112.

Casual Ejector or Tenant in Possession: Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318; Snyder v. Harding, 34 Wash. 286, 75 Pac. 812.

POSSESSION: See Remington's Digest, Eject., §§ 9-2-12.

Prior Possession of Plaintiff: Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works, 48 Wash. 574, 94 Pac. 110.

Right of Plaintiff to Possession: Dunn v. Peterson, 4 Wash. 170, 29 Pac. 998; Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982.

Where the beneficial owner of property, standing in the name of another did not record his deed and kept his interest concealed, his possession was not open and notorious within the meaning of this section: Daniel v. Daniel, 106 Wash. 659, 181 Pac. 215.

Possession of Defendant: Smith v. Wingard, 3 W. T. 291, 13 Pac. 717.

Demand or Notice to Quit: Lewiston Water etc. Co. v. Brown, 42 Wash. 555, 85 Pac. 47.

For text treatment of "Ejectment," see 9 R. C. L. 823.

Who is real party in interest by whom action of ejectment must be brought. 64 L. R. A. 620.

Right to maintain action of ejectment against landlord without joining tenant. 12 Ann. Cas. 531.

Recovery of land subject to easement by action in ejectment. 1 Ann. Cas. 863; 17 Ann. Cas. 734.

§ 786. Limitation for Bringing Actions, Seven Years.

All actions brought for the recovery of any lands, tenements or hereditaments of which any person may be possessed by actual, open and notorious possession for seven successive years, having a connected title in law or equity deducible of record from this state or the United States, or from any public officer, or other person authorized by the laws of this state to sell such land for the nonpayment of taxes, or from any sheriff, marshal or other person authorized to sell such land on execution or under any order, judgment or decree of any court of record, shall be brought within seven years next after possession being taken as aforesaid, but when the possessor shall acquire title after taking such possession, the limitation shall begin to run from the time of acquiring title. [L. '93, p. 20, § 1.]

Cited in 25 Wash. 571, 572; 43 Wash. 672; 49 Wash. 337; 50 Wash. 336, 337; 64 Wash. 663; 65 Wash. 497; 68 Wash. 179; 72 Wash. 229; 74 Wash. 474; 83 Wash. 257; 84 Wash. 44; 106 Wash. 675; 110 Wash. 123; 113 Wash. 207—209, 213.

TIME TO SUE AND PARTIES—Time to Sue: See Remington's Digest, Eject., § 20; Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863 (overruled in Id., 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. Rep. 1108); Hoffmeister v. Renton Coal Co., 40 Wash. 48, 82 Pac. 127.

Under this section, the statute of limitations would not begin to run against plaintiff until his actual ouster and the taking possession of the premises by defendants, where possession was not taken until some time subsequent to the sheriff's sale: Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141.

Where an action is brought under sections 785, 786, both for possession and the quieting of title, the limitation upon such actions of seven years specially provided therein governs: Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141.

This section operates to bar an action by minors to recover an interest in property sold under mortgage foreclosure ex-

ecution, although the minors were necessary parties to the foreclosure and were not joined in the foreclosure which did not affect their interests and the purchaser was only their tenant in common, where the purchaser understood he was buying the entire property and maintained adverse possession for seven years for his own exclusive benefit: Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289.

Where neither of two adjoining land owners intends to claim beyond the true boundary line set out in their deeds, possession by mistake to an erroneous line does not work a disseisin as against the other under the seven-year statute: Snell v. Stelling, 83 Wash. 248, 145 Pac. 466.

Adverse Possession by or Under Life Tenant: See Remington's Digest, Life Est., § 1; McDowell v. Beckham, 72 Wash. 224, 130 Pac. 350.

Contracts, Improvements, Insurance and Repairs: See Remington's Digest, Life Est., §§ 4, 5; Stahl v. Schwartz, 81 Wash. 293, 142 Pac. 651.

Necessity that defendant plead statute of limitations in action of ejectment. 21 Ann. Cas. 1244.

§ 787. Rights of Heirs, etc.

The heirs, devisees and assigns of the person having such title and possession shall have the same benefit of the preceding section as the person from whom the possession is derived. [L. '93, p. 20, § 2.]

§ 788. Legal Owner, Defined.

Every person in actual, open and notorious possession of lands, or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements.

shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section. [L. '93, p. 20, § 3.]

Cited in 4 Wash. 6; 32 Wash. 461; 34 Wash. 419; 35 Wash. 17; 36 Wash. 215, 216; 38 Wash. 18, 73, 74; 39 Wash. 76; 41 Wash. 612; 44 Wash. 178; 50 Wash. 117—119, 693; 52 Wash. 55, 56; 53 Wash. 650; 61 Wash. 620; 64 Wash. 663; 65 Wash. 494; 83 Wash. 257; 84 Wash. 44; 113 Wash. 205—207.

Necessity of Claim or Color of Title: See Remington's Digest, Adv. Poss., § 26; Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; May v. Sutherlin, 41 Wash. 609, 84 Pac. 585; Philadelphia Mtg. & Trust Co. v. Palmer, 32 Wash. 455, 73 Pac. 501.

An irregular or void guardian's deed in partition proceedings constitutes color of title, within the meaning of this section, where land is held under color of title and payment of taxes: Hamilton v. Witner, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. Rep. 921.

A deed of tide lands from the state constitutes "claim and color of title," within this section: Grays Harbor Com. Co. v. McCullough, 113 Wash. 203, 193 Pac. 709.

— **Mortgages and Mortgage Foreclosures as Color of Title:** See Remington's Digest, Adv. Poss., § 29; Olson v. Howard, 38 Wash. 15, 80 Pac. 170; Cox v. Tompkinson, 39 Wash. 70, 80 Pac. 1005; Goetter v. Moore, 53 Wash. 5, 101 Pac. 365; Johnson v. Bartlett, 50 Wash. 114, 96 Pac. 833.

— **Tax Sales and Tax Deeds:** See Remington's Digest, Adv. Poss., § 30;

Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Lara v. Sandell, 52 Wash. 53, 100 Pac. 166; Flueck v. Pedigo, 55 Wash. 646, 104 Pac. 1119; Northern Pac. R. Co. v. Smith, 68 Wash. 269, 122 Pac. 1057.

PAYMENT OF TAXES: See Remington's Digest, Adv. Poss., § 33; Miller v. O'Leary, 44 Wash. 172, 87 Pac. 113; Tremmel v. Mess, 46 Wash. 137, 89 Pac. 487.

Where there has been double taxation, by payments of the true owner and the adverse claimant, the latter is not within this section: Grays Harbor Commercial Co. v. McCullough, 113 Wash. 203, 193 Pac. 709.

Color of Title and Good Faith: See Remington's Digest, Adv. Poss., § 34; Hesser v. Siepmann, 35 Wash. 14, 76 Pac. 295; Biggart v. Evans, 36 Wash. 212, 78 Pac. 925; Brodack v. Morsbach, 38 Wash. 72, 80 Pac. 275; May v. Sutherlin, 41 Wash. 609, 84 Pac. 585; Lohse v. Burch, 42 Wash. 156, 84 Pac. 722; Vietzen v. Otis, 46 Wash. 402, 90 Pac. 264; Lara v. Sandell, 52 Wash. 53, 100 Pac. 166; Petticrew v. Greenshields, 61 Wash. 614, 112 Pac. 749; Northern Pac. R. Co. v. Smith, 68 Wash. 269, 122 Pac. 1057; Prentice v. How, 84 Wash. 136, 146 Pac. 388; State v. Scott, 89 Wash. 63, 154 Pac. 165; Bassett v. Spokane, 93 Wash. 413, 161 Pac. 65.

See, also, Grays Harbor Commercial Co. v. McCulloch, 113 Wash. 203, 193 Pac. 709.

§ 789. Vacant and Unoccupied Lands.

Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: Provided, however, if any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and in that case

such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section. [L. '93, p. 21, § 4.]

Cited in 53 Wash. 9, 650; 65 Wash. 494; 72 Wash. 229, 230; 93 Wash. 414.

The payment of taxes for seven years under color and claim of title in good faith, within this section, cannot be asserted, as against remaindermen, under a deed from the life tenant purporting to convey the fee, as the claim cannot be asserted in good faith, and it being the duty of a life tenant to pay taxes, he cannot assert title against remaindermen:

McDowell v. Beckham, 72 Wash. 224, 130 Pac. 350.

Duration and Continuity of Payment:
See Remington's Digest, Adv. Poss., § 35; Philadelphia Mtg. etc. Co. v. Palmer, 32 Wash. 455, 73 Pac. 501; Johnson v. Conner, 48 Wash. 431, 93 Pac. 914; McMillan v. Walker, 48 Wash. 342, 93 Pac. 520; Lara v. Sandell, 52 Wash. 53, 100 Pac. 166; Seymour v. Dufur, 53 Wash. 646, 102 Pac. 756; Kennedy v. Anderson, 88 Wash. 457, 153 Pac. 319.

§ 790. Public Lands and Adverse Title in Infants, etc.—Except.

The two preceding sections shall not extend to lands or tenements owned by the United States or this state, nor to school lands, nor to lands held for any public purpose. Nor shall they extend to lands or tenements when there shall be an adverse title to such lands or tenements, and the holder of such adverse title is an infant or person under legal age, or insane: Provided, such persons as aforesaid shall commence an action to recover such lands or tenements so possessed as aforesaid, within three years after the several disabilities herein enumerated shall cease to exist, and shall prosecute such action to judgment, or in case of vacant and unoccupied land shall, within the time last aforesaid, pay to the person or persons who have paid the same for his or her betterments, and the taxes, with interest on said taxes at the legal rate per annum that have been paid on said vacant and unimproved land. [L. '93, p. 21, § 5.]

Cited in 36 Wash. 216; 41 Wash. 612; 48 Wash. 450, 579; 93 Wash. 45.

Adverse possession of the bed or shores of a navigable lake below the line of high water does not run against the state, in view of the fact that, after the state's constitutional assertion of title thereto, the legislature passed laws uniformly recognizing the rights of the many persons in possession of such shore lands at the time of the adoption of the constitution, giving them the preference right to purchase the same when the land shall be put on the market, or requiring the purchaser to pay for the value of the improvement

thereon; since the possession thereby became permissive: Brace & Hergert Mill Co. v. State, 49 Wash. 326, 95 Pac. 278.

The legislature has power to provide that statutes of limitations shall run against minors, and such was the intent of section 786, supra, providing a seven year limitation for lands held under judicial sale; since by this section infants are not excepted from its operation: Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289.

Ejectment pending final determination between conflicting claimants of public land. 12 Ann. Cas. 33.

§ 791. Construction.

The provisions of sections 786, 787, 788, 789 and 790 shall be liberally construed for the purposes set forth therein. [L. '93, p. 21, § 6.]

Cited in 48 Wash. 450.

§ 792. Substitution of Landlord in Action Against Tenant.

A defendant who is in actual possession may, for answer, plead that he is in possession only as a tenant of another, naming him and his place of residence, and thereupon the landlord, if he apply therefor, shall be made defendant in place of the tenant, and the action shall proceed in all respects as if originally commenced against him. If the landlord do

not apply to be made defendant within the time the tenant is allowed to answer, thereafter he shall not be allowed to, but he shall be made defendant if the plaintiff require it. If the landlord be made defendant on motion of the plaintiff, he shall be required to appear and answer within ten days from notice of the pendency of the action and the order making him defendant, or such further notice as the court, or judge thereof, may prescribe. [L. '69, p. 128, § 489; Cd. '81, § 537; 2 H. C., § 530.]

Cited in 9 Wash. 157; 59 Wash. 118.

This section provides how a landlord may be brought into the action; it is the only one we have which changes the common-law rule requiring only defendant in possession to be made defendant: *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

In ejectment a plaintiff suing the owner's agent in possession cannot complain because the agent did not have his rights protected by substituting the owner as party defendant, since plaintiff, under this section, had the right to make the owner a party defendant: *O'Brien v. McKelvey*, 59 Wash. 115, 109 Pac. 337.

§ 793. Pleadings—Superior Title Prevails.

The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had. [Cf. L. '69, p. 128, § 490; L. '79, p. 134, § 2; Cd. '81, § 538; 2 H. C., § 531.]

Cited in 10 Wash. 262, 664; 20 Wash. 31; 26 Wash. 670; 28 Wash. 243; 29 Wash. 112, 634; 34 Wash. 322; 52 Wash. 520; 56 Wash. 219; 57 Wash. 673; 58 Wash. 693; 59 Wash. 118; 63 Wash. 682; 94 Wash. 402; 109 Wash. 4.

Title to Support Action: See *Remington's Digest*, Eject., §§ 6—9-1.

In General: *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Lawrence v. Bellingham Bay etc. R. Co.*, 4 Wash. 664, 30 Pac. 1099; *Bracka v. Fish*, 23 Wash. 646, 63 Pac. 561; *State v. Johanson*, 26 Wash. 668, 67 Pac. 401; *Brummett v. Campbell*, 32 Wash. 358, 73 Pac. 403; *Hughes v. South Bay School District*, 32 Wash. 678, 73 Pac. 778; *George v. Columbia & Puget S. R. Co.*, 38 Wash. 480, 80 Pac. 767; *Helm v. Johnson*, 40 Wash. 420, 83 Pac. 402; *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690; *Hauge v. Walton*, 72 Wash. 554, 131 Pac. 248; *Bryant Lumber & Shingle Mill Co. v. Pacific Iron & Steel Works*, 48 Wash. 574, 94 Pac. 110; *Delacey v. Commercial Trust Co.*, 51 Wash. 542, 99 Pac. 574, 130 Am. St. Rep. 1112; *Seymour v. Dufur*, 53 Wash. 646, 102 Pac. 756; *Gauthier v. Morrison*, 62 Wash. 572, 114 Pac. 501.

See, also, *Blanc's Cafe v. Corey*, 110 Wash. 242, 188 Pac. 759.

— **Paper Title:** *Northern Pac. R. Co. v. George*, 51 Wash. 303, 98 Pac. 1126; *Stockand v. Hall*, 54 Wash. 106, 102 Pac. 1037.

— **Adverse or Prior Possession:** *Kline v. Stein*, 30 Wash. 189, 70 Pac. 235.

— **Interest in Public Lands:** *Roberts v. Lucas*, 1 W. T. 205; *Pierce v. Frace*, 2 Wash. 81, 26 Pac. 192, 807; *Orchard v. Alexander*, 2 Wash. 108, 26 Pac. 196; *Pierce v. Kennedy*, 2 Wash. 324, 26 Pac. 554, 28 Pac. 35; *Northern Pac. R. Co. v. Miller*, 20 Wash. 21, 54 Pac. 603.

— **Equitable Title:** *Snyder v. Parker*, 19 Wash. 276, 53 Pac. 59, 67 Am. St. Rep. 726; *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250; *State v. Johanson*, 26 Wash. 668, 67 Pac. 401; *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

See, also, *Bloomington v. Weil*, 29 Wash. 611, 70 Pac. 94.

— **Title from Common Source:** *Seymour v. Dufur*, 53 Wash. 646, 102 Pac. 756.

DEFENSES: See *Remington's Digest*, Eject., §§ 13—18. **In General:** *Jean v. Dee*, 5 Wash. 580, 32 Pac. 460; *Owen v. St. Paul etc. R. Co.*, 12 Wash. 313, 41 Pac. 44.

Under this section, a defendant cannot defend upon the ground that a quitclaim deed constituting an alleged cloud is invalid and in fact not a cloud because not recorded, where he claims title under such deed: *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113.

— **Adverse Possession:** *Phinney v. Campbell*, 16 Wash. 203, 47 Pac. 502;

Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555, 87 Am. St. Rep. 766, 54 L. R. A. 526; Olson v. Howard, 38 Wash. 15, 80 Pac. 170.

— **Title or Right of Possession of Third Person:** Ward v. Moorey, 1 W. T. 104; Wright v. Jessup, 44 Wash. 618, 87 Pac. 930; O'Brien v. McKelvey, 59 Wash. 115, 109 Pac. 337.

— **Equitable Defenses in General:** Burmeister v. Howard, 1 W. T. 207; Ryan v. Fergusson, 3 Wash. 356, 8 Pac. 910; Peterson v. Philadelphia Mtg. etc. Co., 33 Wash. 464, 74 Pac. 585.

— **Equitable Estoppel:** Parker v. Dacres, 1 Wash. 190, 24 Pac. 192; Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113; Riverside Land Co. v. Pietsch, 35 Wash. 210, 77 Pac. 195.

— **Pendency of Other Action or Proceeding:** Hays v. Parker, 2 W. T. 198, 3 Pac. 901.

— **Defenses by Tenant:** See Remington's Digest, Land. & Ten., § 124; McGlaflin v. Holman, 1 Wash. 239, 24 Pac. 439; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123.

See, also, Womach v. Stuermer, 105 Wash. 625, 178 Pac. 801; Sheridan v. Doherty, 106 Wash. 561, 181 Pac. 16.

PLEADING AND EVIDENCE—COMPLAINT: See Remington's Digest, Eject., §§ 24—26. **Form and requisites in general:** Meeker v. Gilbert, 3 W. T. 369, 19 Pac. 18; Jeffries v. Spencer, 86 Wash. 133, 149 Pac. 651.

— **Title, Estate and Possession of Plaintiff:** Balch v. Smith, 4 Wash. 497, 30 Pac. 648; Belles v. Miller, 10 Wash. 259, 38 Pac. 1050; Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982; Malloy v. Benway, 34 Wash. 315, 75 Pac. 869; Wilkeson v. Miller, 63 Wash. 680, 116 Pac. 268.

— **Ouster by and Possession of Defendant:** Murray v. Briggs, 29 Wash. 245, 69 Pac. 765.

— **Actions for Recovery of Possession—Pleading:** See Remington's Digest, Land. & Ten., § 123; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Brown v. Baruch, 24 Wash. 572, 64 Pac. 789; Snyder v. Harding, 34 Wash. 286, 75 Pac. 812.

— **Necessity and Requisites of Replication or Reply:** See Remington's Digest, Eject., § 29; Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318; Kline v. Stein, 38 Wash. 124, 80 Pac. 278.

— **Demurrer:** See Remington's Digest, Eject., § 30; Smith v. Wingard, 3 W. T. 291, 13 Pac. 717.

— **Amended and Supplemental Pleadings:** See Remington's Digest, Eject., § 31; Belles v. Miller, 10 Wash. 259, 38 Pac. 1050; Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Peterson v. Phila-

delphia Mtg. etc. Co., 33 Wash. 464, 74 Pac. 585.

— **Issues, Proof and Variance:** See Remington's Digest, Eject., §§ 32—34. Issues in general: Snyder v. Harding, 34 Wash. 286, 75 Pac. 812; Boyer v. Paine, 60 Wash. 56, 110 Pac. 682.

— **Necessity of Proof of Title Pleaded:** Moore v. Brownfield, 10 Wash. 439, 39 Pac. 113; Riverside Land Co. v. Pietsch, 35 Wash. 10, 77 Pac. 195.

— **Evidence Admissible Under Pleadings:** Raymond v. Morrison, 9 Wash. 156, 37 Pac. 318; Rogers v. Miller, 13 Wash. 82, 42 Pac. 525, 52 Am. St. Rep. 20; Chrast v. O'Connor, 41 Wash. 360, 83 Pac. 238; Brown v. Haley, 56 Wash. 218, 105 Pac. 478.

EVIDENCE: See Remington's Digest, Eject., §§ 35—40. **Presumptions and burden of proof:** Lynch v. Richter, 10 Wash. 486, 39 Pac. 125; Bracka v. Fish, 23 Wash. 646, 63 Pac. 561; Lundell v. Allen & Nelson Mill Co., 57 Wash. 150, 106 Pac. 626; Gough v. Center, 57 Wash. 276, 106 Pac. 774; O'Brien v. McKelvey, 59 Wash. 115, 109 Pac. 337; Hope v. Brown, 74 Wash. 421, 133 Pac. 612; Dicus v. Major, 72 Wash. 398, 130 Pac. 474.

— **Admissibility of Evidence—Identity and Description of Property:** Phinney v. Campbell, 16 Wash. 203, 47 Pac. 502; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765; Simmons v. Jamieson, 32 Wash. 619, 73 Pac. 700.

— **Title and Right to Possession:** Smith v. Taylor, 2 Wash. 422, 27 Pac. 812; Murray v. Briggs, 29 Wash. 245, 69 Pac. 765.

— **Possession and Ouster:** McAuliff v. Parker, 10 Wash. 141, 38 Pac. 744.

— **Weight and Sufficiency of Evidence—Title and Right to Possession:** Roberts v. Lucas, 1 W. T. 205; Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285; Bracka v. Fish, 23 Wash. 646, 63 Pac. 561; McInerney v. Beck, 10 Wash. 515, 39 Pac. 130; Russell v. Gay, 33 Wash. 83, 73 Pac. 795; Wood v. Earles, 39 Wash. 21, 80 Pac. 837; Dicus v. Major, 72 Wash. 398, 130 Pac. 474.

— **Possession and Ouster:** Horr v. Hollis, 20 Wash. 424, 55 Pac. 565; Johnson v. Brown, 33 Wash. 588, 74 Pac. 677; George v. Columbia & Puget S. R. Co., 38 Wash. 480, 80 Pac. 767.

Establishment of prima facie title in ejectment by conveyances not running back to sovereignty or common source of title. 10 L. R. A. (N. S.) 404; 22 L. R. A. (N. S.) 1100.

Rule that plaintiff in ejectment need not trace title back of common source. 7 A. L. R. 860.

Sufficiency of possessory title in ejectment. 46 L. R. A. (N. S.) 487, 508.

Equitable estoppel as basis for action of ejectment. 49 L. R. A. (N. S.) 777.

§ 794. Defendant must Plead Title—Judgment Against Landlord.

The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. If the defendant does not defend for the whole of the property, he shall specify for what particular part he does defend. In an action against a tenant, the judgment shall be conclusive against a landlord who has been made defendant in place of the tenant, to the same extent as if the action had been originally commenced against him. [L. '69, p. 129. § 491; Cd. '81, § 539; 2 H. C., § 532.]

Cited in 9 Wash. 160, 447; 29 Wash. 115, 252; 52 Wash. 520; 56 Wash. 219, 221; 59 Wash. 118; 60 Wash. 528; 67 Wash. 108.

ANSWER: See Remington's Digest, Eject., §§ 27, 28. Want of title: Hays v. Parker, 2 W. T. 198, 3 Pac. 901; George v. Columbia R. Co., 38 Wash. 480, 80 Pac. 767. Denials and effect thereof: Parker v. Dacres, 1 Wash. 190, 24 Pac. 192; Allen v. Higgins, 9 Wash. 446, 37 Pac. 671, 43 Am. St. Rep. 847.

A general denial will raise no issue, and where plaintiff pleads and proves any legal right to the premises, he thereby establishes a prima facie case against defendant: Allen v. Higgins, 9 Wash. 446, 37 Pac. 671, 43 Am. St. Rep. 847.

The offer in evidence at the trial of a deed not pleaded, nor recorded when the suit was commenced, comes too late, and the court may refuse to allow an amendment; and judgment quieting title has the effect to vacate the deed recorded after action brought: Garvey v. Garvey, 52 Wash. 516, 101 Pac. 45.

The fact that defendants in a suit to quiet title by one out of possession plead their own title as required by this section would not constitute a waiver of their right to object that plaintiff had mistaken her remedy, when they do not ask for any affirmative relief in their answer: Povah v. Lee, 29 Wash. 108, 69 Pac. 639.

Upon appeal, defendants who appeared and filed an answer amounting to a disclaimer asking no costs or relief, and setting up no title or interest as required by this section, are not necessary parties to the appeal upon whom notice of appeal need be served, where they ceased to have any interest in the controversy: Soderberg v. McRae, 67 Wash. 104, 120 Pac. 878.

Oral contract to purchase land as defense to action of ejectment. Ann. Cas. 1912A, 566.

Effect on landlord's title to land of judgment in ejectment against tenant. 5 Ann. Cas. 61; 19 Ann. Cas. 263.

§ 795. Verdict.

The jury by their verdict shall find as follows:—

1. If the verdict be for the plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be;

2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license, or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded. [L. '69, p. 129; Cd. '81, § 540; 2 H. C., § 533.]

Cited in 94 Wash. 401.

TRIAL, JUDGMENT AND REVIEW—Dismissal or Nonsuit Before Trial—Dismissal as to One or More Codefendants: See Remington's Digest, Eject., § 41; Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

Instructions: See Remington's Digest, Eject., § 43; Lynch v. Richter, 10 Wash. 486, 39 Pac. 125.

Verdict and Findings: See Remington's Digest, Eject., § 44; Simmons v. Jamie-

son, 32 Wash. 619, 73 Pac. 700; Weidlich v. Independent Asphalt Paving Co., 94 Wash. 395, 162 Pac. 541.

Appeal and Error: See Remington's Digest, Eject., § 45; Barton v. Wickizer, 41 Wash. 293, 83 Pac. 312.

Requisites of special verdict in ejectment. 24 **L. R. A. (N. S.)** 18.

Right to accept favorable part of decree in ejectment and appeal from rest. 29 **L. R. A. (N. S.)** 9.

§ 796. Damages—Limitation—Use of Improvements.

The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant. [L. '69, p. 129, § 493; Cd. '81, § 541; 2-H. C., § 534.]

Cited in 2 Wash. 263; 10 Wash. 519, 665; 13 Wash. 222; 14 Wash. 479; 21 Wash. 389; 34 Wash. 314.

DAMAGES, IMPROVEMENTS AND TAXES—Measure of Damages or Profits: See Remington's Digest, Eject., § 47; Lownsdale v. Gray's Harbor Boom Co., 36 Wash. 198, 78 Pac. 904; Lownsdale v. Gray's Harbor Boom Co., 54 Wash. 542, 103 Pac. 833.

Setoff of Improvements Against Damages or Mesne Profits: See Remington's Digest, Eject., § 49; McInerney v. Beck, 10 Wash. 515, 39 Pac. 130; Sengfelder v. Hill, 21 Wash. 371, 58 Pac. 250; Skinner v. McCrackan, 93 Wash. 43, 159 Pac. 977.

Under this section the value of improvements can only be set off against

damages: Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

The rule in ejectment, under this section, limiting the recovery for improvements to the value of the rents and profits accruing during such occupancy, does not apply to actions for partition: Leake v. Hayes, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

Costs: See Remington's Digest, Eject., § 46; Hays v. Parker, 2 W. T. 198, 3 Pac. 901; Mason v. McLean, 6 Wash. 31, 32 Pac. 1006; Wilcox v. Smith, 38 Wash. 585, 80 Pac. 803.

Right of plaintiff to recover as damages interest on value of premises during period of detention: 16 **Ann. Cas.** 853.

§ 797. Betterments—Counterclaim for—Taxes and Improvements.

In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant. [L. '03 p. 262, § 1; see historical references to last section.]

Cited in 54 Wash. 365, 399; 55 Wash. 357, 609, 650; 62 Wash. 406; 63 Wash. 561; 93 Wash. 45; 95 Wash. 570; 112 Wash. 16.

This section has no retrospective effect: Investment Co. v. Hambach, 37 Wash. 628, 80 Pac. 190; Barton v. Wickizer, 41 Wash. 293, 83 Pac. 312.

Bona fide purchasers who take possession of vacant and unoccupied land in good faith, are entitled to recover the value of improvements if the same were made after the enactment of this section,

and not for improvements made prior thereto. Monk v. Duell, 41 Wash. 403, 83 Pac. 313; Gould v. White, 54 Wash. 394, 103 Pac. 460; Flueck v. Pedigo, 55 Wash. 646, 104 Pac. 1119.

Under this section, there can be no lien for improvements placed on property by permission of the owner for the benefit of defendant occupying by sufferance without any claim of right: Wallace v. Wallace, 112 Wash. 14, 191 Pac. 793.

Ownership of Improvements: See Remington's Digest, Improv., § 3; Hart Lumber Co. v. Rucker, 20 Wash. 383, 55 Pac. 320; Minder v. Mottaz, 37 Wash. 474, 79 Pac. 996.

Compensation for Improvements: See Remington's Digest, Improv., § 4; Brygger v. Schweitzer, 5 Wash. 564, 32 Pac. 462, 33 Pac. 388; Legg v. Legg, 34 Wash. 132, 75 Pac. 130; Sloan v. Lucas, 37 Wash. 348, 79 Pac. 949; Lawson v. Vernon, 38 Wash. 422, 80 Pac. 559, 107 Am. St. Rep. 880; Johnson v. Ingram, 63 Wash. 554, 115 Pac. 1073; Ernst v. Schmidt, 66 Wash. 452, 119 Pac. 828, Ann. Cas. 1913C, 389.

See, also, Wallace v. Wallace, 112 Wash. 14, 191 Pac. 793.

Charge of Improvements or Taxes on Property Recovered: See Remington's Digest, Eject., § 50; McInerney v. Beck, 10 Wash. 515, 39 Pac. 130; Ward v. Hug-

gins, 16 Wash. 530, 48 Pac. 240; Merritt v. Corey, 22 Wash. 444, 61 Pac. 171.

The interest of a son in his mother's half of the community land cannot be charged with improvements placed thereon by the surviving husband, either at common law or under this section: Mason's Estate, In re, 95 Wash. 564, 164 Pac. 205.

Findings and Judgment as to Improvements or Taxes: See Remington's Digest, Eject., § 51; Palmer v. Abrahams, 55 Wash. 352, 104 Pac. 648.

The judgment is bad in form where it permits the plaintiffs to remain in possession until their lien for improvements is paid; and the judgment must establish the rights of the parties in conformity with this section: Palmer v. Abrahams, 55 Wash. 352, 104 Pac. 648.

§ 798. Pleading, Issue and Trial on Counterclaim.

The counterclaim shall set forth the value of the land apart from the improvements, and the nature and value of the improvements apart from the land and the amount of said taxes and assessment so paid, and the date of payment. Issues shall be joined and tried as in other actions, and the value of the land and the amount of said taxes and assessments apart from the improvements, and the value of the improvements apart from the land must be specifically found by the verdict of the jury, report of the referee, or findings of the court as the case may be. [L. '03, p. 262, § 2.]

§ 799. Judgment on Counterclaim—Payment.

If the judgment be in favor of the plaintiff for the recovery of the realty, and of the defendant upon the counterclaim, the plaintiff shall be entitled to recover such damages as he may be found to have suffered through the withholding of the premises and waste committed thereupon by the defendant or those under whom he claims, but against this recovery shall be offset pro tanto the value of the permanent improvements and the amount of said taxes and assessments with interest found as above provided. Should the value of improvements or taxes or assessments with interest exceed the recovery for damages, the plaintiff shall, within two months, pay to the defendant the difference between the two sums and upon proof, after notice, to the defendant, that this has been done, the court shall make an order declaring that fact, and that title to the improvements is vested in him. Should the plaintiff fail to make such payment, the defendant may at any time within two months after the time limited for such payment to be made, pay to the plaintiff the value of the land apart from the improvements, and the amount of the damages awarded against him, and he thereupon shall be vested with title to the land, and, after notice to the plaintiff, the court shall make an order reciting the fact and adjudging title to be in him. Should neither party make the payment above provided, within the specified time, they shall be deemed to be tenants in common of the premises, including the improve-

ments, each holding an interest proportionate to the value of his property determined in the manner specified in section 798; Provided, that the interest of the owner of the improvements shall be the difference between the value of the improvements and the amount of damages recovered against him by the plaintiff. [L. '03, p. 262, § 3.]

Cited in 62 Wash. 408; 93 Wash. 47.

§ 800. Verdict After Right of Possession has Expired.

If the right of the plaintiff to the possession of the property expire after the commencement of the action, and before the trial, the verdict shall be given according to the fact, and judgment shall be given only for the damages. [L. '69, p. 130, § 494; Cd. '81, § 542; 2 H. C., § 535.]

§ 801. Order for Survey.

The court, or judge thereof, on motion, and after notice to the adverse party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy and make survey and admeasurement thereof for the purposes of the action. [L. '69, p. 130, § 495; Cd. '81, § 543; 2 H. C., § 536.]

§ 802. Contents, Service and Effect of Order.

The order shall describe the property, and a copy thereof shall be served upon the defendant, and thereupon the party may enter upon the property and make such survey and admeasurement; but if any unnecessary injury be done to the premises, he shall be liable therefor. [L. '69, p. 130, § 496; Cd. '81, p. 544; 2 H. C., § 537.]

§ 803. Alienation Pendente Lite.

An action for the recovery of the possession of real property against a person in possession cannot be prejudiced by any alienation made by such person either before or after the commencement of the action; but if such alienation be made after the commencement of the action, and the defendant do not satisfy the judgment recovered for damages for withholding the possession, such damages may be recovered by action against the purchaser. [L. '69, p. 130, § 497; Cd. '81, § 545; 2 H. C., § 538.]

Cited in 41 Wash. 613; 60 Wash. 481.

Notice of the pendency of an action to recover the possession of real estate is not necessary under sections 803 and 806, which are not superseded or controlled by

the general statute, section 243, providing for the filing of notice of *lis pendens* in certain forms of action: *May v. Sutherlin*, 41 Wash. 609, 84 Pac. 585.

§ 804. Mortgagee cannot Maintain Ejectment.

A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law. [L. '69, p. 130, § 498; Cd. '81, § 546; 2 H. C., § 539.]

See *infra*, § 1116 et seq., foreclosure of mortgages.

Cited in 19 Wash. 278; 40 Wash. 584; 51 Wash. 519.

§ 805. Actions Between Cotenants.

In an action by a tenant in common or a joint tenant of real property against his cotenant, the plaintiff must show, in addition to his evi-

dence of right, that the defendant either denied the plaintiff's right or did some act amounting to such denial. [L. '69, p. 130, § 499; Cd. '81, § 547, 2 H. C., § 504.]

Right of Action, Parties and Relief: Wash. 156, 37 Pac. 318; *Allen v. Higgins*, 9 Wash. 446, 37 Pac. 671, 43 Am. St. Rep. 847; *Craver v. Mossback*, 57 Wash. 662, 107 Pac. 1037, 109 Pac. 1016.
Between Cotenants: See *Remington's Digest*, Ten. in C., § 15; *Lawrence v. Beltingham Bay etc. R. Co.*, 4 Wash. 664, 30 Pac. 1099; *Raymond v. Morrison*, 9

§ 806. Judgment, Conclusiveness of.

In an action to recover possession of real property, the judgment rendered therein shall be conclusive as to the estate in such property and the right of possession thereof, so far as the same is thereby determined, upon all persons claiming by, through, or under the party against whom the judgment is rendered, by title or interest passing after the commencement of the action, if the party in whose favor the judgment is rendered shall have filed a notice of the pendency of the action as required by section 243, *supra*. When service of the notice is made by publication, and judgment is given for failure to answer, at any time within two years from the entry thereof, the defendant or his successor in interest as to the whole or any part of the property, shall, upon application to the court or judge thereof, be entitled to an order, vacating the judgment and granting him a new trial, upon the payment of the costs of the action. [L. '09, p. 55, § 1. Cf. L. '69, p. 131, § 501; Cd. '81, § 549; 2 H. C., § 541.]

Cited in 39 Wash. 374, 375; 41 Wash. 613; 44 Wash. 107; 60 Wash. 481; 67 Wash. 492, 493; 68 Wash. 348, 350.

See note to § 803.

This section, giving an absolute right to vacate a judgment had upon the publication of summons in an action to recover the possession of land, has no application to a judgment in an action

to set aside conveyances for fraud and subject land to the lien of judgments: *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867.

An action to have a lost corner established by survey is not an action for the recovery of real property, within the meaning of this section: *Strunz v. Hood*, 44 Wash. 99, 87 Pac. 45.

§ 807. Possession not Affected by Vacating Judgment.

If the plaintiff has taken possession of the property before the judgment is set aside and a new trial granted, as provided in the preceding section, such possession shall not be thereby affected in any way; and if judgment be given for defendant in the new trial, he shall be entitled to restitution by execution in the same manner as if he were plaintiff. [L. '69, p. 131, § 502; Cd. '81, § 550; 2 H. C., § 542.]

§ 808. Conflicting Claimants Under Donation Law.

In an action at law for the recovery of the possession of real property, if either party claim the property as a donee of the United States, and under the act of congress approved September twenty-seventh, eighteen hundred and fifty, commonly called the donation law, or the acts amendatory thereof, such party, from the date of his settlement thereon, as provided in said act, shall be deemed to have a legal estate in fee in such property, to continue upon condition that he perform the conditions required by such acts, which estate is unconditional and indefeasible after the performance of such conditions. In such action, if both plaintiff and

defendant claim title to the same real property, by virtue of settlement, under such acts, such settlement and performance of the subsequent condition shall be prima facie presumed in favor of the party having or claiming under the elder certificate or patent, as the case may be, unless it appears upon the face of such certificate or patent that the same is absolutely void. [Cf. L. '69, p. 132, § 504; L. '77, p. 116, § 556; Cd. '81, § 551; 2 H. C., § 543.]

Cited in 10 Wash. 360; 25 Wash. 358.

Possession of donation claim under what purports to be a quitclaim deed, but executed before the expiration of necessary four years' residence required by the act, is possession under a contract prohibited by law, and gives no color of title: *Bullene v. Garrison*, 1 W. T. 587.

When selection, residence upon, and cultivation of land under the donation law are completed, the transaction is closed; nothing remains except for donee to furnish proof of these acts, and for government to furnish proof of title; these acts complied with, affect the trans-

fer of title, and not the patent; the latter only evidences title and relates back to the acts: *Brazee v. Schofield*, 2 W. T. 209, 3 Pac. 265.

Title to land under donation law was acquired by compliance with the requirements of the act on the part of claimant; and the residence upon and cultivation of claim under that act by a man after having been legally divorced was that of a single man only; the divorced wife can make no claim for one-half: *Maynard v. Hill*, 2 W. T. 321, 5 Pac. 717; reaffirming *Maynard v. Valentine*, 2 W. T. 3, 3 Pac. 195; *Bullene v. Garrison*, 1 W. T. 587.

§ 809. Conflicting Claims to Real Property Generally.

Any person in possession, by himself or his tenant, of real property, and any private or municipal corporation in possession, by itself or its tenant, of any real property, or when such real property is not in the actual possession of anyone, any person, or private or municipal corporation, claiming title to any real property under a patent from the United States, or during his or its claim of title to such real property under a patent from the United States for such real estate, may maintain a civil action against any person or persons, corporations or associations, claiming an interest in said real property, or any part thereof, or any right thereto, adverse to him, them, or it, for the purpose of determining such claim, estate, or interest; and where several persons, or private or municipal corporations, are in possession of, or claim as aforesaid, separate parcels of real property, and an adverse interest is claimed, or claim made in or to any such parcels, by any other person, persons, corporations, or associations, arising out of a question, conveyance, statute, grant, or other matter common to all such parcels of real estate, all or any portion of such persons or corporations so in possession or claiming such parcel of real property may unite as plaintiffs in such suit to determine such adverse claim or interest against all persons, corporations, or associations claiming such adverse interest. [L. '77, p. 116, § 556; Cd. '81, § 551; 2 H. C., § 544.]

This section is for the most part superseded by § 785, supra.

Cited in 10 Wash. 359; 12 Wash. 696; 20 Wash. 126; 21 Wash. 679; 24 Wash. 276; 26 Wash. 130; 29 Wash. 112, 203, 675; 32 Wash. 638; 52 Wash. 344; 56 Wash. 164; 61 Wash. 577; 67 Wash. 493; 71 Wash. 447; 77 Wash. 157.

Actions to Quiet Title—Under this section and section 785, supra, generally: See *Remington's Digest*, Quiet. T., and cases cited, and notes under § 785 et seq.

TITLE TO SUSTAIN ACTION: Under this section, an action lies to quiet title against a mortgage given by a stranger to the title: *Pacific Coast Pipe Co. v. Hedican*, 61 Wash. 576, 112 Pac. 655, Ann. Cas. 1912C, 833.

Under this section a suit to remove the cloud caused by the filing of a lis pendens notice in an action between other parties may be maintained by the owner, with-

out awaiting the result of the action to which he is a stranger: *King v. Branchaid*, 32 Wash. 634, 73 Pac. 668.

Hostile assertion of title to a parcel of land, formerly an alley, which had been vacated by the former owner of abutting lots, constitutes a cloud on the title which may be quieted under this section: *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734.

Any person in possession of land, although not the owner of the fee, may maintain an action for the purpose of quieting his title thereto, so as to avoid any uncertainty in his holding, under this section: *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178.

Under this section, a decree to quiet title may be had where the defendant filed for record an invalid notice, claiming a contract for purchase, although the claim did not constitute a cloud within equitable principles: *McGuinness v. Hargiss*, 56 Wash. 162, 105 Pac. 233, 21 Ann. Cas. 220.

An action to quiet title lies under Bal. Code, § 5521, for the removal of a street

assessment as a cloud upon the title, where the assessment is barred by the statute of limitations and the city claims the right to enforce the same: *Kinsman v. Spokane*, 20 Wash. 118, 54 Pac. 934, 72 Am. St. Rep. 24.

Sufficiency of Possession: *Bigelow v. Brewer*, 29 Wash. 670, 70 Pac. 129.

Under the general rule at common law, one must be in the possession of premises to invoke the aid of equity to determine his estate, and this section is but a reaffirmance of such rule: *Shelton Logging Co. v. Gosser*, 26 Wash. 126, 66 Pac. 151.

An equitable action to try title or remove clouds from title can be maintained under this section, where the property is not in the actual possession of anyone: *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748.

Sufficiency of Complaint Under This Section: *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516; *Kalb v. German Savings & Loan Soc.*, 25 Wash. 249, 65 Pac. 559, 87 Am. St. Rep. 757.

CHAPTER II.

FORCIBLE ENTRY AND DETAINER.

§ 810. Forcible Entry, Defined.

Every person is guilty of a forcible entry who either,—

1. By breaking open windows, doors, or other parts of a house, or by fraud, intimidation, or stealth, or by any kind of violence or circumstance of terror, enters upon or into any real property; or

2. Who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in actual possession. [Cf. L. '90, p. 73, § 1; L. '91, p. 179, § 1; 2 H. C., § 547.]

Cited in 6 Wash. 325; 8 Wash. 358, 535, 539; 12 Wash. 685; 14 Wash. 395; 19 Wash. 561; 28 Wash. 665; 31 Wash. 487; 43 Wash. 369, 371; 45 Wash. 453; 62 Wash. 148; 106 Wash. 133, 568.

The general forcible entry and detainer act applies in many cases where ejectment was the remedy under former laws: *Columbia & Puget Sound R. Co. v. Moss*, 44 Wash. 589, 87 Pac. 951.

Under this section, there was no eviction to sustain an action of forcible entry and detainer against a vendee from a landlord who went into possession at a time when the premises were vacant and unoccupied, without knowledge that the

landlord had unlawfully evicted plaintiff under a void writ of restitution, the plaintiff never having demanded possession of such vendee: *Huston v. Big Bend Land Co.*, 106 Wash. 130, 179 Pac. 101.

For text treatment of "Forcible Entry and Detainer." see 11 **R. C. L.** 1134.

Threats and display of force without actual force as constituting forcible entry. 15 **Ann. Cas.** 804.

Mere display of invalid process without actual force or threats as ground of action of forcible entry and detainer. 37 **L. R. A. (N. S.)** 600.

§ 811. Forcible Detainer, Defined.

Every person is guilty of a forcible detainer who either,—

1. By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of real property, whether the same was acquired peaceably or otherwise; or

2. Who in the night-time, or during the absence of the occupant of any real property [unlawfully] enters thereon, and who, after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant. The occupant of real property within the meaning of this subdivision is one who, for the five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property. [Cf. L. '90, p. 73, § 2; L. '91, p. 179, § 2; 2 H. C., § 548.]

Cited in 33 Wash. 336; 42 Wash. 562, 563; 44 Wash. 590, 591; 45 Wash. 453; 85 Wash. 324; 96 Wash. 342; 106 Wash. 134.

Under this section, subdivision 2, a landlord cannot maintain the action against one who wrongfully enters upon lands occupied by a tenant, although the tenant refuses to prosecute and surrenders up his lease to the landlord: *Chezum v. Campbell*, 42 Wash. 560, 85 Pac. 48, 7 Ann. Cas. 921.

Under this section, a complaint in forcible entry and detainer is sufficient

when it states that, while plaintiff was in actual possession of the premises, the defendants broke open the inclosures during plaintiff's absence, and by force and violence continue to occupy and refuse to surrender the same: *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556.

Under this section, one who enters upon unoccupied lands is not guilty of forcible detainer in the absence of any demand for possession: *Huston v. Big Bend Land Co.*, 106 Wash. 130, 179 Pac. 101.

§ 812. Unlawful Detainer, Defined.

A tenant of real property for a term less than life is guilty of unlawful detainer either,—

(1) When he holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him. In all cases where real property is leased for a specified term or period by express or implied contract, whether written or by parol, the tenancy shall be terminated without notice at the expiration of such specified term or period; or

(2) When he having leased property for an indefinite time, with monthly or other periodic rent reserved continues in possession thereof, in person or by subtenant, after the end of any such month or period, in cases where the landlord, more than twenty days prior to the end of such month or period, shall have served notice (in manner in this act provided), requiring him to quit the premises at the expiration of such month or period.

(3) When he continues in possession in person or by subtenant after a default in the payment of any rent, and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner hereafter in this act provided) in behalf of the person entitled to the rent upon the person owning the same, shall have remained uncomplied with for the period of three days after service thereof. Such notice may be served at any time after the rent becomes due; or

(4) When he continues in possession in person or by subtenant after a neglect or failure to keep or perform any other condition or covenant of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than one for the payment of rent, and after notice in writing requiring . . . in the alternative the performance of such condition or covenant or the surrender of the property, served

(in the manner provided in this act) upon him, and if there be a subtenant in actual possession of the premises, also upon such subtenant, shall remain uncomplished with for ten days after service thereof. Within ten days after the service of such notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform such condition or covenant and thereby save the lease from such forfeiture; or

(5) When he commits or permits waste upon the demised premises, or when he sets up or carries on therein or thereon any unlawful business, or when he erects, suffers, permits or maintains on or about said premises any nuisance, and remains in possession after service (in manner in this act provided) of three days' notice to quit upon him.

(6) Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the land of another and who shall fail or refuse to remove therefrom after three days' notice, in writing, to be served in the manner provided in this act. [L. '05, p. 173, § 1. Cf. L. '91, p. 180, § 3; 2 H. C., § 549; see L. '90, p. 73, § 3.]

Cited in 8 Wash. 359, 533; 21 Wash. 282; 22 Wash. 270; 24 Wash. 485; 25 Wash. 491, 665; 26 Wash. 565; 28 Wash. 76, 77; 29 Wash. 265; 30 Wash. 526; 33 Wash. 457, 458; 35 Wash. 673, 674; 44 Wash. 592, 593; 53 Wash. 514; 57 Wash. 469, 557, 558; 59 Wash. 57, 58; 77 Wash. 628; 86 Wash. 135; 101 Wash. 570; 109 Wash. 220.

Nature and Form of Remedy: See Remington's Digest, Forc. E. & D., § 1-1; Columbia & Puget Sound R. Co. v. Moss, 44 Wash. 589, 87 Pac. 951; Hutchinson v. Wilson, 54 Wash. 410, 103 Pac. 474.

This section was only a change of remedies, affecting no vested right and was not a re-enactment of the forcible entry and detainer act of 1891: Columbia & Puget Sound R. Co. v. Moss, 44 Wash. 589, 87 Pac. 951.

ACTIONS FOR UNLAWFUL DETAINER—Right to Maintain Action in General: See Remington's Digest, Land. & Ten., § 127; Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837; Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Oregon & Washington R. Co. v. Vulcan Iron Works, 57 Wash. 372, 106 Pac. 1120; Olson Land Co. v. Alki Park Co., 63 Wash. 521, 115 Pac. 1083, Ann. Cas. 1912D, 365; Kneeland Inv. Co. v. Aldrich, 63 Wash. 609, 116 Pac. 264; Big Bend Land Co. v. Huston, 98 Wash. 640, 168 Pac. 470.

See, also, Sheridan v. Doherty, 106 Wash. 561, 181 Pac. 16; Williamson v. Hallett, 108 Wash. 176, 182 Pac. 940; Davis v. Pendrass, 107 Wash. 279, 181 Pac. 682; Hinkhouse v. Wacker, 112 Wash. 253, 191 Pac. 881.

The summary action of unlawful detainer for the recovery of the possession of leased premises cannot be maintained un-

less the conventional relation of landlord and tenant exists between the parties: Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661.

The conventional relation of landlord and tenant to sustain an action of unlawful detainer may be created by implication, and arises where defendant entered without the knowledge of plaintiff, who immediately gave notice to quit or pay rent; especially in view of section 10621, *infra*, providing that a person obtaining possession without the owner's consent shall be deemed a tenant by sufferance and liable for reasonable rent: Williamson v. Hallett, 108 Wash. 176, 182 Pac. 940.

Plaintiff was entitled to prosecute an action of unlawful detainer where on denial of the relation of landlord and tenant, the court found, on conflicting evidence, that defendant was in possession as plaintiff's tenant: Davis v. Pendrass, 107 Wash. 279, 181 Pac. 682.

— **Holding Over After Termination of Tenancy:** See Remington's Digest, Land. & Ten., § 128; Yesler's Estate v. Orth, 24 Wash. 483, 64 Pac. 723; Decker v. Verloop, 73 Wash. 10, 131 Pac. 190.

See, also, Greene v. Garrison, 107 Wash. 430, 181 Pac. 858; Andersonian Inv. Co. v. Wade, 108 Wash. 373, 184 Pac. 327; Sowle v. Johnson, 109 Wash. 218, 186 Pac. 255.

Time to Sue and Limitations: See Remington's Digest, Forc. E. & D., § 4-1; Land. & T., § 137; Columbia & Puget Sound R. Co. v. Moss, 53 Wash. 512, 102 Pac. 439; Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564; Smith v. Seattle Camp No. 69, W. O. W., 57 Wash. 556, 107 Pac. 372.

See, also, Greene v. Garrison, 107 Wash. 430, 181 Pac. 858.

Conditions Precedent—Necessity of Notice to Quit and Demand of Possession: See Remington's Digest, Land. & Ten., § 133; Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178; Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740; Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 662; Jeffries v. Spencer, 86 Wash. 133, 149 Pac. 651; State ex rel. Robertson v. Superior Court, 95 Wash. 447, 164 Pac. 63.

— Sufficiency of Notice or Demand: See Remington's Digest, Land. & Ten., § 134; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Gilmore v. Baker Co., 12 Wash. 468, 41 Pac. 124; Bond v. Chapman, 34 Wash. 606, 76 Pac. 97; Byrnett v. Gardner, 35 Wash. 668, 77 Pac. 1048; Newman v. Worthen, 57 Wash. 467, 107 Pac. 188; Bowman v. Harrison, 59 Wash. 56, 109 Pac. 192; Olson Land Co. v. Alki Park Co., 63 Wash. 521, 115 Pac. 1083, Ann. Cas. 1912D, 365; Kneeland Inv. Co. v. Aldrich, 63 Wash. 609, 116 Pac. 264.

See, also, Hinkhouse v. Wacker, 112 Wash. 253, 191 Pac. 881.

— Time of Service: See Remington's Digest, Land. & Ten., § 135; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Ferguson v. Hashi, 25 Wash. 664, 66 Pac. 105; McGinnis v. Genns, 25 Wash. 490, 65 Pac. 755; Teater v. King, 35 Wash. 138, 76 Pac. 688; Smith v. Seattle Camp No. 69, W. O. W., 57 Wash. 556, 107 Pac. 372; Corner Market Co. v. Gilman, 77 Wash. 625, 138 Pac. 2.

See, also, Sowle v. Johnson, 109 Wash. 218, 186 Pac. 255; Hinkhouse v. Wacker, 112 Wash. 253, 191 Pac. 881.

— Waiver of Notice or Demand by Tenant: See Remington's Digest, Land. & Ten., § 136; Lowman v. West, 8 Wash. 355, 36 Pac. 258; Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564.

Parties—Who may Maintain Action: See Remington's Digest, Land. & Ten., § 138; Roderick v. Swanson, 6 Wash. 222, 33 Pac. 349; Capital Brewing Co. v. Crosbie, 22 Wash. 269, 60 Pac. 652; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Schreiner v. Stanton, 26 Wash. 563, 67 Pac. 219; Chezum v. Campbell, 42 Wash. 560, 85 Pac. 48, 7 Ann. Cas. 921; Stahl Brewing & Malting Co. v. Van Buren, 45 Wash. 451, 88 Pac. 837.

— Persons Against Whom Action Will Lie: See Remington's Digest, Land. & Ten., § 139; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Agen v. Nelson, 51 Wash. 431, 98 Pac. 1115; Canyon Lumber Co. v. Sexton, 93 Wash. 620, 161 Pac. 841.

Trial and Judgment: See Remington's Digest, Land. & Ten., § 148; Gaffney v. Megrath, 11 Wash. 456, 39 Pac. 973; Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860; Mitchell v. Matheson, 23 Wash. 723, 63 Pac. 564; Teater v. King, 41 Wash. 134, 83 Pac. 8; O'Connell v. Arai, 63 Wash. 280, 115 Pac. 95; Hutchinson Investment Co. v. Van Nostern, 99 Wash. 549, 170 Pac. 121.

See, also, Sheridan v. Doherty, 106 Wash. 561, 181 Pac. 16.

Necessity of notice to quit before landlord can bring action against tenant whose lease has expired. 8 Ann. Cas. 731.

Right of vendor to bring action of unlawful detainer against vendee under contract to purchase. Ann. Cas. 1915C, 317.

§ 813. Tenancy upon Agricultural Lands—Effect of Holding Over.

In all cases of tenancy upon agricultural lands, where the tenant has held over and retained possession for more than sixty days after the expiration of his term, without any demand or notice to quit by his landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of his landlord or the successor in estate of his landlord, if any there be, and shall be entitled to hold under the terms of the lease for another full year, and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year. [Cf. L. '90, p. 74, § 3; L. '91, p. 181, § 4; 2 H. C., § 550.]

Cited in 29 Wash. 266; 38 Wash. 672; 51 Wash. 433; 98 Wash. 606; 101 Wash. 569, 570.

Where a tenant has continued in possession of agricultural lands for more than sixty days after the expiration of the

term for which the premises were let to him, he is entitled, under this section to hold for another year, when he will again be guilty of unlawful detainer for a period of sixty days succeeding the end of that hold-over year, but any notice prior to

the end of his term is sufficient to authorize the bringing of the action of unlawful detainer: *Mounts v. Goranson*, 29 Wash. 261, 69 Pac. 740.

Under this section, any oral notice of termination of the lease and demand of possession at the expiration of the specified term is sufficient to prevent the tenant from acquiring rights by holding over, and to authorize an action of unlawful de-

tainer: *Smeltzer v. Webb*, 101 Wash. 568, 172 Pac. 750.

Under this section, a holding over of agricultural lands for more than sixty days after expiration of any annual rent period continues the tenancy for another crop year or rent period; but an oral lease may be terminated by notice given at the prescribed time before the end of the period: *Spreitzer v. Miller*, 98 Wash. 601, 168 Pac. 179.

§ 814. Service of Notice.

Any notice provided for in this act shall be served either (1) by delivering a copy personally to the person entitled thereto; or (2) if he be absent from the premises unlawfully held, by leaving there a copy, with some person of suitable age and discretion, and sending a copy through the mail addressed to the person entitled thereto at his place of residence; or (3) if the person to be notified be a tenant, or an unlawful holder of premises, and his place of residence is not known, or if a person of suitable age and discretion there cannot be found then by affixing a copy of the notice in a conspicuous place on the premises unlawfully held, and also delivering a copy to a person there residing, if such a person can be found, and also sending a copy through the mail addressed to the tenant, or unlawful occupant, at the place where the premises unlawfully held are situated. Service upon a subtenant may be made in the same manner: Provided, that in cases where the tenant or unlawful occupant, shall be conducting a hotel, inn, lodging-house, boarding-house, or shall be renting rooms while still retaining control of the premises as a whole, that the guests, lodgers, boarders or persons renting such rooms shall not be considered as subtenants within the meaning of this act, but all such persons may be served by affixing a copy of the notice to be served in two conspicuous places upon the premises unlawfully held; and such persons shall not be necessary parties defendant in an action to recover possession of said premises. Service of any notice provided for in this act may be had upon a corporation by delivering a copy thereof to any officer, agent or persons having charge of the business of such corporation, at the premises unlawfully held, and in case no such officer, agent or person can be found upon such premises, then service may be had by affixing a copy of such notice in a conspicuous place upon said premises and by sending a copy through the mail addressed to such corporation at the place where said premises are situated. Proof of any service under this section may be made by the affidavit of the person making the same in like manner and with like effect as the proof of service of summons in civil actions. When a copy of notice is sent through the mail, as provided in this section, service shall be deemed complete when such copy is deposited in the United States mail in the county in which the property is situated properly addressed with postage prepaid: Provided, however, That when service is made by mail one additional day shall be allowed before the commencement of an action based upon such notice. [L. '11, p. 95, § 1. Cf. L. '05, p. 174, § 2; L. '90, p. 75, § 4; L. '91, p. 181, § 5; 2 H. C., § 551.]

Cited in 57 Wash. 558; 95 Wash. 606; 112 Wash. 257.

Notice to Quit and Demand of Possession: See Remington's Digest, Fore. E. &

D., § 2; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; Columbia & Puget Sound R. Co. v. Moss, 53 Wash. 512, 102 Pac. 439.

See, also, Huston v. Big Bend Land Co., 106 Wash. 130, 179 Pac. 101.

Service at the premises on a person of suitable age and discretion is not sufficient unless a copy be sent through the mail addressed to the person entitled to receive it: Hinkhouse v. Wacker, 112 Wash. 253, 191 Pac. 881, 195 Pac. 218.

Under this section, notice to quit in unlawful detainer may be served upon a

corporation, in case no person in charge of its business can be found upon the premises, by affixing a copy on the door of the premises and mailing a copy, properly addressed, etc.: Hutchinson Investment Co. v. Woman's Exchange, 95 Wash. 605, 164 Pac. 196.

Necessity of notice to quit before landlord can bring forcible entry and detainer against tenant whose lease has expired. 8 Ann. Cas. 731.

Denial of tenancy as waiver of notice to quit or of demand of possession. 25 L. R. A. (N. S.) 104.

§ 815. Venue.

The superior court of the county in which the property or some part of it is situated shall have jurisdiction of proceedings under this chapter. [L. '90, p. 75, § 5; L. '91, p. 182, § 6; 2 H. C., § 552.]

§ 816. Parties Defendant—Judgment.

No person other than the tenant of the premises, and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in any proceeding under this chapter, nor shall any proceeding abate, nor the plaintiff be nonsuited, for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him. In case a person has become a subtenant of the premises in controversy after the service of any notice in this chapter provided for, the fact that such notice was not served on such subtenant shall constitute no defense to the action. All persons who enter the premises under the tenant, after the commencement of the action hereunder, shall be bound by the judgment the same as if they had been made parties to the action. [L. '90, p. 75, § 6; L. '91, p. 182, § 7; 2 H. C., § 533.]

Cited in 93 Wash. 624.

Under this section and sections 827, 830, providing for relief against the judgment by those claiming under or through the tenant, a person claiming a mechanic's lien against the interest of the tenant need not be made a party, and is never-

theless bound by the judgment as being in privity with the tenant: Canyon Lumber Co. v. Sexton, 93 Wash. 620, 161 Pac. 841.

Joint liability of husband and wife for forcible entry and detainer. 12 A. L. R. 1485.

§ 817. Complaint—When Summons must Issue.

The plaintiff in his complaint, which shall be in writing, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence, which may have accompanied the said forcible entry, or forcible or unlawful detainer, and claim damages therefor, or compensation for the occupation of the premises, or both; in case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent. Upon filing the complaint a summons must be issued thereon as in other cases, returnable at a day

designated therein, which shall not be less than six nor more than twelve days from its date, except in cases where the publication of summons is necessary, in which case the court or judge thereof may order that the summons be made returnable at such time as may be deemed proper, and the summons shall specify the return day so fixed. [Cf. L. '90, p. 76, § 7; L. '91, p. 182, § 8; 2 H. C., § 554.]

Cited in 27 Wash. 247; 31 Wash. 486; 33 Wash. 455; 44 Wash. 592, 593; 98 Wash. 643.

Process and Appearance: See Remington's Digest, Forc. E. & D., § 5; State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113; Security Savings & Trust Co. v. Hackett, 27 Wash. 247, 67 Pac. 607; McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100.

This section, requiring the filing of a complaint in actions of forcible entry and detainer prior to the issuance and service of the summons has been superseded by the subsequent enactment of the general law governing the commencement of actions and services of summons, as provided in section 220 et seq.: Security Savings & T. Co. v. Hackett, 27 Wash. 247, 67 Pac. 607; McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100.

PLEADING: See Remington's Digest, Land. & Ten., §§ 140—142. **Complaint in General:** Chambers v. Hoover, 3 W. T. 107, 13 Pac. 466; Hall & Paulson Furn. Co. v. Wilbur, 4 Wash. 644, 30 Pac. 665; Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178; Quandt v. Smith, 28 Wash. 664, 69 Pac. 369; State v. Pittenger, 37 Wash. 384, 79 Pac. 942. **Allegations as to Existence of Relation:** Lowman v. West, 8 Wash. 355, 36 Pac. 258; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549.

A complaint is not demurrable in failing to allege how and under what terms the defendant took possession, in the absence of any motion to make more definite and certain; Williamson v. Hallett, 108 Wash. 176, 182 Pac. 940.

Description of Premises: Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178.

See, also, Remington's Digest, Forc. E. & D., § 6; Shannon v. Grindstaff, 11 Wash. 536, 40 Pac. 123; McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100; Gore v. Altice, 33 Wash. 335, 74 Pac. 556; State ex rel. Seaborn etc. Co. v. Superior Court, 102 Wash. 215, 172 Pac. 826.

See, also, Williamson v. Hallett, 108 Wash. 176, 182 Pac. 940.

Persons Entitled to Sue: See Remington's Digest, Forc. E. & D., § 4; Chezum v. Campbell, 42 Wash. 560, 85 Pac. 48, 7 Ann. Cas. 921; Hayes v. Osborn, 96 Wash. 342, 165 Pac. 95.

Right of one in peaceable possession to maintain action of forcible entry and detainer against another entitled to possession, who forcibly dispossessed him. 8 L. R. A. (N. S.) 426; 32 L. R. A. (N. S.) 51; L. R. A. 1918B, 670.

Landlord's right to maintain action for entry during possession of tenant. 7 Ann. Cas. 924.

Right of tenant to maintain forcible entry and detainer against landlord for forcible ejectment after termination of lease. 12 Ann. Cas. 767.

Right of tenant to maintain action to secure possession. L. R. A. 1918B, 56.

Recovery of easement by action of forcible entry and detainer. 9 Ann. Cas. 1177.

§ 818. Summons, Form and Service.

The summons must state the names of the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, and also the return day; and must notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him. The summons must be directed to the defendant, and in case of summons by publication, be served at least five days before the return day designated therein. The summons must be served and returned in the same manner as summons in other actions is served and returned. Upon the return of any summons issued under this chapter, when the same has not for any reason been served, or has not been served in time, the plaintiff may have a new summons issued the same

as if no previous summons had been issued. [Cf. L. '90, p. 76, § 8; L. '91, p. 183, § 9; 2 H. C., § 555.]

Cited in 27 Wash. 249; 86 Wash. 134; 98 Wash. 642—646.

Summons—Validity: See Remington's Digest, Land. & Ten., § 142-1; Big Bend Land Co. v. Huston, 98 Wash. 640, 168 Pac. 470.

This section does not incorporate as a part of such act the provision of the

general law respecting service of summons in force at the date of the passage of the special act, but must be construed as a rule applying to the future and referring to the law in force at the time the summons is to be issued: State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113.

§ 819. Writ of Restitution.

The plaintiff, at the time of commencing an action of forcible entry or forcible detainer or unlawful detainer, or at any time afterwards, may apply to the judge of the court in which the action is pending for a writ of restitution restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue. The writ shall be issued by the clerk of the superior court in which the action is pending, and be returnable in twenty days after its date; but before any writ shall issue prior to judgment the plaintiff shall execute to the defendant and file in court a bond in such a sum as the court or judge may order, with two or more sureties, to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out. [Cf. L. '90, p. 77, § 9; L. '91, p. 183, § 10; 2 H. C., § 556.]

Cited in 18 Wash. 235; 19 Wash. 337; 49 Wash. 205; 86 Wash. 134; 98 Wash. 643—645.

This section is not unconstitutional as being a deprivation of property without due process of law, since the statute goes no further than to provide for the temporary possession of the property pending action: State ex rel. German Sav. & Loan Soc. v. Prather, 19 Wash. 336, 53 Pac. 344, 67 Am. St. Rep. 729; Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 662.

Under this and section 817, the issuance of a summons is necessary to the

commencement of an action, and the court has no jurisdiction to issue a writ of restitution until the action has been commenced: Big Bend Land Co. v. Huston, 98 Wash. 640, 168 Pac. 470.

The writ of restitution in unlawful detainer does not lose its force after twenty days, because this section requires the sheriff's return to be made in that time; and after being held in abeyance by defendants' counter bond, it is revived when the defendants lose their right of possession by failing to comply with the statute: State ex rel. Barnes v. Superior Court, 96 Wash. 581, 165 Pac. 493.

§ 820. Service of Writ—Bond.

The sheriff shall, upon receiving the writ of restitution, forthwith serve a copy thereof upon the defendant, his agent or attorney, or a person in possession of the premises, and shall not execute the same for three days thereafter, within which time the defendant, or those in possession of the premises, may execute to the plaintiff a bond to be filed with and approved by the clerk of the court in such sum as may be fixed by the judge, with two or more sureties to be approved by the clerk of said court, conditioned that they will pay to the plaintiff such sum as the plaintiff may recover for the use and occupation of the said premises, or any rent found due, together with all damages the plaintiff may sustain by reason of the defendant occupying or keeping possession of said premises, and also all the

costs of the action. The plaintiff, his agent or attorneys, shall have notice of the time and place where the court or judge thereof shall fix the amount of the defendant's bond, and shall have notice and a reasonable opportunity to examine into the qualification and sufficiency of the sureties upon said bond before said bond shall be approved by the clerk. The writ may be served by the sheriff, in the event he shall be unable to find the defendant, an agent or attorney, or a person in possession of the demised premises, by affixing a copy of said writ in a conspicuous place upon the demised premises. [L. '05, p. 175, § 3. Cf. L. '90, p. 77, § 10; L. '91, p. 183, § 11; 2 H. C., § 551.]

Cited in 18 Wash. 235; 44 Wash. 591; 45 Wash. 458; 75 Wash. 609; 96 Wash. 584, 585; 98 Wash. 643.

Stay of Proceedings: See Remington's Digest, Land. & Ten., § 149; Lowman v. West, 18 Wash. 233, 51 Pac. 373.

Liabilities on Bonds: See Remington's Digest, Land. & Ten., § 131-1; Corman v. Sanderson, 72 Wash. 627, 131 Pac. 198.

See, also, Remington's Digest, Fore. E. & D., § 14; Morrison v. Fidelity & Deposit Co., 97 Wash. 623, 166 Pac. 1122.

— **Counter Bonds, Effect and Validity:** See Remington's Digest, Land. & Ten., § 132; Glover v. Fidelity & Deposit Co., 75 Wash. 606, 135 Pac. 486; State ex rel. Barnes v. Superior Court, 96 Wash. 581, 165 Pac. 493.

§ 821. Modification of Amount of Bond.

The plaintiff or defendant at any time, upon two days' notice to the adverse party, may apply to the court or any judge thereof for an order raising or lowering the amount of any bond in this act provided for. Either party may, upon like notice, apply to the court or any judge thereof for an order requiring additional or other surety or sureties upon any such bond. Upon the hearing or [of] any application made under the provisions of this section evidence may be given. The judge after hearing any such application shall make such an order as shall be just in the premises. The bondsmen may be required to be present at such hearing if so required in the notice thereof, and shall answer under oath all questions that may be asked them touching their qualifications as bondsmen, and in the event the bondsmen shall fail or refuse to appear at such hearing and so answer such questions the bond shall be stricken. In the event the court shall order a new or additional bond to be furnished by defendant, and the same shall not be given within twenty-four hours, the court shall order the sheriff to forthwith execute the writ. In the event the defendant shall file a second or additional bond and it shall also be found insufficient after hearing, as above provided, the right to retain the premises by bond shall be lost and the sheriff shall forthwith put the plaintiff in possession of the premises. [L. '05, p. 176, § 4. Cf. L. '90, p. 78, § 11; L. '91, p. 184, § 12; 2 H. C., § 558.]

Cited in 18 Wash. 238; 25 Wash. 116; 96 Wash. 584, 585.

This section does not require the court to take evidence: State ex rel. Barnes v. Superior Court, 96 Wash. 581, 165 Pac. 493.

An insufficient counter bond by de-

fendants in unlawful detainer may be stricken on motion where it was not approved or conditioned as required by the statute, notwithstanding this section provides a different procedure through examination of the bondsmen: State ex rel. Barnes v. Superior Court, 96 Wash. 581, 165 Pac. 493.

§ 822. Judgment by Default.

If at the time appointed in the summons the defendant do not appear and defend, the court must render judgment in favor of the plaintiff as

prayed for in the complaint. [Cf. L. '90, p. 78, § 13; L. '91, p. 184, § 13; 2 H. C., § 559.]

§ 823. Pleading by Defendant.

On or before the day fixed for his appearance the defendant may appear and answer or demur. [L. '90, p. 78, § 14; L. '91, p. 184, § 14; 2 H. C., § 560.]

Cited in 27 Wash. 385.

Defenses and Grounds of Opposition:

See Remington's Digest, Land. & Ten., § 129; Carmack v. Drum, 27 Wash. 382, 67 Pac. 808; Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 662; Bond v. Chapman, 34 Wash. 606, 76 Pac. 97; Teater v. King, 35 Wash. 138, 76 Pac. 688; Hutchinson v. Wilson, 54 Wash. 410, 103 Pac. 474; Monroe v. Stayt, 57 Wash. 592, 107 Pac. 517, 30 L. R. A. (N. S.) 1102; Decker v. Verloop, 73 Wash. 10, 131 Pac. 190; Newman v. Worthen, 57 Wash. 467, 107 Pac. 188; Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823.

See, also, Remington's Digest, Forc. E. & D., § 3; Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. 133, 23 Pac. 928; Ridpath v. Denee, 85 Wash. 322, 148 Pac. 15.

See, also, Cohen v. McKenna Lbr. Co., 104 Wash. 245, 176 Pac. 1; Huston v. Big Bend Land Co., 106 Wash. 130, 179 Pac. 101.

In unlawful detainer of leased premises in lawful possession, upon an attempted forfeiture of the lease for breach of conditions, the tenant may present a defense, legal or equitable, excusing the breach, and may show equitable estoppel to enforce the conditions: Andersonian Investment Co. v. Wade, 108 Wash. 373, 178 Pac. 801.

Tender of the amount admitted to be due for rent prior to the commencement of an action for unlawful detainer, renewed by bringing the tender into court, waives the tenant's option in the lease for an extension of time to pay rent, and precludes the defense that the rent was not due and the notice to quit premature: Sowle v. Johnson, 109 Wash. 218, 186 Pac. 255.

Plea or Answer: See Remington's Digest, Land. & Ten., § 143; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760; Roberts v. Center, 26 Wash. 435, 67 Pac. 151.

See, also, Remington's Digest, Forc. E. & D., § 7; Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. 133, 23 Pac. 928; Roberts v. Center, 26 Wash. 435, 67 Pac. 151.

Setoff and Counterclaim: See Remington's Digest, Land. & Ten., § 130; Phillips v. Port Townsend Lodge, 8 Wash. 529, 36 Pac. 476; Owens v. Swanton, 25 Wash. 112, 64 Pac. 921; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760; Tipton v. Roberts, 48 Wash. 391, 93 Pac. 906.

Availability of defense of equitable estoppel in action of forcible entry and detainer. 49 L. R. A. (N. S.) 778.

§ 824. Trial by Jury.

Whenever an issue of fact is presented by the pleadings it must be tried by a jury, unless such a jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending, and in all cases actions under this chapter shall take precedence of all other civil actions. [Cf. L. '90, p. 78, § 15; L. '91, p. 184, § 15; 2 H. C., § 561.]

Cited in 19 Wash. 340.

§ 825. Proof Required by Plaintiff.

On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer. [Cf. L. '90, p. 78, § 16; L. '91, p. 184, § 16; 2 H. C., § 562.]

Cited in 33 Wash. 337; 85 Wash. 325.

Issues, Proof and Variance: See Remington's Digest, Forc. E. & D., § 9; McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100; Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661.

Evidence—Admissibility: See Remington's Digest, Land. & Ten., § 144; McLennan v. Grant, 8 Wash. 603, 36 Pac. 682; Harris v. Halverson, 23 Wash. 779, 63 Pac. 549; Owens v. Swanton, 25 Wash. 112, 64 Pac. 921; Roberts v. Center, 26 Wash. 435, 67 Pac. 151; Hutchinson Inv. Co. v. Van Nostern, 99 Wash. 549, 170 Pac. 121.

See, also, Remington's Digest, Forc. E. & D., § 10; **Possession and Title:** Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. 133, 23 Pac. 928; Gore v. Altice, 33 Wash. 335, 74 Pac. 556; McMillan v. Walker, 48 Wash. 342, 93 Pac. 520.

See, also, Cohen v. McKenna Lbr.

Co., 104 Wash. 245, 176 Pac. 1; Huston v. Big Bend Land Co., 106 Wash. 130, 179 Pac. 101.

Weight and Sufficiency of Evidence: See Remington's Digest, Land. & Ten., § 145; Seattle Operating Co. v. Cavanaugh, 6 Wash. 325, 33 Pac. 356; Teater v. King, 35 Wash. 138, 76 Pac. 688; Stahl Brewing & Malt Co. v. Van Buren, 45 Wash. 451, 88 Pac. 837; Ridpath v. Spokane Stamp Works, 48 Wash. 329, 93 Pac. 416; Tipton v. Roberts, 48 Wash. 391, 93 Pac. 906.

See, also, Remington's Digest, Forc. E. & D., § 11; Bellingham Bay & B. C. R. Co., v. Strand, 1 Wash. 133, 23 Pac. 928; Roberts v. Center, 26 Wash. 435, 67 Pac. 151; Columbia & Puget Sound R. Co. v. Moss, 44 Wash. 589, 87 Pac. 951; Fowler v. Ohnick, 45 Wash. 44, 87 Pac. 1050.

§ 826. Amendment of Complaint—Continuance.

When upon the trial of any proceeding under this chapter it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, in respect of the premises described in the complaint, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs; such amendment must be made without any imposition of terms. No continuance shall be permitted on account of such amendment unless the defendant shows to the satisfaction of the court good cause therefor. [Cf. L. '90, p. 78, § 17; L. '91, p. 185, § 17; 2 H. C., § 653.]

§ 827. Verdict and Judgment.

If upon the trial the verdict of the jury, or if the case be tried without a jury the finding of the court, be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for unlawful detainer after neglect or failure to perform any condition or covenant of a lease or agreement under which the property is held, or after default in the payment of rent, the judgment shall also declare the forfeiture of the lease, agreement, or tenancy. The jury, or the court if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and if the alleged unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due. When the proceeding is for an unlawful detainer after default in the payment of rent, and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of five days after the entry of the judgment, within which time the tenant or any subtenant, or any mortgagee of the term or other party interested in its continuance, may pay into court for the landlord the amount of the judgment

and costs, and thereupon the judgment shall be satisfied and the tenant restored to his estate; but if payment, as herein provided, be not made within five days, the judgment may be enforced for its full amount and for the possession of the premises. In all other cases the judgment may be enforced immediately. If the writ of restitution shall have been executed prior to judgment, no further writ or execution for the premises shall be required. [Cf. L. '90, p. 79, § 18; L. '91, p. 185, § 18; 2 H. C., § 564.]

Cited in 11 Wash. 459; 19 Wash. 564; 28 Wash. 667; 34 Wash. 609; 45 Wash. 430; 57 Wash. 470; 63 Wash. 284; 65 Wash. 643; 75 Wash. 608; 93 Wash. 624; 98 Wash. 385; 104 Wash. 477, 479; 106 Wash. 135; 108 Wash. 173; 109 Wash. 672.

This statute, compelling lien claimants claiming through the tenant to seek relief under the statute, is valid: Canyon Lumber Co. v. Sexton, 93 Wash. 620, 161 Pac. 841.

This section is applicable to contracts entered into before its passage, although the penalties are increased by the later law, as it comes under the rule that a change in the remedy incident to existing contracts may be made without affecting rights thereunder: Woodward v. Winehill, 14 Wash. 394, 44 Pac. 860.

In an action of unlawful detainer, the objection that the judgment was in form a judgment of ejectment is not available for reversal; since the judgment will be affirmed with directions to enter formal judgment: Sheridan v. Doherty, 106 Wash. 561, 181 Pac. 16.

Damages and Amount of Recovery: See Remington's Digest, Land. & Ten., § 146; Cutler v. Co-operative Brotherhood, 31 Wash. 680, 72 Pac. 464; State v. Pit-tenger, 37 Wash. 384, 79 Pac. 942; Stevens v. Jones, 40 Wash. 484, 82 Pac. 754; Agen v. Nelson, 51 Wash. 431, 98 Pac. 1115; Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823; Kegley v. Skillman, 68 Wash. 637, 123 Pac. 1081.

Double Damages: See Remington's Digest, Land. & Ten., § 147; Hall & Paulson Furn. Co. v. Wilbur, 4 Wash. 644, 30

Pac. 665; Gaffney v. Megrath, 11 Wash. 456, 39 Pac. 923; Hart v. Pratt, 19 Wash. 560, 53 Pac. 711; Quandt v. Smith, 28 Wash. 664, 69 Pac. 369; Bond v. Chapman, 34 Wash. 606, 76 Pac. 97; Hineckley v. Casey, 45 Wash. 430, 88 Pac. 753; Newman v. Worthen, 57 Wash. 467, 107 Pac. 188; O'Connell v. Aria, 63 Wash. 280, 115 Pac. 95; Shannon v. Loeb, 65 Wash. 640, 118 Pac. 823; Decker v. Verloop, 73 Wash. 10, 131 Pac. 190.

This section authorizes judgment for double the amount of rent accrued; notwithstanding the defendant tendered and paid into court the amount due up to the time of trial, contesting only the landlord's right to re-enter: Armstrong v. Burkett, 104 Wash. 476, 177 Pac. 333.

In an action of unlawful detainer of leased premises, judgment upon verdict for the plaintiff should be for double damages, regardless of whether or not the verdict was founded upon nonpayment of rent: Swanson v. Stubb, 108 Wash. 170, 183 Pac. 91.

Measure of damages where tenant holds over without consent of landlord. 17 Ann. Cas. 284.

Statutory penalty of double rent or value for holding over after termination of tenancy. Ann. Cas. 1912A, 278.

Statute prescribing damages for forcibly ejecting or excluding one from possession of real property as applicable to possession held by one as servant or employee. 14 A. L. R. 808.

§ 828. Amendments Allowed, When.

Amendments may be allowed by the court at any time before final judgment, upon such terms as to the court may appear just, in the same cases and manner and to the same extent as in civil actions. [Cf. L. '90, p. 80, § 20; L. '91, p. 186, § 19; 2 H. C., § 565.]

§ 829. Practice—General Provisions Applicable.

Except as otherwise provided in this chapter, the provisions of the laws of this state with reference to practice in civil actions are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter; and the provisions of such laws relative to new trials and appeals, except so far as they are inconsistent with the provisions of this chapter, shall be held to apply to the proceedings men-

tioned in this chapter. [Cf. L. '90, p. 80, § 21; L. '91, p. 186, § 20; 2 H. C., § 566.]

Cited in 27 Wash. 249.

§ 830. Forfeiture, Relief Against.

The court may relieve a tenant against a forfeiture of a lease and restore him to his former estate, as in other cases provided by law, where application for such relief is made within thirty days after the forfeiture is declared by the judgment of the court, as provided in this chapter. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served on the plaintiff in the judgment, who may appear and contest the application. In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions of covenants stipulated, so far as the same is practicable, be first made. [Cf. L. '90, p. 80, § 22; L. '91, p. 186, § 21; 2 H. C., § 567.]

Cited in 93 Wash. 625.

This act, in providing that the right to relief against the judgment of unlawful detainer "may" be exercised within a limited time, is not merely permissive,

but precludes the idea that it can be exercised at some later time: *Canyon Lumber Co. v. Sexton*, 93 Wash. 620, 161 Pac. 841.

§ 831. Appeal—Bond.

If either party feels aggrieved by the judgment he may appeal to the supreme court, as in other civil actions: Provided, that if the defendant appealing desires a stay of proceedings pending such appeal, he shall execute and file a bond, with two or more sufficient sureties to be approved by the judge, conditioned to abide the order of the court on such appeal, and to pay all rents and other damages justly accruing to the plaintiff during the pendency of the appeal. [Cf. L. '90, p. 80, § 23; L. '91, p. 187, § 22; 2 H. C., § 568.]

Cited in 14 Wash. 53; 17 Wash. 99; 21 Wash. 582; 54 Wash. 37.

Review: See Remington's Digest, Forc. E. & D., § 13; *Fife v. Olson*, 5 Wash. 789, 32 Pac. 766; *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124; *Squires v. Zumwalt*, 12 Wash. 241, 40 Pac. 986; *Columbia*

& Puget Sound R. Co. v. Moss, 53 Wash. 512, 102 Pac. 439.

Bond or Undertaking: *Northwestern & Pac. Hyp. Bank v. Griffiths*, 17 Wash. 98, 49 Pac. 223; *State ex rel. Orth v. Benson*, 21 Wash. 580, 59 Pac. 501; *Hinckley v. Casey*, 54 Wash. 34, 102 Pac. 1051.

§ 832. Stay of Proceedings Pending Appeal.

When the defendant shall appeal, and shall file a bond as provided in the preceding section, all further proceedings in the case shall be stayed until the determination of said appeal, and the same has been remanded to the superior court for further proceedings therein. [Cf. L. '90, p. 80, § 24; L. '91, p. 187, § 23; 2 H. C., § 569.]

Cited in 96 Wash. 587; 97 Wash. 625.

Under this section an appeal will not stay proceedings in forcible entry and detainer unless a bond is given to pay all rent and other damages pending the

appeal: *Morrison v. Fidelity & Deposit Co.*, 97 Wash. 623, 166 Pac. 1122.

Certiorari does not lie to review an order striking defendants' counter bond in unlawful detainer, since the statute

provides an adequate remedy by application for an order raising or lowering the amount of any bond, and by appeal and stay bond if, by the judgment, the de-

fendant is dispossessed, under this and the next section: *State ex rel. Barnes v. Superior Court*, 96 Wash. 581, 165 Pac. 493.

§ 833. Appeal Suspends Writ of Restitution.

If a writ of restitution has been issued previous to the taking of an appeal by the defendant, and said defendant shall execute and file a bond as provided in this chapter, the clerk of the court, under the direction of the judge, shall forthwith give the appellant a certificate of the allowance of such appeal; and upon the service of such certificate upon the officer having such writ of restitution the said officer shall forthwith cease all further proceedings by virtue of such writ; and if such writ has been completely executed, the defendant shall be restored to the possession of the premises, and shall remain in possession thereof until the appeal is determined. [Cf. L. '90, p. 81, § 25; L. '91, p. 187, § 24; 2 H. C., § 570.]

Cited in 21 Wash. 582; 96 Wash. 587.

§ 834. Unlawful Detainer of Certain Lands—What Constitutes.

Any person who shall, without the permission of the owner and without having any color of title thereto, enter upon the lands of another, and shall refuse to remove therefrom after three days' notice, shall be deemed guilty of unlawful detainer and may be removed from such lands. [L. '91, p. 212, § 1; 2 H. C., § 571.]

Cited in 5 Wash. 790; 26 Wash. 436; 31 Wash. 487; 44 Wash. 591, 593; 48 Wash. 343; 62 Wash. 148.

§ 835. Complaint and Answer.

The complaint in all cases under the provisions of the last section shall be upon oath, and then [there] shall be embodied therein or amended [appended] thereto an abstract of the plaintiffs' title, and the defendant shall, in his answer, state whether he makes any claim of title to the lands described in the complaint, and if he makes no claim to the legal title, but does claim a right to the possession of such lands, he shall state upon what grounds he claims a right to such possession. [L. '91, p. 212, § 2; 2 H. C., § 572.]

Cited in 44 Wash. 592.

This section does not make a certified abstract admissible in evidence for the purpose of proving title: *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151.

- This section does not make a certified abstract admissible in evidence for the purpose of proving title, since section 1260 does not permit public records to be proved by the certificate of any other person than the officer having such record in his possession: *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151.

In an action of forcible entry and detainer, a complaint alleging entrance

without right, by means of breaking open windows and doors, without permission of the owner and without color of title, merely tenders an issue of the right of possession, where it fails to embody in the complaint an abstract of plaintiff's title, as required by this section, and therefore fails to state a cause of action involving title: *McGrew v. Lamb*, 31 Wash. 485, 72 Pac. 100.

Reply: See *Remington's Digest*, Forc. E. & D., § 8; *Bellingham Bay & B. C. R. Co. v. Strand*, 1 Wash. 133, 23 Pac. 928; *Fife v. Olson*, 5 Wash. 789, 32 Pac. 766.

§ 836. Proof Required by Plaintiff—Trial.

It shall not be necessary for the plaintiff, in proceedings under sections 834–837, to allege or prove that the said lands were, at any time, actually occupied prior to the defendant's entry thereupon, but it shall be sufficient to allege that he is the legal owner and entitled to the immediate possession thereof: Provided, that if the defendant shall, by his answer, deny such ownership, and shall state facts showing that he has a lawful claim to the possession thereof, the cause shall thereupon be entered for trial upon the docket of the court in all respects as if the action were brought under the provisions of chapter XLVI of the code of eighteen hundred and eighty-one [chapter I, of this title]. [L. '91, p. 212, § 3; 2 H. C., § 573.]

Cited in 44 Wash. 592.

§ 837. Proof—Parties Defendant—Trial of Separate Issues.

All persons in actual possession of any portion of the several subdivisions of any section of land, according to the government surveys thereof, may be made defendants in one action: Provided, that they may, in their discretion, make separate answers to the complaint, and if separate issues are joined thereupon, the same shall nevertheless be tried as one action, but the verdict, if tried by jury, shall find separately upon the issues so joined, and judgment shall be rendered according thereto. [L. '91, p. 213, § 4; 2 H. C., § 576.]

CHAPTER III.

PARTITION.

§ 838. Persons Entitled to Bring Actions for.

When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance, or for life or years, an action may be maintained by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners. [L. '69, p. 133, § 505; Cd. '81, § 552; 2 H. C., § 577.]

See *infra*, §§ 1532, 1551, partition of estates of decedents.

Cited in 7 Wash. 36; 78 Wash. 510, 511; 96 Wash. 535.

RIGHT OF ACTION: See Remington's Digest, Partit., §§ 4–6. **Property and Estates Subject to Partition:** *Easly v. Easly*, 78 Wash. 505, 139 Pac. 200. **Cotenancy:** *Hill v. Young*, 7 Wash. 33, 34 Pac. 144. **Right to and Grounds for Partition in General:** *Griggs v. Gower*, 29 Wash. 86, 69 Pac. 745; *Williamson Investment Co. v. Williamson*, 96 Wash. 529, 165 Pac. 385.

Title to Support Action: See Remington's Digest, Partit., §§ 7–9. In general: *Houghton v. Callahan*, 3 Wash. 158, 28 Pac. 377; *Hyde v. Britton*, 41 Wash. 277,

83 Pac. 307. Establishment or determination of disputed title: *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Crowley v. Byrne*, 71 Wash. 444, 129 Pac. 113. Conditions precedent: *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219.

Persons Against Whom Action may be Brought: See Remington's Digest, Partit., § 10; *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130; *Sawyer v. Vermont L. & T. Co.*, 41 Wash. 524, 84 Pac. 8.

Time to Sue, Limitations and Laches: See Remington's Digest, Partit., § 12; *McGowan v. Smith*, 22 Wash. 625, 61 Pac. 713; *Hyde v. Britton*, 41 Wash. 277, 83 Pac. 307.

Parties—Plaintiffs: See Remington's Digest, Partit., § 13; *Sawyer v. Vermont L. & T. Co.*, 41 Wash. 524, 84 Pac. 8.

For text treatment of "Partition," see 20 **R. C. L.** 714.

Right of tenant in common to partition of property in which he has a life estate only. 11 **Ann. Cas.** 1040.

Partition between life tenant and remainderman. **L. R. A.** 1918D, 454.

Sufficiency of possessory title to support action for partition. 46 **L. R. A. (N. S.)** 505.

Right of trustee in bankruptcy or assignee for creditors to sue for partition. 16 **Ann. Cas.** 560; 20 **L. R. A. (N. S.)** 105.

Right of one out of possession to partition. 20 **L. R. A.** 624.

Right of remainderman or reversioner to partition of property. 21 **Ann. Cas.** 264.

Right of purchaser at execution sale to maintain action for partition. **Ann. Cas.** 1915D, 1097.

Right to partition of property subject to lease for term of years. 9 **Ann. Cas.** 1029.

Railroad right of way as subject to partition. **Ann. Cas.** 1914A, 393; 39 **L. R. A. (N. S.)** 538.

Partition of cemetery lot. 12 **Ann. Cas.** 976.

Right to partition of standing timber. **Ann. Cas.** 1912D, 587.

Right to partition of trust property. **Ann. Cas.** 1912C, 327.

Partition of community property. 56 **L. R. A.** 79.

Partition of mining interests and mining rights. 15 **Ann. Cas.** 778; **Ann. Cas.** 1917D, 135; **L. R. A.** 1916D, 1154.

Right to partition of homestead. 6 **Ann. Cas.** 954; 56 **L. R. A.** 77; 4 **L. R. A. (N. S.)** 786; 27 **L. R. A. (N. S.)** 550.

Partition of water rights. 26 **L. R. A.** 284.

Partnership real estate as subject to partition. 28 **L. R. A.** 103.

Right to partition of undivided interests held respectively in fee and in life estate with remainder. 12 **A. L. R.** 644.

Respective rights of owners of different parcels into which land subject to oil and gas leases is divided on partition. 5 **A. L. R.** 1165.

Adjustment on partition of improvements made by tenant in common. 1 **A. L. R.** 1189.

§ 839. Complaint—All Known Interests must be Stated.

The interest of all persons in the property shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint. [L. '69, p. 133, § 506; Cd. '81, § 553; 2 **II. C.**, § 578.]

Cited in 10 Wash. 640; 11 Wash. 630; 78 Wash. 511. § 14; *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 **L. R. A.** 671; *Chapman v. Allen*, 11 Wash. 627, 40 Pac. 219.

Pleading—Allegations as to Interests of Parties: See Remington's Digest, Partit.,

§ 840. Parties—Lien Creditors—Liens Adjusted.

The plaintiff may, at his option, make creditors having a lien upon the property, or any portion thereof, other than by a judgment or decree, defendants in the suit. When the lien is upon an undivided interest or estate of any of the parties, such lien, if a partition be made, is thenceforth a lien only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien. [L. '69, p. 133, § 507; Cd. '81, § 554; 2 **II. C.**, § 579.]

Cited in 4 Wash. 374.

§ 841. Notice.

The notice shall be directed by name to all the tenants in common who are known, and in the same manner to all lien creditors who are made parties to the suit, and generally to all persons unknown having or claiming an interest or estate in the property. [L. '69, p. 133, § 508; Cd. '81, § 555; 2 H. C., § 581.]

§ 842. Service by Publication.

If a party having a share or interest in or lien upon the property be unknown, or either of the known parties reside out of the state, or cannot be found therein, and such fact be made to appear by affidavit, the notice may be served by publication, as in ordinary cases. When service is made by publication, the notice must contain a brief description of the property which is the subject of the suit. [L. '69, p. 134, § 509; Cd. '81, § 556; 2 H. C., § 580.]

§ 843. Answer, Contents of.

The defendant shall set forth in his answer the nature and extent of his interest in the property, and if he be a lien creditor, how such lien was created, the amount of the debt secured thereby and remaining due, and whether such debt is secured in any other way, and if so, the nature of such other security. [L. '69, p. 134, § 510; Cd. '81, § 557; 2 H. C., § 582.]

Cited in 13 Wash. 218.

Plea or Answer: See Remington's Digest, Partit., § 15; Leake v. Hayes, 13

Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34.

§ 844. Issues to be Tried.

The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined in such suit, and where a defendant fails to answer, or where a sale of the property is necessary, the title shall be ascertained by proof, to the satisfaction of the court, before the decree for partition or sale is given. [L. '69, p. 134, § 511; Cd. '81, § 558; 2 H. C., § 583.]

Cited in 4 Wash. 555; 7 Wash. 37; 10 Wash. 639, 647; 71 Wash. 450; 96 Wash. 15.

In an action for a partition, the defendant, on disputing the title of the plaintiffs, is not entitled to a jury trial as a matter of right, but under this section, the calling of a jury is within the discretion of the court: *State ex rel. Hill v. Lichtenberg*, 4 Wash. 553, 30 Pac. 659.

Partition proceedings may be used as a form of action to try title to land, and the determination of that fact, by the court, is conclusive upon all the parties thereto: *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144.

Incidental Relief: See Remington's Digest, Partit., §§ 17—19-1. Allowances and charges for improvements: *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317; *Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34; *Womach v. Sandygren*, 96 Wash. 12, 164 Pac. 600; **Allowances And Charges For Rents And Profits:** *Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34. **Reimbursement of Payments and Advances:** *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317; *Leake v. Hayes*, 13 Wash. 213, 43 Pac. 48, 52 Am. St. Rep. 34. **Encumbrances on Property:** *Easly v. Easly*, 78 Wash. 505, 139 Pac. 200; *Womach v. Sandygren*, 96 Wash. 12, 164 Pac. 600,

§ 845. Order of Sale—Partial Partition.

If it be alleged in the complaint and established by evidence, or if it appear by the evidence without such allegation in the complaint,

to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners, the court may order a sale thereof, and for that purpose may appoint one or more referees. Otherwise, upon the requisite proofs being made, it shall decree a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained. [L. '69, p. 134, § 512; Cd. '81, § 559; 2 H. C., § 584.]

Cited in 7 Wash. 37, 39; 9 Wash. 304; 96 Wash. 535.

Determination as to Mode: See Remington's Digest, Partit., §§ 16—16-2. Pleading and proof to sustain order of sale: Hill v. Young, 7 Wash. 33, 34 Pac. 144. Mode of actual partition or allotment: Hamlin v. Hamlin, 90 Wash. 467, 156 Pac. 393. Reference: Hamlin v. Hamlin, 90 Wash. 467, 156 Pac. 393; Williamson Investment Co. v. Williamson, 96 Wash. 529, 165 Pac. 385.

SALE: See Remington's Digest, Partit., §§ 20—23. Manner and conduct in general: Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317. Opening, vacating and re-sale: Wilson v. Hubbard, 39 Wash. 671, 82 Pac. 154. Title, rights and liabilities of purchaser: Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

If it appears from the evidence that partition of lands cannot be made without great prejudice to the owners, a sale may be ordered under this section, though the necessity therefor has not been alleged in the complaint: Hill v. Young, 7 Wash. 33, 34 Pac. 144.

A decree in partition is not erroneous because it designates the person appointed to take charge of the land and sell the same as a "trustee" instead of "referee," as required in this section: Blackwell v. McLean, 9 Wash. 301, 37 Pac. 317.

Where land was sold at receiver's sale in partition proceedings, the purchaser took the entire title, free from a tenant's claim for summer-fallowing not of record: Womach v. Stuermer, 105 Wash. 625, 178 Pac. 801.

§ 846. Partition, How Made—Referees.

In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, designating the several portions by proper landmarks, and may employ a surveyor, with the necessary assistants, to aid them therein. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided and the shares allotted to each party, with a particular description of each share. [L. '69, p. 134, § 513; Cd. '81, § 560; 2 H. C., § 585.]

Cited in 78 Wash. 511.

§ 847. Report of Referees—Confirmation—Decree.

The court may confirm or set aside the report in whole or in part, and if necessary, appoint new referees. Upon the report being confirmed, a decree shall be entered that such partition be effectual forever, which decree shall be binding and conclusive,—

1. On all parties named therein, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder, or inheritance of such property, or any part thereof, after the termination of a particular estate therein, or who by any contingency may be entitled to a beneficial interest

in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2. On all persons interested in the property, to whom notice shall have been given by publication;

3. On all other persons claiming from or through such parties or persons, or either of them. [L. '69, p. 135, § 514; Cd. '81, § 561; 2 H. C., § 586.]

Cited in 78 Wash. 512; 90 Wash. 469.

Under this section the court has power to set aside the report and to direct a new allotment in a partition suit, and the interlocutory decree whereby the mat-

ter was referred is not final but may be amended as to the manner of allotting the property: *Hamlin v. Hamlin*, 90 Wash. 467, 156 Pac. 393.

§ 848. Decree, Rights Affected by.

Such decree and partition shall not affect any tenants for years or for life of the whole of the property which is the subject of partition, nor shall such decree and partition preclude any persons, except such as are specified in the last section, from claiming title to the property in question, or from controverting the title of the parties between whom the partition shall have been made. [L. '69, p. 135, § 515; Cd. '81, § 562; 2 H. C., § 587.]

Cited in 78 Wash. 512.

§ 849. Expenses Taxed as Costs.

The expenses of the referees, including those of a surveyor and his assistants, when employed, shall be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by law to the referees, shall be paid by the plaintiff, and may be allowed as costs. [L. '69, p. 135, § 516; Cd. '81, § 563; 2 H. C., § 588.]

§ 850. Decree of Sale on Referee's Report.

If the referees report to the court that the property of which partition shall have been decreed, or any separate portion thereof, is so situated that a partition thereof cannot be made without great prejudice to the owners, and the court is satisfied that such report is correct, it may thereupon, by an order, direct the referees to sell the property, or separate portion thereof. [L. '69, p. 135, § 517; Cd. '81, § 564; 2 H. C., § 589.]

§ 851. Estate for Life, How Set Off.

When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the property, the whole of such estate may be set off in any part of the property not ordered sold. [L. '69, p. 136, § 518; Cd. '81, § 565; 2 H. C., § 590.]

Cited in 78 Wash. 512.

§ 852. Lien Creditors not Parties, How Brought in.

Before making an order of sale, if lien creditors, other than those by judgment or decree, have not been made parties, the court, on motion of either party, shall order the plaintiff to file a supplemental

complaint, making such creditors defendants. [L. '69, p. 136, § 519; Cd. '81, § 566; 2 H. C., § 591.]

§ 853. Unsatisfied Liens—Reference.

If an order of sale be made before the distribution of the proceeds thereof, the plaintiff shall produce to the court the certificate of the auditor of the county [and county clerk] where the property is situated, showing the liens remaining unsatisfied, if any, by judgment or decree upon the property, or any portion thereof, and unless he do so, the court shall order a referee to ascertain them. [L. '69, p. 136, § 520; Cd. '81, § 567, 2 H. C., § 592.]

See *supra*, § 444, judgment liens.

§ 854. Ascertainment of Liens and Their Priority.

If it appear by such certificate, or reference in case the certificate is not produced, that any such liens exist, the court shall appoint a referee to ascertain what amount remains due thereon or secured thereby respectively, and the order of priority in which they are entitled to be paid out of the property. [L. '69, p. 136, § 521; Cd. '81, § 568; 2 H. C., § 593.]

§ 855. Notice to Lienholders.

The plaintiff must cause a notice to be served at least twenty days before the time for appearance on each person having such lien by judgment or decree, to appear before the referee at a specified time and place, to make proof, by his own affidavit or otherwise, of the true amount due or to become due, contingently or absolutely, on his judgment or decree. [L. '69, p. 136, § 522; Cd. '81, § 569; 2 H. C., § 594.]

§ 856. Proceedings of Referee on Ascertaining Liens.

The referee shall receive the evidence, and report the names of the creditors whose liens are established, the amounts due thereon, or secured thereby, and their priority respectively, and whether contingent or absolute. He shall attach to his report the proof of service of the notices and the evidence before him. [L. '69, p. 136, § 523; Cd. '81, § 570; 2 H. C., § 595.]

§ 857. Report of Referee.

The report of the referee may be excepted to by either party to the suit, or to the proceedings before the referee, in like manner and with like effect as in ordinary cases. If a lien creditor be absent from the state, or his residence therein be unknown, and that fact appear by affidavit, the court, or judge thereof, may by order direct that service of the notice may be made upon his agent or attorney of record, or by publication thereof, for such time and in such manner as the order may prescribe. [L. '69, p. 137, § 524; Cd. '81, § 571; 2 H. C., § 596.]

§ 858. Confirmation of Report.

If the report of the referee be confirmed, the order of confirmation is binding and conclusive upon all parties to the suit, and upon the lien creditors who have been duly served with the notice to appear before

the referee, as provided in section 855. [L. '69, p. 137, § 525; Cd. '81, § 572; 2 H. C., § 297.]

§ 859. Distribution of Proceeds of Sale.

The proceeds of the sale of the encumbered property shall be distributed by the decree of the court, as follows:—

1. To pay its just proportion of the general costs of the suit;
2. To pay the costs of the reference;
3. To satisfy the several liens in their order of priority, by payment of the sums due and to become due, according to the decree;
4. The residue among the owners of the property sold, according to their respective shares. [L. '69, p. 137, § 526; Cd. '81, § 573; 2 H. C., § 598.]

§ 860. Other Securities to be First Exhausted.

Whenever any party to the suit, who holds a lien upon the property, or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such sureties to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property on account thereof. [L. '69, p. 137, § 527; Cd. '81, § 574; 2 H. C., § 599.]

§ 861. Proceedings to Ascertain and Adjust Liens Do not Delay Sale.

The proceedings to ascertain the amount of the liens, and to determine their priority, as above provided, or those hereinafter authorized to determine the right of parties to funds paid into court, shall not delay the sale, nor affect any other party whose rights are not involved in such proceedings. [L. '69, p. 137, § 528; Cd. '81, § 575; 2 H. C., § 600.]

§ 862. Proceeds of Sale, Disposition of.

The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But if no such direction be given, all such proceeds and securities shall be paid into court, or deposited as directed by the court. [L. '69, p. 138, § 529; Cd. '81, § 576; 2 H. C., § 601.]

§ 863. Continuance of Action to Determine Rights of Parties.

When the proceeds of sale of any shares or parcel belonging to persons who are parties to the suit, and who are known, are paid into court, the suit may be continued, as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original suit. [L. '69, p. 138, § 530; Cd. '81, § 577; 2 H. C., § 602.]

§ 864. Sales by Referees may be Made by Auction.

All sales of real property made by the referees shall be made by public auction, to the highest bidder, in the manner required for the sale

of real property on execution. The notice shall state the terms of sale, and if the property, or any part of it, is to be sold subject to a prior estate, charge, or lien, that shall be stated in the notice. [L. '69, p. 138, § 531; Cd. '81, § 578; 2 H. C., § 603.]

Cited in 9 Wash. 304; 52 Wash. 58; 84 Wash. 300.

the sale to be made at public or private sale is irregular: *Blackwell v. McLean*, 9 Wash. 301, 37 Pac. 317.

Under this section a decree authorizing

§ 865. Terms of Sale may be Directed by Court.

The court shall, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises, of which it may direct a sale on credit; and for that portion of which the purchase money is required by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state. [L. '69, p. 138, § 532; Cd. '81, § 579; 2 H. C., § 604.]

§ 866. Securities to be Taken by Referee.

The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money of such parts of the property as are directed by the court to be sold on credit, in the name of the clerk of the court and his successors in office; and for the shares of any known owner of full age, in the name of such owner. [L. '69, p. 138, § 533; Cd. '81, § 580; 2 H. C., § 605.]

§ 867. Estate of Tenant for Life or for Years may be Sold.

When the estate of any tenant for life or years in any undivided part of the property in question shall have been admitted by the parties or ascertained by the court to be existing at the time of the order of sale, and the person entitled to such estate shall have been made a party to the suit, such estate may be first set off out of any part of the property, and a sale made of such parcel, subject to the prior unsold estate of such tenant therein; but if, in the judgment of the court, a due regard to the interest of all the parties require that such estate be also sold, the sale may be so ordered. [L. '69, p. 138, § 534; Cd. '81, § 581; 2 H. C., § 606.]

Cited in 78 Wash. 512, 513.

§ 868. Tenant for Life or Years Entitled to Gross Sum.

Any person entitled to an estate for life or years in any undivided part of the property, whose estate shall have been sold, shall be entitled to receive such sum in gross as may be deemed a reasonable satisfaction for such estate, and which the person so entitled shall consent to accept instead thereof, by an instrument duly acknowledged and filed with the clerk. [L. '69, p. 139, § 535; Cd. '81, § 582; 2 H. C., § 607.]

Cited in 78 Wash. 512.

§ 869. Court to Determine Sum, if Consent not Given.

If such consent be not given, as provided in the last section, before the report of sale, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be invested for the benefit of the person entitled

to such estate for life or years, and shall order the same to be deposited in the court for that purpose. [L. '69, p. 139, § 536; Cd. '81, § 583; 2 H. C., § 608.]

Cited in 78 Wash. 513.

§ 870. Protection of Unknown Tenant.

If the persons entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared. [L. '69, p. 139, § 538; Cd. '81, § 584; 2 H. C., § 609.]

§ 871. Inchoate and Contingent Interests.

In all cases of sales in partition, when it appears that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportionate value of such contingent or vested right or estate, and shall direct such proportion of the proceeds of sale to be invested, secured, or paid over in such manner as to protect the rights and interests of the parties. [L. '69, p. 140, § 539; Cd. '81, 585; 2 H. C., § 610.]

§ 872. Terms of Sale must be Made Known.

In all cases of sales of property, the terms shall be made known at the time, and if the premises consist of distinct farms or lots, they shall be sold separately, or otherwise, if the court so directs. [L. '69, p. 140, § 540; Cd. '81, § 586; 2 H. C., § 611.]

§ 873. Referees or Guardians not to be Interested in Purchase.

Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase, nor shall the guardian of an infant be an interested party in the purchase of any real property being the subject of the suit, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void. [L. '69, p. 140, § 541; Cd. '81, § 587; 2 H. C., § 612.]

§ 874. Report of Sale—Contents.

After completing the sale, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report shall be filed with the clerk. [L. '69, p. 140, § 542; Cd. '81, § 588; 2 H. C., § 613.]

§ 875. Exceptions to Report—Confirmation—Conveyance.

The report of sale may be excepted to in writing by any party entitled to a share of the proceeds. If the sale be confirmed, the order of confirmation shall direct the referees to execute conveyances and take securities pursuant to such sale. [L. '69, p. 140, § 543; Cd. '81, § 589; 2 H. C., § 614.]

The fact that publication of notice of the finding of the court had been made sale is given before the signing of the in fact prior to the publication, and, if decree is merely an irregularity, when unappealed from, would not affect the

jurisdiction of the court to order and confirm the sale: *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

After confirmation of a partition sale, the referee's report and order of confirmation showing a substantial compliance with the statute as to notice, objection cannot be made to the notice of sale in that the name of the news-

paper and the day of the week on which the paper was published was not shown by the report, nor that the last day of publication was given as November 14th, when from the context of the report it appears that the same was a clerical error, intended for December 14th: *Prince v. Mottman*, 84 Wash. 287, 146 Pac. 841.

§ 876. Receipt of Proceeds.

When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belong to him. [L. '69, p. 140, § 544; Cd. '81, § 590; 2 H. C., § 615.]

§ 877. Investment of Proceeds of Unknown Owner.

When there are proceeds of sale belonging to an unknown owner, or to a person without the state who has no legal representative within it, or when there are proceeds arising from the sale of an estate subject to the prior estate of a tenant for life or years, which are paid into the court or otherwise deposited by order of the court, the same shall be invested in securities on interest for the benefit of the persons entitled thereto. [L. '69, p. 140, § 545; Cd. '81, § 591; 2 H. C., § 616.]

§ 878. Investment in Name of Clerk.

When the security for the proceeds of sale is taken, or when an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the court and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court. [L. '69, p. 141, § 546; Cd. '81, § 592; 2 H. C., § 617.]

§ 879. Securities to be Taken in Name of Parties.

When security is taken by the referees on a sale, and the parties interested in such security by an instrument in writing under their hands, delivered to the referees, agree upon the share and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of and payable to the parties respectively entitled thereto, and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk. [L. '69, p. 141, § 547; Cd. '81, § 593; 2 H. C., § 618.]

§ 880. Duties of Clerk Making Investments.

The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof. [L. '69, p. 141, § 548; Cd. '81, § 594; 2 H. C., § 619.]

§ 881. Unequal Partition—Compensation Adjudged.

When it appears that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, the court may adjudge compensation to be made by one party to another on account of the inequality of partition; but such compensation shall not be required to be made to others by owners unknown, nor by infants, unless in case of an infant it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby. [L. '69, p. 141, § 549; Cd. '81, § 595; 2 H. C., § 620.]

§ 882. Share of Infant may be Paid to Guardian.

When the share of an infant is sold, the proceeds of the sale may be paid by the referees making the sale, to his general guardian, or the special guardian appointed for him in the suit, upon giving the security required by law, or directed by order of the court. [L. '69, p. 142, § 550; Cd. '81, § 596; 2 H. C., § 621.]

§ 883. Guardian of Insane, etc., may Receive.

The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees, on executing a bond, with sufficient sureties, approved by the judge of the court, conditioned that he faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or to his legal representative. [L. '69, p. 142, § 551; Cd. '81, § 597; 2 H. C., § 622.]

§ 884. Guardian may Consent to Partition.

The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in common or in any other manner, so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without suit, and agree upon the share to be set off to such infant or other person entitled, and may execute a release in his behalf to the owners of the shares or parts to which they may respectively be entitled, and upon an order of the court. [L. '69, p. 142, § 552; Cd. '81, § 598; 2 H. C., § 623.]

The statute expressly provides that partition may be maintained against infant cotenants, the provision being broad enough to reach all interests and parties and expressly make confirmation conclusive against all parties to the suit:

Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

A guardian may consent to a partition without suit under the supervision of the court: *Kromer v. Friday*, *supra*.

§ 885. Costs, How Apportioned.

The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case there shall be a lien

on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them. [L. '69, p. 142, § 553; Cd. '81, § 599; 2 H. C., § 624.]

Cited in 34 Wash. 138.

In an action for a partition of real estate, attorney's fees outside the statutory fee cannot be allowed or taxed as

part of the costs or disbursements provided for by this section: *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130.

CHAPTER IV.

ACTIONS AGAINST THE STATE.

§ 886. Manner of Collecting Claims Against the State—Bond.

Any person or corporation having any claim against the state of Washington shall have the right to begin an action against the state in the superior court of Thurston county. Such action shall be begun against the state of Washington by filing a complaint in such superior court, setting forth the nature of such claim, and containing a direction to the defendant to appear within twenty days after service of the complaint exclusive of the day of service, and defend the action, and a notice that in case of failure so to do, judgment will be rendered against the state according to the prayer of the complaint. The plaintiff in such action shall, at the time of filing his complaint, file a bond or undertaking with two or more sureties to be approved by the clerk of the court to the effect that such party will indemnify the state against all costs that may accrue in such action, and will pay to the clerk of said court all costs in case the plaintiff shall fail to prosecute his action or to obtain a judgment against the state. [L. '95, p. 188, § 1.]

Cited in 18 Wash. 74; 27 Wash. 291; 28 Wash. 502; 68 Wash. 332; 86 Wash. 688; 95 Wash. 68.

Claims and Liability and Consent of State to be Sued, in General: See Remington's Digest, States, § 36; *Northwestern & Pac. Hyp. Bank v. State*, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33; *Billings v. State*, 27 Wash. 288, 67 Pac. 583; *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 151 Pac. 108.

Rights of Action Against State or State Officers: See Remington's Digest, States, § 38; *Northwestern & Pac. Hyp. Bank v. State*, 18 Wash. 73, 50 Pac. 586, 42 L. R. A. 33; *Billings v. State*, 27 Wash. 288, 67 Pac. 583; *Stern v. State Board of Dental Examiners*, 50 Wash. 100, 96 Pac. 693; *Riddoch v. State*, 68 Wash. 329, 123 Pac. 450, Ann. Cas. 1913E, 1033, 42 L. R. A. (N. S.) 251; *State v. Asotin County*, 79 Wash. 634, 140 Pac. 914.

Parties: *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528.

When claim against state deemed based on contract within statute

permitting action against state. 42 L. R. A. (N. S.) 256.

Effect of statute permitting state to be sued upon the question of its liability for negligence or tort. 13 A. L. R. 1276.

What claims are valid demands against state. 42 L. R. A. 33.

Suit to enjoin enforcement of statute by state officer as suit against state within constitutional prohibition. 14 Ann. Cas. 791.

Right to maintain ejectment against state officer or agent in actual possession of premises. Ann. Cas. 1913C, 357.

Liability of state or its officers to suit for specific performance of contract. 5 Ann. Cas. 295.

When action against officers is deemed to be action against the state. 44 L. R. A. (N. S.) 189.

Liability of state for torts of its officers. Ann. Cas. 1913E, 1038; Ann. Cas. 1918D, 916.

Liability of state for injury in state building. 42 L. R. A. (N. S.) 251.

§ 887. Service, How Made.

Service of the complaint shall be made by the sheriff of the county in which such action is brought, or by any of his deputies, by delivering an attested copy thereof to the attorney general, or by leaving such copy in his office, and by delivering another like copy to the secretary of state, or by leaving such copy in his office. [L. '95, p. 188, § 2.]

Cited in 18 Wash. 74.

§ 888. Attorney General Counsel for State—Procedure.

The attorney general or his assistant shall appear and act as counsel for the state. The action shall proceed in all respects as other actions. Appeals may be taken to the supreme court of the state as in other actions or proceedings, but in case an appeal shall be taken on behalf of the state, no bond shall be required of the appellant. [L. '95, p. 188, § 3.]

Cited in 18 Wash. 75; 28 Wash. 502; 42 Wash. 655.

This section making it the duty of the attorney general to appear and defend all suits brought against the state,

does not give him implied authority to employ an expert to assist him, when the public interests require it: *Ritchie v. State*, 42 Wash. 653, 85 Pac. 417.

§ 889. Judgment, How Satisfied.

No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any such action, the clerk shall make and furnish to the auditor of state a duly certified transcript of such judgment; and the auditor of state shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury. [L. '95, p. 188, § 4.]

Cited in 94 Wash. 170.

There is no conflict between this section and section 900, relating to payments

of awards in condemnation: *State ex rel. Peel v. Clausen*, 94 Wash. 166, 162 Pac. 1.

§ 890. Limitations.

All provisions of law relating to the limitations of personal actions shall apply to claims against the state, but the computation of time thereunder shall not begin until this chapter shall have become a law. [L. '95, p. 189, § 5.]

Cited in 18 Wash. 75.

Right of state to plead statute of limitations as to action against it. 10 Ann. Cas. 595.

Running of statute of limitations against state as defendant on state

being real party in interest. 8 Ann. Cas. 702.

Applicability of statute of limitations to actions by agencies of state. 3 L. B. A. (N. S.) 746; 22 L. B. A. (N. S.) 921; L. B. A. 1916E, 96.

§ 890-1. Action Against State Officers—Request for Defense at State Expense.

Whenever an action or proceeding for damages shall be instituted against any state officer or employee for the performance of any official act, such officer or employee may request the administrative board to authorize the defense of said action or proceeding at the expense of the state. [L. '21, p. 220, § 1.]

§ 890-2. Expenses, from What Fund Payable.

If the administrative board shall find that said officer or employee acted in good faith and without negligence, it shall grant said request, in which event the necessary expenses of the defense of said action or proceeding shall be paid from the appropriations made for the support of the department to which such officer or employee is attached. In such cases the attorney general shall appear and defend such officer or employee. [L. '21, p. 220, § 2.]

CHAPTER V.**EMINENT DOMAIN.****§ 891. Appropriation of Property by the State—Requisites of Petition.**

Whenever any officer, board, commission, or other body representing the state is authorized by the legislature to acquire any land, real estate, premises, or other property, deemed necessary for the public uses of the state, or any department or institution thereof, and the officer, board, commission or other body whose duty it is to acquire such land, real estate, premises, or other property is unable to agree with the owner or owners thereof for its purchase, it shall be the duty of the attorney general to present to the superior court of the county in which said land, real estate, premises, or other property so sought to be acquired or appropriated shall be situated, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such lands, real estate, premises or other property, or in case a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law, then that the compensation to be made as aforesaid be ascertained and determined by the court or judge thereof. [L. '11, p. 335, § 1. Cf. L. '91, p. 138, § 1; 2 H. C., § 638.]

Cited in 4 Wash. 67; 28 Wash. 501; 38 Wash. 687; 94 Wash. 170; 112 Wash. 415.

NATURE, EXTENT AND DELEGATION OF POWER—Nature and Source of Power: See Remington's Digest, Em. Dom., §§ 1, 2; Smith's Petition, In re, 9 Wash. 85, 37 Pac. 311, 494; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68; State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 Pac. 994; Bilger v. State, 63 Wash. 457, 116 Pac. 19.

Application and Strict Construction of Constitutional Provisions: See Remington's Digest, Em. Dom., § 3; Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; State ex rel. Morrell v.

Superior Court, 33 Wash. 542, 74 Pac. 686; Neitzel v. Spokane International R. Co., 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522; State ex rel. Postal Telegraph-Cable Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855; Taylor v. Chicago & St. Paul R. Co., 85 Wash. 592, 148 Pac. 887, L. R. A. 1915E, 634; North Coast R. Co. v. Aumiller, 61 Wash. 271, 112 Pac. 384.

See, also, State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 Pac. 805.

Power of State in General: See Remington's Digest, Em. Dom., § 5; Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; State ex rel. Public Service Commission v. Skagit River Tel. & Tel. Co., 85 Wash. 29, 147 Pac. 885.

For text treatment of "Eminent Domain," see 10 **R. C. L.** 1.

State power of eminent domain over property of United States. 4 **A. L. R.** 548.

Nature and extent of power of United States to condemn land. **Ann. Cas.** 1918E, 39.

§ 892. Notice—Contents of—Service—Publication.

A notice stating briefly the objects of the petition, and containing a description of the land, real estate, premises, or property sought to be acquired and appropriated, and stating the time and place when and where the same will be presented to the court or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or otherwise interested therein at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other director or trustee of such corporation. In case of minors, or their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor; in case of idiots, lunatics, or distracted persons, on their guardians, or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is school or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be acquired and appropriated is situated. In all cases where the owner or person claiming an interest in such real estate or other property is a nonresident of this state, or where the residence of such owner or person is unknown, and an affidavit of the attorney general shall be filed that such owner or person is a nonresident of this state, or that after diligent inquiry his residence is unknown or cannot be ascertained, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest the county in which lies the land sought to be acquired and appropriated. And such publication shall be deemed service upon each of such nonresident person or persons whose residence is unknown. Such notice shall be signed by the attorney general of the state of Washington. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice by affidavit of the person serving the same, or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served, but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided

for, service of notices, order, and other papers in the proceedings authorized by this act, may be made as the superior court or judge thereof may direct. [L. '91, p. 139, § 2; 2 H. C., § 639.]

"Act" refers to §§ 891—900.

Notice in general condemnations, see *infra*, § 922.

§ 893. Adjournment of Proceedings—Notice.

The court or judge may, upon application of the said attorney general or any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected. [L. '91, p. 140, § 3; 2 H. C., § 640.]

§ 894. Hearing of Petition—Jury.

At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises, or other property described in said petition have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really necessary for the public use of the state of Washington, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summons from the citizens of the county in which such land, real estate, premises, or other property sought to be acquired or appropriated shall be situated, as many qualified persons as may be necessary in order to form a jury of twelve persons, unless the parties to the proceedings consent to a less number (such number to be not less than three), and such consent shall be entered by the clerk in the minutes of the trial. If necessary to complete the jury, the sheriff, under the direction of the court or judge thereof, shall summon as many qualified persons as may be required to complete the jury from the bystanders, citizens of the county where the land, real estate, premises, or other property is situated. [L. '91, p. 140, § 4; 2 H. C., § 641.]

§ 895. Trial—Damages—Judgment.

A judge of the superior court shall preside at the trial, which shall be held at such time as the court or judge thereof may direct, at the courthouse in the county where the land, real estate, premises, or other property sought to be appropriated or acquired is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation or company, or to any county, by reason of the appropriation and use of such land, real estate, premises, or other property, and shall ascertain, determine, and award the amount of damage to be paid said owner or owners respectively, and to all tenants, encumbrancers, and others interested for taking such land, real estate, premises, or other property so taken. Upon the trial, witnesses may be examined in behalf of either party to the proceedings as in civil actions; and a witness served with a subpoena in such proceedings shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the

verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for taking such land, real estate, or premises. In case a jury is waived, as in civil cases in courts of record, in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court or judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [L. '91, p. 141, § 5; 2 H. C., § 642.]

Cited in 38 Wash. 687; 46 Wash. 48; fee at the time of the award is the only one entitled thereto: *Schaefer v. Gregory* 112 Wash. 415.

Under this section, the owner of the Co., 112 Wash. 408, 192 Pac. 968.

§ 896. Judgment—Filing and Recording of.

At the time of rendering judgment for damages, whether upon default or trial, the court or judge thereof shall also enter a judgment or decree of appropriation of the land, real estate, or premises sought to be appropriated, thereby vesting the legal title to the same in the state of Washington. Whenever said judgment or decree of appropriation is made, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. [L. '91, p. 142, § 6; 2 H. C., § 643.]

Cited in 94 Wash. 176.

§ 897. Payment of Damages, Effect of—Appeal.

Upon the entry of judgment upon the verdict of the jury or the decision of the court or judge thereof, awarding damages as hereinbefore prescribed, the state of Washington may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court or the judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises or other property mentioned in said petition, said state of Washington shall be released and discharged from any and all further liability therefor, unless upon appeal the owner or party interested shall recover a greater amount of damages; and in that case only for the amount in excess of the sum paid into said court and the costs of appeal: Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by the state as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [L. '91, p. 142, § 7; 2 H. C., § 644.]

Cited in 94 Wash. 176.

A specific appropriation by the legislature for the payment of an award

under this section is not necessary: *State ex rel. Peel v. Clausen*, 94 Wash. 166, 162 Pac. 1.

§ 898. Claimants, How Paid—Conflicting Claims, How Determined.

Any person, corporation, or county claiming to be entitled to any money paid into court, as provided in this act, may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is

entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court or judge thereof should decide that the title to the land, real estate, or premises specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, or premises be determined according to law. [L. '91, p. 143, § 8; 2 H. C., § 645.]

"Act" refers to §§ 891—900.

Cited in 71 Wash. 358.

This section is not exclusive where the fund has been paid into court, and where all the parties appeared as upon an intervention and there was a trial on the merits, the court had jurisdiction to in-

quire into all the claims, and having done so, the supreme court on appeal can direct the proper judgment to be entered: State ex rel. Smith v. Superior Court, 71 Wash. 354, 128 Pac. 648.

§ 899. Appeal.

Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state, within thirty days after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damage in respect to the parties to the appeal: Provided, however, that upon such appeal no bond shall be required: And provided further, that, if the owner of land, the real estate, or premises accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases: Provided further, that no appeal shall operate so as to prevent the said state of Washington from taking possession of such property pending such appeal, after the amount of said award shall have been paid into court. [L. '91, p. 143, § 9; 2 H. C., § 646.]

§ 900. Payment of Award and Costs.

Whenever the attorney general shall file with the auditor of this state a certificate setting forth the amount of any award found against the state of Washington under the provisions of this act, together with the costs of said proceeding, and a description of the lands and premises sought to be appropriated and acquired, and the title of the action or proceeding in which said award is rendered, it shall be the duty of the state auditor to forthwith issue a warrant upon the state treasury to the order of the attorney general in a sum sufficient to make payment in money of said award and the costs of said proceeding, and thereupon it shall be the duty of said attorney general to forthwith pay to the clerk of said court in money the amount of said award and costs. [L. '91, p. 143, § 10; 2 H. C., § 647.]

"Act" refers to §§ 891—900.

Cited in 94 Wash. 170, 171, 176.

This section leaves it discretionary with the attorney general to file the certificate, as the state may abandon the proceedings before taking possession if the award is unsatisfactory, and does not conflict with the earlier act, section

889, providing that no execution shall issue against the state on any judgment: State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

A specific appropriation by the legislature to pay awards in condemnation proceedings is not contemplated or neces-

sary to authorize the state auditor to issue a warrant therefor: State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

The state having taken possession of lands before paying the award, and refused to avail itself of this section, authorizing an abandonment of the proceedings, it cannot escape liability for the amount of the award: State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

Where the state took possession of condemned lands before paying the award, the law presumes that the state is prepared to pay the award, and the burden is not upon the claimant to allege or prove the state of the public fund: State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

Right of county to exercise power of eminent domain. *Ann. Cas.* 1913E, 1079.

§ 900-1. Condemnation for Military Purposes—Certificate of Necessity—Proceedings.

Whenever the governor, as commander-in-chief of the military of this state, shall deem it necessary to acquire any lands, real estate, premises or other property for any military purpose or purposes of this state, either to add to, enlarge, increase or otherwise improve state military facilities now or hereafter existing or to establish new facilities, the acquisition of which shall have been provided for by the state, by a county or by a city, or by either, all or any thereof, upon certificate by the governor of such necessity, proceedings for the condemnation, appropriation and taking of the lands, real estate, premises or other property so certified to be necessary shall be taken as follows:

Where the state is to pay the purchase price it shall be the duty of the attorney general, upon receipt by him of said certificate of the governor, to file a petition in the superior court for the county in which such lands, real estate, premises or other property may be situate praying such condemnation, appropriating and taking, which petition shall be prosecuted to a final determination in the manner by law provided for other condemnation suits brought by or on behalf of the state;

Where a county is to pay the purchase price it shall be the duty of the prosecuting attorney of said county, upon receipt by him of said certificate of the governor, to file a petition in the superior court for said county praying such condemnation, appropriation and taking, which petition shall be prosecuted to a final determination in the manner by law provided for other condemnation suits brought by or on behalf of a county;

Where a city is to pay the purchase price it shall be the duty of the corporation counsel, city attorney or other head of the legal department of said city, upon receipt by him of said certificate of the governor, to file a petition in the superior court for the county in which said city is situate, praying such condemnation, appropriation and taking, which petition shall be prosecuted to a final determination in the manner by law provided for other condemnation suits brought by or on behalf of such city;

Where the purchase price is to be paid by the state, a county and a city or by the state and a county, or by the state and a city, or by a county and a city, the condemnation shall be prosecuted to a final determination in the manner by law provided for either or any thereof, as the governor may determine, which determination shall be final and conclusive. [L. '17, p. 620, § 1.]

§ 900-2. Applying Act.

Nothing herein contained shall be construed as in any manner applying to condemnation by any county for the purpose of acquiring title to any site for a mobilization, training and supply station, to be donated by any county to the United States. [L. '17, p. 621, § 2.]

§ 901. Counties may appropriate Lands for Public Use.

Every county in this state is hereby, for the purposes of this and the four following sections, declared to be a body corporate and is authorized and empowered by and through its board of county commissioners whenever said board shall judge it to be clearly for the general welfare and benefit of the people of the county, and so far as shall be in harmony with the constitution of this state and the provisions of this act, to condemn and appropriate as hereinafter in this act provided and to dispose of for public use such lands, properties, rights and interests as are hereinafter in this act mentioned, whenever the government of the United States or of this state is intending or proposing the construction, operation or maintenance of any public work situated or to be situated wholly or partly within such county, or the expenditure of money or labor for the construction, operation or maintenance of any such work, and such condemnation or appropriation will enable the county to aid, promote, facilitate or prepare for any such construction, operation, maintenance or expenditure by either or both such governments, or to fulfill or dispose of any condition upon which such construction, operation, maintenance or expenditure is by law or from any cause contingent, and no property shall be exempt from such condemnation, appropriation or disposition by reason of the same having been or being dedicated, appropriated or otherwise reduced or held to public use. [L. '95, p. 3, § 1.]

"Act" refers to §§ 901—905.

Cited in 58 Wash. 516.

§ 902. Tax Levy to Pay Cost of Condemnation.

The board of county commissioners is hereby authorized and empowered in aid of the powers granted or prescribed in the foregoing section to levy, annually, a tax as large as may be necessary, but not exceeding the rate of one mill on the dollar, upon all taxable property in the county, such tax to be assessed, levied and collected at the same time and in the same manner as taxes for general county purposes, but the proceeds of said taxes, when collected, shall constitute and be a special fund, applicable solely to the cost of such condemnation, appropriation or disposition, as is mentioned in the foregoing section, and the expenses incident thereto. [L. '95, p. 4, § 2.]

§ 903. Eminent Domain Extended to Counties.

The right of eminent domain for the purposes intended in this act is hereby extended to all counties in this state and every such county for any purpose of condemnation, appropriation or disposition such as is mentioned in section 901, supra, is hereby authorized and empowered to condemn and appropriate all necessary lands and all rights, properties and interests in or appurtenant to land under the same procedure as is or shall be provided

by the laws of this state for the case of any similar condemnation or appropriation by other corporations. [L. '95, p. 4, § 3.]

"Act" refers to §§ 901—905.

§ 904. Indebtedness Contracted, General County Purpose.

Any county purpose mentioned in this act shall be deemed and held to be a general county purpose and any indebtedness contracted or to be contracted therefor shall be deemed and held to be an indebtedness for general county purposes, and all the provisions of law of this state relative to indebtedness for general county purposes or the contracting of such indebtedness or the bonds for funding the same shall be deemed applicable to any indebtedness contracted or to be contracted or any bonds issued by any county under this act, but the accounts of the county with respect to the receipts and disbursements of all moneys received or disbursed by the county under the provisions of this act shall, for each condemnation, appropriation and disposition, be so kept as to clearly and fully exhibit such accounts separate and apart from the other accounts of the county. [L. '95, p. 5, § 4.]

"Act" refers to §§ 901—905.

§ 905. County Purpose, Defined.

Any condemnation, appropriation or disposition intended in this act shall be deemed and held to be for a county purpose and public use within the meaning of this act when it is directly or indirectly, approximately or remotely for the general benefit or welfare of the county or of the inhabitants thereof, or when it is otherwise within the meaning of the phrase "for a county purpose" as occurring in the constitution of this state. [L. '95, p. 5, § 5.]

"Act" refers to §§ 901—905.

This act authorizing counties to condemn land for a right of way for a ship canal projected by the general government, is not a violation of article VIII,

§§ 6 and 7, of the constitution: *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817.

§ 905-1. Condemnation for Aerial Transportation Purposes.

That all cities and counties are authorized and empowered by and through their appropriate corporate authorities to acquire, maintain and operate sites and other facilities for landings, terminals, housing, repair and care of airplanes and seaplanes for the aerial transportation of persons, property or mail; and to acquire by purchase, condemnation or lease all lands and personal property necessary therefor; and the same is hereby declared to be a city and county purpose and a public use. Cities and counties are hereby empowered to acquire lands and other property for said purpose by the exercise of the power of eminent domain under the same procedure as is or shall be provided by law for the condemnation and appropriation of private property for any of their respective corporate uses. [L. '19, p. 102, § 1.]

§ 906. School Districts may appropriate Land.

Whenever any school district shall select any real estate as a site for a schoolhouse, or as additional grounds to an existing schoolhouse site, within

the district, and the board of school directors of such district and the owner or owners of the site or any part thereof, or addition thereto so selected, shall be unable to agree upon the compensation to be paid by such school district to the owner or owners thereof, such school district shall have the right to take and acquire title to such real estate for use as a schoolhouse site or additional site, upon first paying to the owner or owners thereof therefor the value thereof, to be ascertained in the manner hereinafter provided. [L. '03, p. 193, § 1; L. '09, p. 372, § 1.]

§ 907. Petition to Superior Court.

The board of directors of the school district shall present to the superior court of the state of Washington in and for the county wherein is situated the real estate desired to be acquired for schoolhouse site purposes, a petition, reciting that the board of directors of such school district have selected certain real estate, describing it, as a schoolhouse site, or as additional grounds to an existing site, for such school district; that the site so selected, or some part thereof, describing it, belongs to a person or persons, naming him or them, that such school district has offered to give the owner or owners thereof therefor — dollars, and that the owner of such real estate has refused to accept the same therefor; that the board of school directors of such school district and the said owner or owners of such real estate are unable to agree upon the compensation to be paid by such school district to the owner or owners of such real estate therefor, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money by such school district to such owner or owners for the taking of such real estate for the use as a schoolhouse site for such school district; or in case a jury be waived in the manner provided by law in other civil actions in courts of record, then that the compensation to be made as aforesaid, be ascertained and determined by the court, or judge thereof. [L. '03, p. 194, § 2; L. '09, p. 372, § 2.]

§ 908. Notice of Petition—Service.

A notice, stating the time and place when and where such petition shall be presented to the court, or the judge thereof, together with a copy of such petition, shall be served on each and every person named therein as owner, or otherwise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such notice shall be signed by the prosecuting attorney of the county wherein the real estate sought to be taken is situated, and may be served in the same manner as summons in a civil action in such superior court is authorized by law to be served. [L. '03, p. 104, § 3; L. '09, p. 373, § 3.]

§ 909. Adjournment of Proceedings.

The court may, upon application of the petitioner or of any owner of said real estate, or any person interested therein, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interests may be affected by such proceedings. [L. '03, p. 194, § 4; L. '09, p. 373, § 4.]

§ 910. Findings of Necessity—Setting Trial.

At the time and place appointed for the hearing of such petition, or to which the same may have been adjourned, if the court shall find that all parties interested in such real estate sought to be taken have been duly served with notice and a copy of the petition as above prescribed, and shall further find that such real estate sought to be taken is required and necessary for the purpose of a schoolhouse site, or as a part of or as an addition to a schoolhouse site, for such school district, the court shall make an order reciting such findings, and shall thereupon set the hearing of such petition down for trial by a jury, as other civil actions are tried, unless a jury is waived in the manner provided by law in other civil actions. [L. '03, p. 195, § 5; L. '09, p. 373, § 5.]

§ 911. Jury Trial.

The jury impaneled to hear the evidence and determine the compensation to be paid to the owner or owners of such real estate desired for such schoolhouse site purpose shall consist of twelve persons unless a less number be agreed upon, and shall be selected, impaneled and sworn in the same manner that juries in other civil actions are selected, impaneled and sworn, provided a juror may be challenged for cause on the ground that he is a taxpayer of the district seeking the condemnation of any real estate. [L. '03, p. 195, § 6; L. '09, p. 373, § 6.]

§ 912. Trial—View by Jury.

A judge of the superior court shall preside at the trial and witnesses may be examined in behalf of either party to the proceedings, as in other civil actions, and upon the request of all the parties interested in such proceedings the court shall cause the jury impaneled to hear the same, to view the premises sought to be taken, and upon the request of any less number of the persons interested in the proceedings, the court may cause the jury to view the premises, pending the hearing of the case. [L. '03, p. 195, § 7; L. '09, p. 374, § 7.]

§ 913. Verdict for Full Value of Property.

Upon the close of the evidence, and the argument of counsel, the court shall instruct the jury as to the matters submitted to them, and the law pertaining thereto, whereupon the jury shall retire and deliberate and determine upon the amount of compensation in money that shall be paid to the owner or owners of the real estate sought to be taken for such schoolhouse site purposes therefor, which shall be the amount found by the jury to be the fair and full value of such premises; and when the jury shall have determined upon their verdict, they shall return the same to the court as in other civil actions. [L. '03, p. 195, § 8; L. '09, p. 374, § 8.]

Cited in 69 Wash. 194, 195.

This section does not limit the recovery to the naked value of the land, in violation of the constitution requiring payment of the value of the land taken and for any depreciation to the land not

taken; since the statute is directory and contains no words of limitation confining the jury to the value of the land taken alone: *State ex rel. School Dist. No. 56 v. Superior Court*, 69 Wash. 189, 124 Pac. 484.

§ 914. Verdict by Ten Jurors.

When ten of the jurors agree upon a verdict, the verdict so agreed upon shall be signed by the foreman, and the verdict so agreed upon shall be and stand as the verdict of the jury. [L. '03, p. 196, § 9; L. '09, p. 374, § 9.]

§ 915. Waiver of Jury.

In case a jury is waived, the compensation that shall be paid for the premises taken shall be determined by the court and the proceedings shall be the same as in the trial of issues of fact by the court in other civil actions. [L. '03, p. 196, § 10; L. '09, p. 374, § 10.]

§ 916. Judgment—Effect.

Upon the verdict of the jury, or upon the determination by the court of the compensation to be paid for the property sought to be taken as herein provided, judgment shall be entered against such school district in favor of the owner or owners of the real estate sought to be taken, for the amount found as compensation therefor, and upon the payment of such amount by such school district to the clerk of such court for the use of the owner or owners of, and the persons interested in the premises sought to be taken, the court shall enter a decree of appropriation of the real estate sought to be taken, thereby vesting the title to the same in such school district; and a certified copy of such decree of appropriation may be filed in the office of the county auditor of the county wherein the real estate taken is situated, and shall be recorded by such auditor like a deed of real estate, and with like effect. The money so paid to the clerk of the court shall be by him paid to the person or persons entitled thereto, upon the order of the court. [L. '03, p. 196, § 11; L. '09, p. 374, § 11.]

§ 917. Costs.

All the costs of such proceedings in the superior court shall be paid by the school district initiating such proceedings. [L. '03, p. 196, § 12; L. '09, p. 375, § 12.]

§ 918. Appeal to Supreme Court.

Either party may appeal from the judgment for compensation awarded for the property taken, entered in the superior court, to the supreme court of the state within sixty days after the entry of the judgment, and such appeal shall bring before the supreme court the justness of the compensation awarded for the property taken, and any error occurring on the hearing of such matter, prejudicial to the party appealing, [and no bond shall be required of either party appealing from such judgment]: Provided, however, that if the owner or owners of the land taken accepts the sum awarded by the jury or court, he or they shall be deemed thereby to have waived their right of appeal to the supreme court. [L. '03, p. 196, § 13; L. '09, p. 375, § 13.]

The words in brackets were omitted from the act of 1909, which was part of the school code, and did not expressly repeal the act of 1903.

§ 919. Possession of Premises.

An appeal from such judgment by the owner or owners of the land sought to be taken, shall not have the effect to preclude the school dis-

trict from taking possession of the premises sought, pending the appeal, provided the amount of the judgment against the school district shall have been paid in to the clerk of the court, as hereinbefore provided. [L. '03, p. 197, § 14; L. '09, p. 375, § 14.]

§ 920. Parties—Designation—Fees of Clerk.

In all proceedings under this act the school district seeking to acquire title to real estate for a schoolhouse site, shall be denominated plaintiff, and all other persons interested therein shall be denominated defendants; and in all such proceedings the clerk of the superior court wherein any such proceedings is brought shall charge nothing for his services, except in taking an appeal from the judgment entered in the superior court. [L. '03, p. 197, § 15; L. '09, p. 375, § 15.]

§ 921. Eminent Domain by Corporations—Petition, Requisites of.

Any corporation authorized by law to appropriate land, real estate, premises, or other property for right of way or any other corporate purposes, may present to the superior court of the county in which any land, real estate, or premises, or other property sought to be appropriated shall be situated, or to the judge of such superior court in any county where he has jurisdiction or is holding court, a petition in which the land, real estate, premises, or other property sought to be appropriated shall be described with reasonable certainty, and setting forth the name of each and every owner, encumbrancer, or other person or party interested in the same, or any part thereof, so far as the same can be ascertained from the public records, the object for which the land is sought to be appropriated, and praying that a jury be impaneled to ascertain and determine the compensation to be made in money, irrespective of any benefit from any improvement proposed by such corporation, to such owner or owners, respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such lands, real estate, premises, or other property, or in case a jury be waived, as in other civil cases in courts of record in the manner prescribed by law, then that the compensation to be made, as aforesaid, be ascertained and determined by the court, or judge thereof. [Cf. L. '88, p. 58, § 1; L. '90, p. 294, § 1; 2 H. C., § 648.]

See *infra*, § 2969, appropriation by agricultural development districts.

See *infra*, § 3803, necessity of subscription to all of capital stock.

See §§ 4236—4340, appropriation of lands for diking and drainage districts.

See *infra*, § 5432, appropriation by electric light and power companies.

See *infra*, § 6423, appropriation for county quarries.

See *infra*, § 6456, appropriation for gravel-beds.

See *infra*, § 6585, appropriation for toll road.

See *infra*, § 6720, appropriation by metropolitan park districts.

See *infra*, § 6746, appropriation for private ways of necessity.

See *infra*, § 6780, appropriation for permanent highways.

See *infra*, § 6854, appropriation for state quarries.

See *infra*, § 6855, appropriation by water districts.

See *infra*, §§ 7417—7504, appropriation for irrigation purposes.

See *infra*, § 8108, appropriation by United States.

See *infra*, § 8398, appropriation for toll logging roads.

See *infra*, § 8409, appropriation for boom companies.

See *infra*, § 8608 et seq., right of eminent domain extended to mining companies.

See *infra*, § 9214, eminent domain in cities.

See *infra*, § 9236, appropriation for pipe lines.

See *infra*, § 9410, appropriation for parkways.

See *infra*, § 9626, appropriation for river improvements.

See *infra*, § 9731, appropriation by commercial waterways.

See *infra*, § 10525, appropriation for grade crossing eliminations.

See §§ 10535—10539, appropriation by railroad companies.

See *infra*, § 10539, appropriation of public lands by certain corporations.

See *infra*, § 11083, appropriation by street and electric railways.

See §§ 11338—11359, appropriation for telegraph and telephone companies.

See *infra*, §§ 11572, 11574, appropriation by water power companies.

Cited in 2 Wash. 378, 380, 501; 4 Wash. 65, 311, 451; 5 Wash. 780; 14 Wash. 145; 19 Wash. 205; 29 Wash. 498; 31 Wash. 463; 45 Wash. 321; 47 Wash. 92; 48 Wash. 281; 52 Wash. 448; 71 Wash. 88; 80 Wash. 419; 84 Wash. 409; 86 Wash. 158; 92 Wash. 198; 102 Wash. 336.

Delegation of Power: See Remington's Digest, Em. Dom., §§ 6—10; Necessity of legislative acts in general: Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Long v. Billings, 7 Wash. 267, 34 Pac. 936.

§ 7. Construction and Operation of Legislative Acts in General: Spokane v. Colby, 16 Wash. 610, 48 Pac. 248; Seattle v. Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133; State ex rel. Attorney General v. Superior Court, 36 Wash. 381, 78 Pac. 1011; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; State ex rel. Wauconda Investment Co. v. Superior Court, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E, 1076.

This section has no application to municipal corporations: Tacoma v. State, 4 Wash. 64, 29 Pac. 847; Vancouver v. Wintler, 8 Wash. 378, 36 Pac. 278, 685.

§ 9. To Private Corporation: Cascades R. Co. v. Sohns, 1 W. T. 557; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417; State ex rel. Tolt Power & Transp. Co. v. Superior Court, 50 Wash. 13, 96 Pac. 519; State ex rel. Bremer v. Superior Court, 69 Wash. 278, 124 Pac. 1135; State ex rel. De Soucy v. Superior Court, 77 Wash. 31, 137 Pac. 311.

§ 10. To Individual: State ex rel. Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893; State ex rel. Springfield Inv. Co. v. Superior Court, 78 Wash. 679, 139 Pac. 601, 51 L. R. A. (N. S.) 987.

Property Subject to Appropriation: See Remington's Digest, Em. Dom., §§ 28—34.

In General: State ex rel. Kent Lumber Co. v. Superior Court, 35 Wash. 303, 77 Pac. 382; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663; State ex rel. Schade Brewing Co. v. Superior Court, 62 Wash. 96, 113 Pac.

576; State ex rel. Sylvester v. Superior Court, 64 Wash. 594, 117 Pac. 487; State ex rel. Great Northern R. Co. v. Superior Court, 68 Wash. 572, 123 Pac. 996, 40 L. R. A. (N. S.) 793.

§ 29. Public Property: Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Samish Boom Co. v. Callvert, 27 Wash. 611, 68 Pac. 367; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; State ex rel. Attorney General v. Superior Court, 36 Wash. 381, 78 Pac. 1011; State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co., 54 Wash. 530, 103 Pac. 809; State ex rel. Schade Brewing Co. v. Superior Court, 62 Wash. 96, 113 Pac. 576; Roberts v. Seattle, 63 Wash. 573, 116 Pac. 25; State v. Superior Court, 91 Wash. 454, 157 Pac. 1097; State ex rel. Mason County Power Co. v. Superior Court, 99 Wash. 496, 169 Pac. 994; State ex rel. Mason County Power Co. v. Superior Court, 102 Wash. 291, 173 Pac. 19.

The fact that property of a city is not now all being devoted to a public use does not authorize its condemnation by another public corporation: State ex rel. Cle Elum v. Kittitas County, 107 Wash. 326, 173 Pac. 698.

§ 30. Property Previously Devoted to Public Use: Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Columbia Valley R. Co. v. Superior Court, 45 Wash. 316, 88 Pac. 332; North Coast R. v. Northern Pac. R. Co., 48 Wash. 529, 94 Pac. 112; State ex rel. Milwaukee Terminal R. Co. v. Superior Court, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; State ex rel. Everett & Cherry Valley Traction Co. v. Superior Court, 59 Wash. 598, 110 Pac. 428; State ex rel. Harbor Boom Co. v. Superior Court, 65 Wash. 129, 117 Pac. 755; Newell v. Loeb, 77 Wash. 182, 137 Pac. 811; State ex rel. Peabody v. Superior Court, 77 Wash. 593, 138 Pac. 277; State ex rel. Washington Boom Co. v. Chehalis Boom Co., 82 Wash. 509, 144 Pac. 719; State ex rel. Union Trust & Savings Bank v. Superior Court, 84 Wash. 20, 145 Pac. 999, 149 Pac. 324; State ex

rel. South Fork Log Driving Co. v. Superior Court, 94 Wash. 691, 163 Pac. 15; State ex rel. South Fork Log & Driving Co. v. Superior Court, 102 Wash. 460, 173 Pac. 192.

Irrigation ditches—Rights of tenants in common: State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 Pac. 805.

§ 31. Franchises: State ex rel. Peabody v. Superior Court, 77 Wash. 593, 138 Pac. 277.

§ 32. Crossings and Connections: Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; State ex rel. Spokane Falls & N. R. Co. v. Superior Court, 40 Wash. 389, 82 Pac. 417; State ex rel. Portland & Seattle R. Co. v. Superior Court, 45 Wash. 270, 88 Pac. 201; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663; State ex rel. North Coast R. v. Northern Pac. R. Co., 49 Wash. 78, 94 Pac. 907.

§ 33. Limited Estates or Interests: State ex rel. Kettle Falls Power etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 650; State ex rel. Burrows v. Superior Court, 48 Wash. 286, 93 Pac. 426; State ex rel. Wilson v. Grays Harbor & Puget Sound R. Co., 60 Wash. 32, 110 Pac. 676; Dahlgren v. Chicago, Milwaukee & Puget Sound R. Co., 85 Wash. 395, 148 Pac. 567.

§ 34. Easements or Other Rights in Real Property: State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; Northern Pac. R. Co. v. Slade Lumber Co., 61 Wash. 195, 112 Pac. 240, 34 L. R. A. (N. S.) 423.

Exercise of Delegated Power: See Remington's Digest, Em. Dom., §§ 37, 38. Effect of previous trespass: Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Sylvester v. Superior Court, 60 Wash. 583, 111 Pac. 787; State ex rel. Postal Telegraph-Cable Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855.

§ 35. Purpose of Appropriation: Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Harris v. Olympia L. & P. Co., 46 Wash. 511, 90 Pac. 656.

— Discretion in Exercise of Power: See Remington's Digest, Em. Dom., § 40; State ex rel. Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968; State ex rel. Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893; State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444; State ex rel. Grays Harbor Logging Co. v. Superior Court, 82 Wash. 503, 144 Pac. 722; State ex rel. Clear Lake Logging R. Co. v. Superior Court, 83 Wash. 445, 145 Pac. 421, 148 Pac. 7.

See, also, State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 Pac. 234.

— Extent of Appropriation: See Remington's Digest, Em. Dom., § 41; Oregon R. & Nav. Co. v. Owsley, 3 W. T. 38, 13 Pac. 186; Nicomen Boom Co. v. North Shore Boom etc. Co., 40 Wash. 315, 82 Pac. 412; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663; Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 Pac. 515; Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. 1191; State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

Powers of city—Property in other state—Statutes—Validity: Langdon v. Walla Walla, 112 Wash. 446, 193 Pac. 1.

Acts Constituting Appropriation of Property: See Remington's Digest, Em. Dom., § 43; Oregon R. & Nav. R. Co. v. Day, 3 W. T. 252, 14 Pac. 588; Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; Lewis v. Seattle, 5 Wash. 741, 32 Pac. 794; Brown v. Pierce County, 28 Wash. 345, 68 Pac. 872; Compton v. Seattle, 38 Wash. 514, 80 Pac. 757; Ettor v. Tacoma, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

— Conclusiveness and Effect of Legislative Action: See Remington's Digest, Em. Dom., § 47; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 686, 99 Am. St. Rep. 964, 63 L. R. A. 820; Tacoma v. Titlow, 53 Wash. 217, 101 Pac. 827; Seattle v. Byers, 54 Wash. 518, 103 Pac. 791; Mercer Street, In re, 55 Wash. 116, 104 Pac. 133; Bowes v. Aberdeen, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709; Casassa v. Seattle, 66 Wash. 146, 119 Pac. 13; Tacoma v. Brown, 69 Wash. 538, 125 Pac. 940; Yesler Way, Seattle, In re, 94 Wash. 427, 162 Pac. 536.

PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION—Applicable Statutory Provisions and Remedies: See Remington's Digest, Em. Dom., § 101; Smith's Petition, In re, 9 Wash. 85, 37 Pac. 311, 494; Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1929; Redmond v. Perrigo, 84 Wash. 407, 146 Pac. 838; State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

State roads—Condemnation for right of way—Statutes—Construction: State v. Superior Court, 111 Wash. 542, 191 Pac. 413.

Right to Institute Proceedings: See Remington's Digest, Em. Dom., § 102; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; State ex rel. Kent Lum. Co. v. Superior Court, 35 Wash. 303, 77 Pac. 382; State ex rel. Cascade Public Service Corp. v. Superior Court, 53 Wash.

321, 101 Pac. 1094; State ex rel. Kettle Falls Power etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 650; Lewis County v. McGeorge, 47 Wash. 414, 92 Pac. 268; Chehalis v. Centralia, 77 Wash. 673, 138 Pac. 293.

— **Limitations:** See Remington's Digest, Em. Dom., § 103; Lewis County v. McCutcheon, 53 Wash. 367, 101 Pac. 1083.

Conditions Precedent in General: See Remington's Digest, Em. Dom., § 104, and cases cited.

See, also, State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 Pac. 234; State v. Superior Court, 111 Wash. 542, 191 Pac. 413; State ex rel. Urquhart v. Superior Court, 112 Wash. 34, 191 Pac. 416.

— **Inability to Agree With Owner:** See Remington's Digest, Em. Dom., § 105; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; State ex rel. Skamania Boom Co. v. Superior Court, 47 Wash. 166, 91 Pac. 637; State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 269; Spokane v. Merriam, 80 Wash. 222, 141 Pac. 358.

Defenses and Objections: See Remington's Digest, Em. Dom., § 106; Bellingham Bay etc. R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423, 125 Am. St. Rep. 927, 17 L. R. A. (N. S.) 1005; State ex rel. Forney v. Superior Court, 55 Wash. 215, 104 Pac. 200; State ex rel. McIntosh v. Superior Court, 56 Wash. 214, 105 Pac. 637; State ex rel. United Tanners' Timber Co. v. Superior Court, 60 Wash. 193, 110 Pac. 1017; Chehalis v. Centralia, 77 Wash. 673, 138 Pac. 293; Yesler Way, Seattle, In re, 94 Wash. 427, 162 Pac. 536.

Parties: See Remington's Digest, Em. Dom., §§ 109—111. Petitioner or complainant: State ex rel. Grays Harbor Boom Co. v. Superior Court, 57 Wash. 71, 106 Pac. 481; Spokane v. Thompson, 69 Wash. 650, 126 Pac. 47. Defendants: North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485; Fulton v. Methow Trading Co., 45 Wash. 136, 88 Pac. 117; Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68; North Coast R. Co. v. Hess, 56 Wash. 335, 105 Pac. 853; Tacoma v. Bonnell, 58 Wash. 593, 109 Pac. 60; State ex rel. Peabody v. Superior Court, 77 Wash. 593, 138 Pac. 277; State ex rel. Long v. Superior Court, 80 Wash. 417, 141 Pac. 906; State v. Superior Court, 91 Wash. 454, 157 Pac. 1097; Seattle v. Seattle, Renton & Southern R. Co., 83 Wash. 94, 145 Pac. 54, 1167.

Vendee in executory contract—Title—Statutes: Schaefer v. Gregory Co., 112 Wash. 408, 192 Pac. 968.

Intervention or Substitution: North Coast R. Co. v. Gentry, 58 Wash. 82, 107 Pac. 1060; State ex rel. Grant Realty Co. v. Superior Court, 76 Wash. 376, 136 Pac. 144.

Pleading—Petition or Complaint: See Remington's Digest, Em. Dom., § 119; Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029; Chelan County v. Navarre, 38 Wash. 684, 80 Pac. 845; State ex rel. Oregon R. & Nav. Co. v. Superior Court, 45 Wash. 321, 88 Pac. 334; State ex rel. Liberty Lake Irr. Co. v. Superior Court, 47 Wash. 310, 91 Pac. 968; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423, 125 Am. St. Rep. 927, 17 L. R. A. (N. S.) 1005; Kitsap County v. Melker, 50 Wash. 29, 96 Pac. 695; Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 Pac. 515; State ex rel. McIntosh v. Superior Court, 56 Wash. 673, 138 Pac. 293; Hoquiam v. Wetherby, 57 Wash. 295, 106 Pac. 903; Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co., 76 Wash. 181, 135 Pac. 1042; Chehalis v. Centralia, 77 Wash. 673, 138 Pac. 293; Hoquiam v. Lenhart, 86 Wash. 625, 150 Pac. 1196; State ex rel. Patterson v. Superior Court, 102 Wash. 332, 173 Pac. 186.

See, also, State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 Pac. 234.

— **Answer:** See Remington's Digest, Em. Dom., § 120; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; Pike Street, In re, 42 Wash. 551, 85 Pac. 45; Seattle v. Park, 42 Wash. 151, 84 Pac. 644; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903; Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445, 108 Pac. 1091.

See, also, State ex rel. McPherson Bros. Co. v. Superior Court, 108 Wash. 58, 182 Pac. 962.

— **Amendments:** See Remington's Digest, Em. Dom., § 121; Spokane Valley Land & Water Co. v. Jones & Co., 53 Wash. 37, 101 Pac. 515.

— **Issues, Proof and Variance:** See Remington's Digest, Em. Dom., § 122; Kaufman v. Tacoma, Olympia etc. R. Co., 11 Wash. 632, 40 Pac. 137.

REMEDIES OF OWNERS OF PROPERTY—Exclusiveness of Statutory Provisions and Remedies: See Remington's Digest, Em. Dom., § 160; Bellingham Bay R. & Nav. Co. v. Loose, 2 Wash. 500,

27 Pac. 174; *Downs v. Seattle & M. R. Co.*, 5 Wash. 778, 32 Pac. 745, 33 Pac. 973.

Recovery of Possession of Property: See Remington's Digest, Em. Dom., § 161; *Owen v. St. Paul & M. R. Co.*, 12 Wash. 313, 41 Pac. 44; *Slaught v. Northern Pac. R. Co.*, 39 Wash. 576, 81 Pac. 1062; *Engstrom v. Edendale Land Co.*, 77 Wash. 658, 138 Pac. 302.

Compelling Proceedings to Assess Compensation: See Remington's Digest, Em. Dom., § 162; *State ex rel. Seattle Elec. Co. v. Superior Court*, 28 Wash. 317, 68 Pac. 957, 92 Am. St. Rep. 831.

Recovery of Damages: See Remington's Digest, Em. Dom., § 164; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 194; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *Johanson v. Seattle*, 80 Wash. 527, 141 Pac. 1032; *Great Northern R. Co. v. State*, 102 Wash. 348, 173 Pac. 40.

Injunction: See Remington's Digest, Em. Dom., § 165; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607; *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Lund v. Idaho & Washington Northern Railroad*, 50 Wash. 574, 97 Pac. 665, 126 Am. St. Rep. 916; *Ferry-Leary Land Co. v. Holt & Jeffrey*, 53 Wash. 584, 102 Pac. 445; *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155; *Irwin v. J. K. Lumber Co.*, 102 Wash. 99, 172 Pac. 911.

Defenses—In General: See Remington's Digest, Em. Dom., § 167; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652; *Scanor v. County Commrs.*, 13 Wash. 48, 42 Pac. 552; *Adams County v. Dobschlag*, 19 Wash. 356, 53 Pac. 339; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seavey v. Seattle*, 17 Wash. 361, 49 Pac. 517; *State ex rel. Morrell v. Superior Court*, 33 Wash. 542, 74 Pac. 686; *Keil v. Grays Harbor & Puget Sound R. Co.*, 71 Wash. 163, 127 Pac. 1113; *White v. Stout*, 72 Wash. 62, 129 Pac. 917.

Consent or Acquiescence of Owner: See Remington's Digest, Em. Dom., § 168; *Kakeldy v. Columbia etc. R. Co.*, 37 Wash. 675, 80 Pac. 205; *Slaught v. North-*

ern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062.

Payment of Compensation or Other Satisfaction: See Remington's Digest, Em. Dom., § 169; *White v. Stout*, 72 Wash. 62, 129 Pac. 917; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109; *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111.

Former Adjudication: See Remington's Digest, Em. Dom., § 170; *Spokane v. Kolby*, 16 Wash. 610, 48 Pac. 248; *Hinckley v. Seattle*, 74 Wash. 101, 132 Pac. 855, Ann. Cas. 1915A, 580, 46 L. R. A. (N. S.) 727; *Carpenter-McNeil Investment Co. v. Spokane*, 73 Wash. 232, 131 Pac. 823; *Neitzel v. Spokane International R. Co.*, 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522.

Jurisdiction: See Remington's Digest, Em. Dom., § 171; *Parker v. Superior Court*, 25 Wash. 544, 66 Pac. 154.

Parties: See Remington's Digest, Em. Dom., § 172; *Park v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Kaufman v. Tacoma, Olympia etc. R. Co.*, 11 Wash. 632, 40 Pac. 137; *Hatch v. Tacoma, Olympia etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063.

Pleading: See Remington's Digest, Em. Dom., § 173; *Hatch v. Tacoma etc. R. Co.*, 6 Wash. 1, 32 Pac. 1063.

Delegation of power of eminent domain. 1 Ann. Cas. 537.

Right of municipal corporation to exercise power without legislative authority. Ann. Cas. 1912C, 199.

Right of de facto corporation to exercise power of eminent domain. 9 Ann. Cas. 594; Ann. Cas. 1913C, 271; Ann. Cas. 1918C, 1063; 2 L. R. A. (N. S.) 144; 50 L. R. A. (N. S.) 236.

Right of foreign corporation to exercise power of eminent domain. Ann. Cas. 1915C, 929; 24 L. R. A. 327.

Power of railroad to condemn right of way for spur or siding to private establishment. 7 Ann. Cas. 835; 13 Ann. Cas. 1012; Ann. Cas. 1912D, 234; 20 L. R. A. 434; 22 L. R. A. (N. S.) 181; 35 L. R. A. (N. S.) 636.

Water apart from land as subject to law of eminent domain. 13 Ann. Cas. 72; Ann. Cas. 1914C, 1037.

State or public lands as subject to condemnation. 15 Ann. Cas. 488.

§ 922. Notice—Contents and Service.

A notice, stating briefly the objects of the petition, and containing a description of the land, real estate, premises or property sought to be appropriated, and stating the time and place when and where the same will be presented to the court, or the judge thereof, shall be served on each and every person named therein as owner, encumbrancer, tenant, or other-

wise interested therein, at least ten days previous to the time designated in such notice for the presentation of such petition. Such service shall be made by delivering a copy of such notice to each of the persons or parties so named therein, if a resident of the state; or in case of the absence of such person or party from his or her usual place of abode, by leaving a copy of such notice at his or her usual place of abode; or in case of a foreign corporation, at its principal place of business in this state, with some person of more than sixteen years of age. In case of domestic corporations, such service shall be made upon the president, secretary, or other director or trustee of such corporation. In case of minors or [on] their guardians, or in case no guardian shall have been appointed, then on the person who has the care and custody of such minor. In case of idiots, lunatics, or distracted persons, on their guardian; or in case no guardian shall have been appointed, then on the person in whose care or charge they are found. In case the land, real estate, premises, or other property sought to be appropriated is [state, school,] or county land, the notice shall be served on the auditor of the county in which the land, real estate, premises, or other property sought to be appropriated is situated. In all cases where the owner or person claiming an interest in such real or other property is a nonresident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a nonresident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks; and in case no newspaper is published in said county, then such publication may be had in a newspaper published in the county nearest to the county in which lies the land sought to be appropriated. And such publication shall be deemed service upon each of such nonresident person or persons whose residence is unknown. Such notice shall be signed by the president, manager, secretary, or attorney of the corporation; and in case the proceedings provided for in this act are instituted by the owner or any other person or party interested in the land, real estate, or other property sought to be appropriated, then such notice shall be signed by such owner, person, or party interested, or his, her or its attorney. Such notice may be served by any competent person over twenty-one years of age. Due proof of the service of such notice, by affidavit of the person serving the same or by the printer's affidavit of publication, shall be filed with the clerk of such superior court before or at the time of the presentation of such petition. Want of service of such notice shall render the subsequent proceedings void as to the person not served; but all persons or parties having been served with notice as herein provided, either by publication or otherwise, shall be bound by the subsequent proceedings. In all other cases not otherwise provided for, service of notices, order, and other papers in the proceedings authorized by this act may be made as the superior court, or the judge thereof, may direct. [Cf. L. '88, p. 58, § 2; L. '90, p. 295, § 2; 2 H. C., § 649.]

Superseded as to service in case of state lands, by the next section.

Notice in state condemnations, see *supra*, § 892.

Cited in 5 Wash. 780, 781; 7 Wash. 152; 18 Wash. 381; 31 Wash. 463; 32 Wash. 593; 42 Wash. 174; 43 Wash. 93; 45 Wash. 321; 48 Wash. 518; 50 Wash. 30; 56 Wash. 337; 78 Wash. 486.

Necessity of Process or Notice: See Remington's Digest, Em. Dom., §§ 112, 113; Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89; Chehalis County v. Ellingson, 21 Wash. 638, 59 Pac. 485; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; State ex rel. Kettle Falls Power etc. Co. v. Superior Court, 46 Wash. 500, 90 Pac. 650; King County v. Melker, 50 Wash. 29, 96 Pac. 695.

— **Form, Requisites and Sufficiency:** See Remington's Digest, Em. Dom., § 114; Moynahan v. Superior Court, 42 Wash. 172, 84 Pac. 655; Kitsap County v. Melker, 50 Wash. 29, 96 Pac. 695.

— **Service:** See Remington's Digest, Em. Dom., § 115; Smith's Petition, In re, 9 Wash. 85, 37 Pac. 311, 494; Hanson v. Hammer, 15 Wash. 315, 46 Pac. 332; Moynahan v. Superior Court, 42 Wash.

172, 84 Pac. 655; State ex rel. Thomas v. Superior Court, 42 Wash. 521, 85 Pac. 256; Gasaway v. Seattle, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68.

See, also, State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 Pac. 234.

— **Return and Proof of Service:** See Remington's Digest, Em. Dom., § 116; State ex rel. Thomas v. Superior Court, 42 Wash. 521, 85 Pac. 256; Spokane Interurban R. Co. v. Connelly, 48 Wash. 515, 93 Pac. 1082.

See, also, State ex rel. Cation v. Superior Court, 110 Wash. 506, 188 Pac. 546.

Validity of statute which fails to provide for notice of proceedings to condemn (as distinguished from proceedings to fix compensation). **Ann. Cas.** 1913A, 1256.

Necessity of notice to land owner with respect to assessment of damages in condemnation proceedings. **4 Ann. Cas.** 903.

§ 923. Service Where State is Party Defendant.

In all condemnation proceedings brought for the purpose of appropriating any land owned by the state or in which it has an interest, service of process shall be made upon the commissioner of public lands. [L. '07, p. 507, § 1.]

§ 924. Adjournment of Proceedings.

The court or judge may, upon application of the petitioner or of any owner or party interested, for reasonable cause, adjourn the proceedings from time to time, and may order new or further notice to be given to any party whose interest may be affected. [Cf. L. '88, p. 60, § 3; L. '90, p. 297, § 3; 2 H. C., § 650.]

§ 925. Court to Adjudicate Necessity for Appropriation—Calling Jury.

At the time and place appointed for hearing said petition, or to which the same may have been adjourned, if the court or judge thereof shall have satisfactory proof that all parties interested in the land, real estate, premises or other property described in said petition, have been duly served with said notice as above prescribed, and shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon . . . a jury. [Cf. L. '88, p. 60, § 4; L. '90, p. 297, § 4; 2 H. C., § 651; L. '97, p. 63, § 1.]

Provisions in this section for the summoning of a jury were repealed by the general laws on the subject. see Oregon R. & Nav. Co. v. McCormick, 46 Wash. 45, 89 Pac. 186.

Cited in 7 Wash. 167; 20 Wash. 456; 25 Wash. 552; 32 Wash. 594; 38 Wash. 187; 46 Wash. 46, 47, 278; 64 Wash. 193, 198, 199, 601; 71 Wash. 88, 90, 91; 81 Wash. 209; 82 Wash. 470; 84 Wash. 25; 94 Wash. 694; 102 Wash. 334, 462; 111 Wash. 546; 112 Wash. 38.

WHAT CONSTITUTES PUBLIC USE: See Remington's Digest, Em. Dom., §§ 11—27.

Public Use—In General: Peterson v. Smith, 6 Wash. 163, 32 Pac. 1050; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681; Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670; State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; State ex rel. Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893; Neitzel v. Spokane International R. Co., 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522; State ex rel. Golden Valley Irr. Co. v. Superior Court, 67 Wash. 556, 122 Pac. 19; State ex rel. School District No. 56 v. Superior Court, 69 Wash. 189, 124 Pac. 484; Tacoma v. Brown, 69 Wash. 538, 125 Pac. 940; Spokane v. Thompson, 69 Wash. 650, 126 Pac. 47; DeKay v. North Yakima & Valley R. Co., 71 Wash. 648, 129 Pac. 574; State ex rel. Luedinghaus v. Superior Court, 72 Wash. 480, 130 Pac. 752; Spokane v. Spokane & Inland Empire R. Co., 75 Wash. 651, 135 Pac. 636.

See, also, Langdon v. Walla Walla, 112 Wash. 446, 193 Pac. 1.

§ 12. — Extent of Use or Benefit: North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779.

§ 13. Private Use: Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820; State ex rel. Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 4 Ann. Cas. 987, 2 L. R. A. (N. S.) 842; State ex rel. Harlan v. Centralia etc. Co., 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; State ex rel. Harris v. Superior Court, 42 Wash. 660, 85 Pac. 666, 7 Ann. Cas. 748, 5 L. R. A. (N. S.) 748; State ex rel. Harris v. Olympia L. & P. Co., 46 Wash. 511, 90 Pac. 656; State ex rel. Burrows v. Superior Court, 48 Wash. 277, 93 Pac. 423, 125 Am. St. Rep. 927, 17 L. R. A. (N. S.) 1005; State ex rel. Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. 3; State ex rel. Dominick v. Superior Court, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; State ex rel. McIntosh v. Superior Court, 56 Wash. 214, 105 Pac. 637; Tacoma v. Nisqually Power Co., 57 Wash. 420, 107 Pac. 199; State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444; State ex rel. Lyle Light, Power & Water Co. v. Superior Court, 70 Wash. 486, 127 Pac. 104.

§ 14. Particular Purposes — Highways or Public Streets: State ex rel. Schroeder v. Superior Court, 29 Wash. 1, 69 Pac. 366; State ex rel. Thomas v. Superior Court, 42 Wash. 521, 85 Pac. 256; State ex rel. Jones v. Superior Court, 44 Wash. 476, 87 Pac. 521; State ex rel. Pagett v. Superior Court, 47 Wash. 11, 91 Pac. 241; Yesler Way, Seattle, In re, 94 Wash. 427, 162 Pac. 536.

See, also, State ex rel. Urquhart v. Superior Court, 112 Wash. 34, 191 Pac. 416.

§ 15. — Private Ways and Logging Roads: Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046; State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 Pac. 994; State ex rel. Clear Lake Logging R. Co. v. Superior Court, 83 Wash. 445, 145 Pac. 421, 148 Pac. 7; State ex rel. Preston Mill Co. v. Superior Court, 91 Wash. 249, 157 Pac. 689.

See, also, State ex rel. Carlson v. Superior Court, 107 Wash. 228, 181 Pac. 689; State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 Pac. 234.

§ 16. Railroads and Street Railways: State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; State ex rel. Trimble v. Superior Court, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897; State ex rel. Harlan v. Centralia etc. Co., 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198; State ex rel. Kent Lumber Co. v. Superior Court, 46 Wash. 516, 90 Pac. 663; State ex rel. Miller v. Griffin, 46 Wash. 489, 90 Pac. 661; State ex rel. Milwaukee Terminal R. Co. v. Superior Court, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175; State ex rel. McIntosh v. Superior Court, 56 Wash. 214, 105 Pac. 637; State ex rel. Sylvester v. Superior Court, 64 Wash. 594, 117 Pac. 487; State ex rel. Northern Pac. R. Co. v. Superior Court, 69 Wash. 397, 123 Pac. 529; State ex rel. Flint v. Superior Court, 69 Wash. 300, 124 Pac. 1127.

§ 17. Canals, Waterways and Docks: Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co., 76 Wash. 181, 135 Pac. 1042; State ex rel. Patterson v. Superior Court, 102 Wash. 331, 173 Pac. 186.

§ 18. Toll Logging Roads and Chutes: State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444.

§ 19. Logging Streams and Booms: North River Boom Co. v. Smith, 15 Wash. 138, 45 Pac. 750; Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681, 99 Am. St. Rep. 964, 63 L. R. A. 820; Matthews v. Belfast Mfg. Co., 35 Wash. 662, 77 Pac. 1046; State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac.

269; State ex rel. Pealer v. Superior Court, 58 Wash. 565, 109 Pac. 340.

§ 20. Water Supply in General: New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; Everett Water Company v. Powers, 37 Wash. 143, 79 Pac. 617; State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686; State ex rel. Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. 3.

§ 21. Irrigation: Prescott Irr. Co. v. Flathers, 20 Wash. 454, 55 Pac. 635; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36; State ex rel. Galbraith v. Superior Court, 59 Wash. 621, 110 Pac. 429, 140 Am. St. Rep. 893; State ex rel. Golden Valley Irrigation Co. v. Superior Court, 67 Wash. 556, 122 Pac. 19; State ex rel. Ham, Yearsley & Ryrie v. Superior Court, 70 Wash. 442, 126 Pac. 945.

See, also, State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 Pac. 805.

§ 22. Levees or Dikes: Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332.

§ 23. Drainage of Lands: Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Lewis County v. McCutcheon, 53 Wash. 367, 101 Pac. 1083.

§ 24. Development or Working of Mines: State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686.

§ 25. Production and Supply of Electric Power or Light: State ex rel. Kent Lumber Co. v. Superior Court, 35 Wash. 303, 77 Pac. 382; State ex rel. Tacoma Industrial Co. v. White River Power Co., 39 Wash. 648, 82 Pac. 150, 4 Ann. Cas. 987, 2 L. R. A. (N. S.) 842; State ex rel. Shropshire v. Superior Court, 51 Wash. 386, 99 Pac. 3; State ex rel. Harris v. Olympia L. & P. Co., 46 Wash. 511, 90 Pac. 656; State ex rel. Dominick v. Superior Court, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; State ex rel. Weyerhaeuser Timber Co. v. Superior Court, 71 Wash. 84, 127 Pac. 591.

§ 26. Warehouses or Elevators: State ex rel. True v. Superior Court, 56 Wash. 249, 105 Pac. 639.

§ 26-1. Garbage Plants: Jacobs v. Seattle, 93 Wash. 171, 160 Pac. 299, L. R. A. 1917B, 320.

§ 27. Parks and Reservations: Spokane v. Merriam, 80 Wash. 222, 141 Pac. 358.

Sufficiency of Evidence of Necessity: See Remington's Digest, Em. Dom., § 39, and cases cited.

See, also, State ex rel. Carlson v. Superior Court, 107 Wash. 228, 181 Pac. 689; State ex rel. Stephens v. Superior Court, 111 Wash. 205, 190 Pac. 234; State v. Superior Court, 111 Wash. 542, 191 Pac. 413; State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 Pac. 805; State

ex rel. Urquhart v. Superior Court, 112 Wash. 34, 191 Pac. 416.

Persons Entitled to Question Power: See Remington's Digest, Em. Dom., § 44; State ex rel. Sylvester v. Superior Court, 60 Wash. 279, 111 Pac. 19.

Determination of Questions as to Validity of Exercise of Power: See Remington's Digest, Em. Dom., § 45; State ex rel. Schroeder v. Superior Court, 29 Wash. 1, 69 Pac. 366; Sultan Water & P. Co. v. Weyerhaeuser Timber Co., 31 Wash. 558, 72 Pac. 114; State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

This section invests the court with power to determine whether the specific land sought is necessary in view of the general location or in the event of bad faith or abuse of power in selection: State ex rel. Postal Telegraph-Cable Co. v. Superior Court, 64 Wash. 189, 116 Pac. 855.

— Jurisdiction of Courts in General: See Remington's Digest, Em. Dom., § 46; Seattle v. Byers, 54 Wash. 518, 103 Pac. 791; Tacoma v. Gillespie, 82 Wash. 487, 144 Pac. 697.

Evidence as to Right to Take: See Remington's Digest, Em. Dom., § 123; Jackson Street, In re, 47 Wash. 243, 91 Pac. 970; State ex rel. Biddle v. Superior Court, 44 Wash. 108, 87 Pac. 40; State ex rel. Columbia Valley R. Co. v. Superior Court, 45 Wash. 316, 88 Pac. 332; State ex rel. Northern Pac. R. Co. v. Superior Court, 49 Wash. 390, 95 Pac. 490; State ex rel. Cascade R. Co. v. Superior Court, 51 Wash. 346, 98 Pac. 739; State ex rel. Merriam v. Superior Court, 55 Wash. 64, 104 Pac. 148; State ex rel. Clark v. Superior Court, 62 Wash. 612, 114 Pac. 444; Spokane v. Merriam, 80 Wash. 222, 141 Pac. 358; Northern Pac. R. Co. v. Union Lumber Co., 76 Wash. 563, 137 Pac. 306.

— Admissibility in General: See Remington's Digest, Em. Dom., § 125; Seattle v. Fidelity Trust Co., 22 Wash. 154, 60 Pac. 133; Seattle & Montana R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Pike Street, In re, 42 Wash. 551, 85 Pac. 45; Port Townsend Southern R. Co. v. Barbare, 46 Wash. 275, 89 Pac. 710; Spokane Valley Land & Water Co. v. Jones & Co., 68 Wash. 534, 123 Pac. 1014; Walla Walla v. Dement Brothers Co., 67 Wash. 186, 121 Pac. 63; Seattle v. Dexter Horton Trust & Savings Bank, 90 Wash. 661, 156 Pac. 844; Northlake Avenue, In re, 96 Wash. 344, 165 Pac. 113; King County v. Joyce, 96 Wash. 520, 165 Pac. 399.

What constitutes public use for which property may be taken under eminent domain. 2 Ann. Cas. 50; 3 Ann. Cas. 1113; 4 Ann. Cas. 1175; 14 Ann. Cas. 903; Ann. Cas. 1912D, 1002; Ann. Cas. 1918A, 203.

Right of defendant in condemnation proceedings to question public character of use. 2 *Ann. Cas.* 133.

Dam and reservoir for purpose of regulating flow of river as public use. *Ann. Cas.* 1915A, 1111.

Irrigation as a public use or benefit. 1 *Ann. Cas.* 304; 4 *Ann. Cas.* 1174; 33 *L. R. A. (N. S.)* 807.

Drainage of private lands as a public purpose. 20 *Ann. Cas.* 272; 49 *L. R. A.* 781; 1 *L. R. A. (N. S.)* 208; 22 *L. R. A. (N. S.)* 163.

Taking water for government and domestic consumption as a public purpose. 22 *L. R. A. (N. S.)* 156.

Parks and squares as subject to condemnation for railroad purposes. 21 *Ann. Cas.* 691.

Right of municipality to condemn railroad property for municipal purposes. *Ann. Cas.* 1913E, 163.

Condemnation of property for private use. 1 *Ann. Cas.* 188.

Condemnation of land for public library. *Ann. Cas.* 1918E, 122.

Consequential damages to property from proper exercise of governmental powers as a taking for public use. 4 *Ann. Cas.* 1185.

Taking or damaging land to create water-power for mills and manufacturing. 4 *Ann. Cas.* 992; 10 *Ann. Cas.* 1060.

Right to condemn property in excess of needs for public purpose. 14 *A. L. R.* 1350.

§ 926. Trial, How Conducted.

A judge of the superior court shall preside at the trial, which shall be held at such time as the court, or the judge thereof, may direct, at the courthouse in the county where the land, real estate, premises, or other property sought to be appropriated is situated, and the jurors at such trial shall make in each case a separate assessment of damages which shall result to any person, corporation, or company, or to the state, or to any county, by reason of the appropriation and use of such land, real estate, premises, or other property by such corporation, as aforesaid, for any and all corporate purposes, and shall ascertain, determine, and award the amount of damages to be paid to said owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property, for the purpose of such enterprise, irrespective of any benefit from any improvement proposed by such corporation. Upon the trial, witnesses may be examined in behalf of either party to the proceedings, as in civil actions; and a witness served with a subpoena in such proceedings shall be punished for failure to appear at such trial, or for perjury, as upon a trial of a civil action. Upon the verdict of the jury, judgment shall be entered for the amount of the damages awarded to such owner or owners respectively, and to all tenants, encumbrancers, and others interested, for the taking or injuriously affecting such land, real estate, premises, or other property. In case a jury is waived as in civil cases in courts of record in the manner prescribed by law, the compensation to be paid for the property sought to be appropriated shall be ascertained and determined by the court, or the judge thereof, and the proceedings shall be the same as in trials of an issue of fact by the court. [L. '90, p. 297, § 5; 2 H. C., § 652.]

Cited in 18 Wash. 382; 38 Wash. 188; 46 Wash. 278; 69 Wash. 659; 78 Wash. 486; 82 Wash. 470.

COMPENSATION — Constitutional Provisions — Construction: See Remington's Digest, Em. Dom., § 48; Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214; Lewis v. Seattle, 5 Wash. 741, 32 Pac.

794; Lincoln County v. Brook, 37 Wash. 14, 79 Pac. 477; Smith v. St. Paul etc. R. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L. R. A. 1018; Milwaukee Terminal R. Co. v. Seattle, 86 Wash. 102, 149 Pac. 644.

Since Const., Art. VII, § 9, expressly limits the levy of special assessments

for local improvements to property benefited, there can be no greater charge made than a sum equal to the benefits received; for otherwise there would be a taking of property without compensation in violation of Art. I, § 16 (held obiter, on rehearing in banc); *Behrens v. Commercial Waterway District No. 1*, 107 Wash. 155, 181 Pac. 892, 185 Pac. 628.

Construction and Validity of Various Statutory Provisions: See Remington's Digest, Em. Dom., § 49; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Seanor v. County Commrs.*, 13 Wash. 48, 42 Pac. 552; *Askham v. King County*, 9 Wash. 1, 36 Pac. 1097; *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652; *North Coast R. v. Northern Pacific R. Co.*, 48 Wash. 529, 94 Pac. 112; *State ex rel. Peabody v. Superior Court*, 77 Wash. 593, 138 Pac. 277.

Sufficiency of Statutory Provisions for Compensation: See Remington's Digest, Em. Dom., § 50; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Adams County v. Dobschlay*, 19 Wash. 356, 53 Pac. 339.

Imposition of Conditions: See Remington's Digest, Em. Dom., § 51; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Snohomish County v. Haywood*, 11 Wash. 429, 39 Pac. 652; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385.

Necessity of Payment Before Taking: See Remington's Digest, Em. Dom., § 52; *Askham v. King County*, 9 Wash. 1, 36 Pac. 1097; *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520, 68 Pac. 90; *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607; *Peterson v. Smith*, 6 Wash. 163, 32 Pac. 1050; *Snohomish County v. Haywood*, 11 Wash. 429, 39 Pac. 652; *Seanor v. County Commissioners*, 13 Wash. 48, 42 Pac. 552; *Smith's Petition, In re*, 9 Wash. 85, 37 Pac. 411, 494; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *State ex rel. Smith v. Superior Court*, 26 Wash. 278, 166 Pac. 385; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Puyallup v. Lacey*, 43 Wash. 110, 86 Pac. 215; *State ex rel. Clear Lake Logging R. Co. v. Superior Court*, 83 Wash. 445, 145 Pac. 421, 148 Pac. 7.

See, also, *Duncan Township v. Stayr*, 106 Wash. 514, 180 Pac. 476.

Waiver or Estoppel to Claim Compensation: See Remington's Digest, Em. Dom., § 53; *Oregon R. & Nav. Co. v. Owsley*, 3 W. T. 38, 13 Pac. 186; *Oregon R. & Nav. Co. v. Day*, 3 W. T. 252, 14 Pac. 588; *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Kaufman v. Tacoma, Oly. & G. H. R.*

Co., 11 Wash. 632, 40 Pac. 137; *Pearl Oyster Co. v. Seattle & Montana R. Co.*, 53 Wash. 101, 101 Pac. 503; *State ex rel. Twiss v. Superior Court*, 93 Wash. 429, 161 Pac. 68.

TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION: See Remington's Digest, Em. Dom., §§ 54—60.

Real Property in General: *Seattle & M. R. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503; *State ex rel. Trimble v. Superior Court*, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897.

§ 55. Rights in Public Lands: *Yakima County v. Tullar*, 3 W. T. 393, 17 Pac. 885; *Enoch v. Spokane Falls etc. R. Co.*, 6 Wash. 393, 33 Pac. 966, 36 Am. St. Rep. 182; *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809; *Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co.*, 76 Wash. 181, 135 Pac. 1042.

§ 56. — Water Rights: *Inland Empire R. Co. v. McKinley*, 48 Wash. 675, 94 Pac. 644; *Northwestern Elec. Co. v. Lyle Light, Power & Water Co.*, 71 Wash. 384, 128 Pac. 674.

§ 57. Tide Lands: *Board of Harbor Line Commrs. v. State ex rel. Yesler*, 2 Wash. 530, 27 Pac. 550; *Bellingham Bay etc. R. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144; *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Columbia & Cowlitz River Boom & Rafting Co. v. Hutchinson*, 56 Wash. 323, 105 Pac. 636.

§ 58. Easements and Other Rights in Real Property: *State ex rel. Smith v. Superior Court*, 30 Wash. 219, 70 Pac. 484; *Granger Tel. & Tel. Co. v. Sloane Brothers*, 96 Wash. 333, 165 Pac. 102.

§ 59. — Direct or Remote, Continuous or Prospective Consequences or Losses: *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

Elements of Compensation for Injuries to Property not Taken: See Remington's Digest, Em. Dom., §§ 60—70; **Alteration of Flow or Discharge of Water:** *Yakima County v. Tullar*, 3 W. T. 393, 17 Pac. 885; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 825; *Seattle & Mil. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *State ex rel. Harris v. Olympia L. & P. Co.*, 46 Wash. 511, 90 Pac. 656.

§ 61. Prevention of Access to Navigable Waters: *Sultan W. & P. Co. v. Weyerhaeuser Tim. Co.*, 31 Wash. 558, 72 Pac. 114; *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267; *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 511.

§ 62. Occupation or Use of Street or Other Highway: Hatch v. Tacoma, Olympia etc. R. Co., 6 Wash. 1, 32 Pac. 1063; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362; Patton v. Olympia Door etc. Co., 15 Wash. 210, 46 Pac. 237; Portland & Seattle R. Co. v. Clarke County, 48 Wash. 509, 93 Pac. 1083; Lund v. Idaho & Washington Northern R. Co., 50 Wash. 574, 97 Pac. 665, 126 Am. St. Rep. 916; Brazell v. Seattle, 55 Wash. 180, 104 Pac. 155; Smith v. Centralia, 55 Wash. 573, 104 Pac. 797; Keil v. Grays Harbor & Puget Sound R. Co., 71 Wash. 163, 127 Pac. 1113; Murphy v. Chicago, Mil. & St. Paul R. Co., 66 Wash. 663, 120 Pac. 525.

§ 63. Rights of Owners not Abutting on Street: Fifth Avenue etc., In re, 62 Wash. 218, 113 Pac. 762; Clute v. North Yakima & Valley R. Co., 62 Wash. 531, 114 Pac. 513.

§ 64. Alteration of Grade of Street or Other Highway: Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; Parke v. Seattle, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 34 Am. St. Rep. 839, 20 L. R. A. 68; Hatch v. Tacoma, Oly. & G. H. R. Co., 6 Wash. 1, 32 Pac. 1063; Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 69 Pac. 362; Portland & Seattle R. Co. v. Ladd, 47 Wash. 88, 91 Pac. 573; Seattle v. Seattle, Renton & Southern R. Co., 83 Wash. 94, 145 Pac. 54, 1167; Spokane v. Thompson, 69 Wash. 650, 126 Pac. 47; Donofrio v. Seattle, 72 Wash. 178, 129 Pac. 1094; Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; Provident Trust Co. v. Spokane, 75 Wash. 217, 134 Pac. 927.

See, also, Pratt v. Seattle, 111 Wash. 104, 189 Pac. 565.

§ 65. Interference With Trade or Business: Chicago, Milwaukee & Puget Sound R. Co. v. Thayer, 65 Wash. 402, 118 Pac. 318.

§ 66. Necessity for Fences or Crossings: Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738; Seattle & Mont. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; State ex rel. Union Lumber Co. v. Superior Court, 70 Wash. 540, 127 Pac. 109.

§ 67. Effect of Smoke, Foul Odors, Noise or Vibration: Smith v. St. Paul etc. R. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L. R. A. 1018; De Kay v. North Yakima & Valley R. Co., 71 Wash. 648, 129 Pac. 574.

§ 68. Obstruction of Light or Air: Brown v. Seattle, 5 Wash. 35, 31 Pac. 313, 18 L. R. A. 161; State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385; Seattle Transfer Co. v. Seattle, 27 Wash. 520, 68 Pac. 269; State ex rel.

Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484.

§ 69. Obstruction of Access: Patton v. Olympia Door etc. Co., 15 Wash. 210, 46 Pac. 237; Smith v. St. Paul etc. R. Co., 39 Wash. 355, 81 Pac. 840, 109 Am. St. Rep. 889, 70 L. R. A. 1018; Chicago, Mil. & St. Paul R. Co. v. Alexander, 47 Wash. 131, 91 Pac. 626; Spokane v. Thompson, 69 Wash. 650, 126 Pac. 47; State ex rel. Puget Sound & Willapa Harbor R. Co. v. Foster, 84 Wash. 75, 146 Pac. 154.

§ 70. Consent of Municipality: Hatch v. Tacoma, Olympia etc. R. Co., 6 Wash. 1, 32 Pac. 1063; Kaufman v. Tacoma, Olympia etc. R. Co., 11 Wash. 632, 40 Pac. 137.

Appropriation to New or Additional Use: See Remington's Digest, Em. Dom., § 71; Spokane v. Colby, 16 Wash. 610, 48 Pac. 248; Seattle Land etc. Co. v. Seattle, 37 Wash. 274, 79 Pac. 780; Brandt v. Spokane & Inland Empire R. Co., 78 Wash. 214, 138 Pac. 871, 52 L. R. A. (N. S.) 760.

Corporations and Persons Liable for Compensation: See Remington's Digest, Em. Dom., § 72; Hatch v. Tacoma, Olympia etc. R. Co., 6 Wash. 1, 32 Pac. 1063; Kaufman v. Tacoma, Olympia etc. R. Co., 11 Wash. 632, 40 Pac. 137; Patton v. Olympia Door etc. Co., 15 Wash. 210, 46 Pac. 237.

MEASURE AND AMOUNT.—The damages to abutting property from the construction of a railroad in the street, in a proceeding tried as a condemnation case, must be ascertained as of the time of the trial: Distler v. Grays Harbor & Puget Sound R. Co., 76 Wash. 391, 136 Pac. 364.

Taking Entire Tract or Piece of Property—Value of Land: See Remington's Digest, Em. Dom., § 75; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738; Kaufman v. Tacoma, Oly. & G. H. R. Co., 11 Wash. 632, 40 Pac. 137; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607; East Galer Street, In re, 47 Wash. 603, 92 Pac. 423; Grays Harbor & Puget Sound R. Co. v. Kauppinen, 53 Wash. 238, 101 Pac. 835.

— **Value Enhanced by Proposed Improvement:** See Remington's Digest, Em. Dom., § 76; Northern Pac. etc. R. Co. v. Coleman, 3 Wash. 228, 28 Pac. 514 (overruled); Enoch v. Spokane Falls etc. R. Co., 6 Wash. 393, 33 Pac. 96; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864.

See, also, Pierce County ex rel. Bellingham v. Duffy, 104 Wash. 426, 176 Pac. 670.

— **Improvements, Crops and Fixtures:** See Remington's Digest, Em. Dom., §§ 77,

78; *Seattle & M. R. Co. v. Scheike*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503; *Tacoma v. Bonnell*, 58 Wash. 593, 109 Pac. 60; *Seattle v. Atwood*, 59 Wash. 112, 109 Pac. 326; *Yakima County v. Olson*, 94 Wash. 579, 162 Pac. 987.

See, also, *Ham, Yearsley & Ryrie v. Northern Pac. R. Co.*, 107 Wash. 378, 181 Pac. 898.

— **Improvements Made by Appropriator:** See *Remington's Digest*, Em. Dom., § 79; *Bellingham Bay etc. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; *Lake Whatcom Logging Co. v. Callvert*, 33 Wash. 126, 73 Pac. 1128; *Seattle & M. R. Co. v. Corbett*, 22 Wash. 189, 60 Pac. 127; *King County v. Seattle Cedar Lumber Mfg. Co.*, 94 Wash. 84, 162 Pac. 27, L. R. A. 1917C, 1184.

— **Value for Special Use:** See *Remington's Digest*, Em. Dom., § 80; *Seattle & Mil. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *Kirkland v. Cochrane*, 87 Wash. 528, 151 Pac. 1082; *King County v. Crawford & Conover*, 92 Wash. 195, 158 Pac. 733.

See, also, *Ham, Yearsley & Ryrie v. Northern Pac. R. Co.*, 107 Wash. 378, 181 Pac. 898.

Taking Part of Tract or Property—Land Constituting Single Tract: See *Remington's Digest*, Em. Dom., § 81; *State ex rel. Biddle v. Superior Court*, 44 Wash. 108, 87 Pac. 40; *Seattle v. Atwood*, 59 Wash. 112, 109 Pac. 326; *Queen Anne Boulevard, In re*, 77 Wash. 91, 137 Pac. 435.

— **Injuries to Part not Taken:** See *Remington's Digest*, Em. Dom., § 82; *Enoch v. Spokane Falls etc. R. Co.*, 6 Wash. 393, 33 Pac. 966; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *Seattle & M. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 738; *Sultan Water & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Seattle, Port Angeles & Lake Crescent R. v. Land*, 81 Wash. 206, 142 Pac. 680; *Yakima County v. Olson*, 94 Wash. 579, 162 Pac. 987.

— **Land not Abutting on Part Taken:** See *Remington's Digest*, Em. Dom., § 83; *Sultan Water & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114.

Measure of Compensation: See *Remington's Digest*, Em. Dom., §§ 84, 85. In general: *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

Depreciation of Value: *Idaho & Western R. Co. v. Coey*, 73 Wash. 291, 131 Pac. 810.

Value for special use—Dam site for reservoir—Evidence—Instructions: *Ham, Yearsley & Ryrie v. Northern Pac. R. Co.*, 107 Wash. 378, 181 Pac. 898.

Deduction or Setoff of Benefits: See *Remington's Digest*, Em. Dom., §§ 86—88. In general: *Northern Pac. etc. R. Co. v. Coleman*, 3 Wash. 228, 28 Pac. 514; *Enoch v. Spokane Falls etc. R. Co.*, 6 Wash. 393, 33 Pac. 966; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *Kaufman v. Tacoma, Olympia etc. R. Co.*, 11 Wash. 632, 40 Pac. 137; *Queen Anne Boulevard, In re*, 77 Wash. 91, 137 Pac. 435; *Pierce County v. Thompson*, 82 Wash. 440, 144 Pac. 704; *Great North. R. Co. v. State*, 102 Wash. 348, 173 Pac. 40. **Opening or Improvement of Streets:** *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Jones v. Seattle*, 23 Wash. 753, 63 Pac. 553; *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *King County v. Crawford & Conover*, 92 Wash. 195, 158 Pac. 733. **Benefit to Property Not Part of That Taken:** *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Kitsap County v. Melker*, 50 Wash. 29, 96 Pac. 695; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903; *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811.

See, also, *State v. Kelley*, 108 Wash. 245, 182 Pac. 942.

Limited Estates or Interests in Property: See *Remington's Digest*, Em. Dom., § 89; *Seattle & M. R. Co. v. Schieke*, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503; *Olympia Light & Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940; *North Coast R. Co. v. Kraft Co.*, 63 Wash. 250, 115 Pac. 97.

Interest as Element of Compensation: See *Remington's Digest*, Em. Dom., § 90; *Bellingham Bay etc. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; *North Coast R. Co. v. Aumiller*, 61 Wash. 271, 112 Pac. 384.

Inadequate or Excessive Compensation: See *Remington's Digest*, Em. Dom., § 91; *Yakima County v. Tullar*, 3 W. T. 393, 17 Pac. 885; *Seattle & M. R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; *East Spring Street, In re*, 41 Wash. 366, 83 Pac. 242; *Portland & Seattle R. Co. v. Clarke County*, 48 Wash. 509, 93 Pac. 1083; *Kitsap County v. Melker*, 50 Wash. 29, 96 Pac. 695.

PERSONS ENTITLED AND PAYMENT: See *Remington's Digest*, Em. Dom., §§ 92—96.

In General: *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. 966; *State ex rel. Davis v. Superior Court*, 84 Wash. 252, 146 Pac. 609.

§ 93. **Vendor or Purchaser:** *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201; *Silverstone v. Harn*, 66 Wash. 440, 120 Pac. 109; *Twelfth Avenue South, In re*, 74

Wash. 132, 132 Pac. 868, Ann. Cas. 1915A, 730; Damon v. Ryan, 74 Wash. 138, 132 Pac. 871, Ann. Cas. 1915A, 734.

See, also, Schaefer v. Gregory Co., 112 Wash. 408, 192 Pac. 968.

§ 94. — Mortgagor or Mortgagee: Commercial Nat. Bank v. Johnson, 16 Wash. 536, 48 Pac. 267; Yakima Water etc. Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471; Seattle, In re, 26 Wash. 602, 67 Pac. 250; Gray v. Davison, 78 Wash. 482, 139 Pac. 219; State ex rel. Peel v. Clausen, 94 Wash. 166, 162 Pac. 1.

§ 95. — Landlord or Tenant: Seattle & M. R. Co. v. Scheike, 3 Wash. 625, 29 Pac. 217, 30 Pac. 503.

§ 96. Devisees, or Heirs: Legg v. Legg, 34 Wash. 132, 75 Pac. 130.

PAYMENTS: See Remington's Digest, Em. Dom., §§ 97—100. Apportionment: State ex rel. Long v. Superior Court, 80 Wash. 417, 141 Pac. 906. Duties as to payment—In general: State ex rel. Donofrio v. Humes, 34 Wash. 347, 75 Pac. 348; State ex rel. Murray v. Herdlick, 73 Wash. 301, 131 Pac. 1139. Conflicting claims: Commercial Nat. Bank of Seattle v. Johnson, 16 Wash. 536, 48 Pac. 267; State ex rel. Smith v. Superior Court, 71 Wash. 354, 128 Pac. 648; Carton v. Seattle, 74 Wash. 375, 133 Pac. 596. Requisites and sufficiency of payment: Smith's Petition, In re, 9 Wash. 85, 37 Pac. 311, 494.

Evidence as to Compensation—Burden of Proof: See Remington's Digest, Em. Dom., § 124; Seattle & Mil. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Weed v. Goodwin, 36 Wash. 31, 78 Pac. 36.

— Value of Property: See Remington's Digest, Em. Dom., § 126, and cases cited.

See, also, Ham, Yearsley & Ryrie v. Northern Pac. R. Co., 107 Wash. 378, 181 Pac. 898.

— Damages: See Remington's Digest, Em. Dom., § 127, and cases cited.

See, also, West Marginal Way, Seattle, In re, 109 Wash. 116, 186 Pac. 644.

Assessment by Jury—Application and Proceedings Thereon: See Remington's Digest, Em. Dom., § 129; Chelan County v. Navarre, 38 Wash. 611, 80 Pac. 845; Seattle v. Park, 42 Wash. 151, 84 Pac. 644; Oregon R. & Nav. Co. v. McCormick, 46 Wash. 45, 89 Pac. 186; Newell v. Loeb, 77 Wash. 182, 137 Pac. 811; Commissioners Commercial Waterway District No. 2 v. Seattle Factory Sites Co., 76 Wash. 181, 135 Pac. 1042.

— Qualifications of Jurors: See Remington's Digest, Em. Dom., § 130; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607.

— Summoning and Impaneling Jurors: See Remington's Digest, Em. Dom., § 131;

Oregon R. & Nav. Co. v. McCormick, 46 Wash. 45, 89 Pac. 186; Manhattan Bldg. Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; Newell v. Loeb, 77 Wash. 182, 137 Pac. 811.

— Conduct of Proceedings: See Remington's Digest, Em. Dom., § 132; Bellingham Bay etc. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144; Seattle & M. R. Co. v. Murphine, 4 Wash. 448, 30 Pac. 720; Seattle & M. R. Co. v. Gilchrist, 4 Wash. 509, 30 Pac. 738; Seattle & M. R. Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217; Kitsap County v. Melker, 50 Wash. 29, 96 Pac. 695.

— Consolidation of Actions and Separation: See Remington's Digest, Em. Dom., § 133; Manhattan Building Co. v. Seattle, 52 Wash. 226, 100 Pac. 330; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903; Western Avenue, In re, 57 Wash. 290, 106 Pac. 901; Seattle v. Seattle, Renton & Southern R. Co., 83 Wash. 94, 145 Pac. 54, 1167.

— View: See Remington's Digest, Em. Dom., § 134; Bellingham Bay etc. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864; Jackson Street, In re, 47 Wash. 243, 91 Pac. 970; Sedro-Woolley v. Willard, 71 Wash. 646, 129 Pac. 372.

— Questions for Jury: See Remington's Digest, Em. Dom., § 135; Swope v. Seattle, 36 Wash. 113, 78 Pac. 607; Washington Water Power Co. v. Abacus Assn., 77 Wash. 455, 137 Pac. 1199.

Instructions to Jury: See Remington's Digest, Em. Dom., § 136, and cases cited.

See, also, Ham, Yearsley & Ryrie v. Northern Pac. R. Co., 107 Wash. 378, 181 Pac. 898; State v. Kelley, 108 Wash. 245, 182 Pac. 942.

Verdict and Findings: See Remington's Digest, Em. Dom., § 137, and cases cited.

Time with reference to which value of property taken is to be estimated. 9 Ann. Cas. 115.

Right to compensation in case of condemnation of particular use of property. 8 A. L. R. 594.

Value of fixtures as element of damages sustained by appropriation of property. Ann. Cas. 1916C, 780.

Right of land owner to compensation for improvements placed on land after institution of condemnation proceedings. 17 Ann. Cas. 1033.

Right of condemnee to compensation for improvements placed on land by condemnor without authority. 6 Ann. Cas. 382; 13 Ann. Cas. 980; Ann. Cas. 1912A, 244.

Right of condemnee to recover value of improvements placed on land by

condemnor with authority or color thereof. **Ann. Cas. 1917C, 141.**

Contingent advantage to owner as element of compensation in condemnation proceedings. **Ann. Cas. 1914B, 512.**

Right between grantor and grantee as to compensation where land is conveyed pending condemnation proceedings. **Ann. Cas. 1915A, 732.**

Person entitled to compensation in case of judicial sale of land pending condemnation proceedings. **Ann. Cas. 1915A, 736.**

Right of mortgagee to award in condemnation proceedings. **4 Ann. Cas. 944.**

Right between lessor and lessee as to compensation for property taken. **4 Ann. Cas. 1011; 15 Ann. Cas. 714; 11 L. R. A. 839; 21 L. R. A. 217.**

Right to condemnation money as between heir or devisee and executor or administrator. **Ann. Cas. 1912C, 595.**

Right of vendee under contract for sale of land to compensation where land is condemned. **Ann. Cas. 1912A, 456.**

Right of purchaser of land on which railroad right of way has been constructed to recover compensation: **Ann. Cas. 1912A, 1056.**

Prepayment as a condition of acquisition of water supply. **58 L. R. A. 257.**

Waiver by land owner of right to compensation for property taken in condemnation proceedings. **8 Ann. Cas. 855.**

§ 927. Judgment and Decree of Appropriation.

At the time of rendering judgment for damages, whether upon default or trial, if the damages awarded be then paid, or upon their payment, if not paid at the time of rendering such judgment, the court, or judge thereof, shall also enter a judgment or decree of appropriation of the land, real estate, premises, right of way, or other property sought to be appropriated, thereby vesting the legal title to the same in the corporation seeking to appropriate such land, real estate, premises, right of way, or other property for corporate purposes. Whenever said judgment or decree of appropriation shall affect lands, real estate, or other premises, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other premises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect. If the title to said land, real estate, premises, or other property attempted to be acquired is found to be defective from any cause, the corporation may again institute proceedings to acquire the same, as in this chapter provided. [Cf. L. '90, p. 298, § 6; L. '91, p. 84, § 1; 2 H. C., § 653.]

Cited in 18 Wash. 382; 38 Wash. 188; 46 Wash. 279; 65 Wash. 105, 107, 108; 73 Wash. 191, 194; 82 Wash. 471.

Requisites and Entry of Judgment: See Remington's Digest, Em. Dom., § 140; Bellingham Bay etc. R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; Hansen v. Hammer, 15 Wash. 315, 46 Pac. 332; Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029; Kitsap County v. Melker, 50 Wash. 29, 96 Pac. 695; North Coast R. Co. v. Hess, 56 Wash. 335, 105 Pac. 853; Western Avenue, In re, 57 Wash. 290, 106 Pac. 901; Seattle v. Dexter Horton Trust & Savings Bank, 90 Wash. 661, 156 Pac. 844; Chicago, Milwaukee & Puget Sound R. Co. v. Slosser, 82 Wash. 467, 144 Pac. 706.

— **Conformity to Relief Demanded:** See Remington's Digest, Em. Dom., § 141;

Rem. Wash. Code, Vol. I—40

Northern Pac. etc. R. Co. v. Coleman, 3 Wash. 228, 28 Pac. 514; Seattle & Mil. R. Co. v. Johnson, 7 Wash. 97, 34 Pac. 567; Mercer Street, Seattle, In re, 55 Wash. 116, 104 Pac. 133; Seattle v. Seattle, Renton & Southern R. Co., 83 Wash. 94, 145 Pac. 54, 1167.

Collateral Attack: See Remington's Digest, Em. Dom., § 142; Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Grant Realty Co. v. Ham, Yearsley & Ryrie, 96 Wash. 616, 165 Pac. 495.

Conclusiveness and Effect of Award or Judgment in General: See Remington's Digest, Em. Dom., § 143; Seavey v. Seattle, 17 Wash. 361, 49 Pac. 517; Jones v. Seattle, 23 Wash. 753, 63 Pac. 553; Compton v. Seattle, 38 Wash. 514, 80 Pac. 757; Martenis v. Tacoma, 66 Wash. 92, 118 Pac. 882; Cassassa v. Seattle, 66

Wash. 146, 119 Pac. 13; Queen Anne Boulevard, In re, 77 Wash. 91, 137 Pac. 435; Fifth Avenue West, In re, 80 Wash. 464, 141 Pac. 1035; State ex rel. Long v. Superior Court, 80 Wash. 417, 141 Pac. 906; State ex rel. Grays Harbor Logging Co. v. Superior Court, 100 Wash. 485, 171 Pac. 238.

Right to Abandon Proceedings: See Remington's Digest, Em. Dom., § 146; Bellingham Bay B. C. R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; Port Angeles Pac. R. Co. v. Cooke, 38 Wash. 184, 80 Pac. 305; North Coast R. Co. v. Aumiller, 61 Wash. 271, 112 Pac. 384.

Interest on Award or Judgment: See Remington's Digest, Em. Dom., § 147; State ex rel. Donofrio v. Humes, 34 Wash. 347, 75 Pac. 348; Port Townsend Southern R. Co. v. Barbare, 46 Wash. 275, 89 Pac. 710.

Enforcement of Award or Judgment: See Remington's Digest, Em. Dom., § 149; Bellingham Bay & B. C. R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; Seavey v. Seattle, 17 Wash. 361, 49 Pac. 517; Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781.

TITLE OR RIGHTS ACQUIRED—Nature of Estate or Interest Acquired: See Remington's Digest, Em. Dom., § 175;

Yakima Water etc. Co. v. Hathaway, 18 Wash. 377, 51 Pac. 471; State ex rel. Morrell v. Superior Court, 33 Wash. 542, 74 Pac. 686; State ex rel. Wilson v. Superior Court, 47 Wash. 397, 92 Pac. 269; Washington Water Power Co. v. Abacus Association, 77 Wash. 455, 137 Pac. 1199.

Time of Passing of Title or Right: See Remington's Digest, Em. Dom., § 176; North Coast R. Co. v. Gentry, 73 Wash. 188, 131 Pac. 856.

Transfer of Rights: See Remington's Digest, Em. Dom., § 177; Kakeldy v. Columbia & P. S. R. Co., 37 Wash. 675, 80 Pac. 205; State ex rel. Struntz v. Spokane County, 85 Wash. 187, 147 Pac. 879; Port of Seattle v. Yesler Estate, 83 Wash. 166, 145 Pac. 209; State ex rel. Moore v. Superior Court, 100 Wash. 481, 171 Pac. 248; State ex rel. Grays Harbor Logging Co. v. Superior Court, 100 Wash. 485, 171 Pac. 238.

Abandonment or Nonuser: See Remington's Digest, Em. Dom., § 178; Bellingham Bay & B. C. R. Co. v. Strand, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; Neitzel v. Spokane International R. Co., 65 Wash. 100, 117 Pac. 864, 36 L. R. A. (N. S.) 522; Neitzel v. Spokane International R. Co., 80 Wash. 30, 141 Pac. 186.

§ 928. Decree Against State Lands—Filing With Commissioner—Effect.

When a decree is entered appropriating lands owned by the state, or in which the state has an interest, before any such decree shall be effective, the plaintiff shall cause to be filed in the office of the commissioner of public lands a certified copy of such decree, together with a plat of the lands appropriated and contiguous thereto, in form and substance as prescribed and required by the board of state land commissioners, showing in detail the lands appropriated, together with the amount of damages fixed and awarded in the decree. Upon receipt of such decree, plat and damages, the commissioner of public lands shall examine the same, and if he shall find that the final decree and proceedings comply with the original petition and notice and any amendment duly authorized, and that no additional interest of the state has been taken or appropriated through error or mistake, he shall cause notations thereof to be made upon the abstracts, records and tract books of his office, and shall issue to the plaintiff his certificate, reciting compliance, in substance, with the requirements of this act, particularly describing the lands appropriated, and thereupon the appropriation shall become effective and the commissioner of public lands shall forthwith transmit the amount received as damages to the state treasurer, as in case of the sale of land, and the subdivision of land through which such right of way is appropriated shall thereafter be sold or leased subject to the right of way. [L. '07, p. 507, § 2; L. '09, p. 625, § 1.]

§ 929. Payment to Petitioner—On Appeal Money to Remain in Court.

Upon the entry of judgment upon the verdict of the jury, or the decision of the court, or judge thereof, awarding damages, as hereinbe-

fore prescribed, the petitioner, or any officer of or other person duly appointed by said corporation, may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court, to be paid out under the direction of the court, or judge thereof; and upon making such payment into the court of the damages assessed and allowed, and of the costs to any land, real estate, premises, or other property mentioned in said petition, such corporation shall be released and discharged from any and all further liability therefor, unless upon appeal the owner, or other person or party interested, shall recover a greater amount of damages; and in that case, only for the amount in excess of the sum paid into said court, and the costs of appeal: Provided, that in case of an appeal to the supreme court of the state by any party to the proceedings, the money so paid into the superior court by such corporation as aforesaid shall remain in the custody of said court until the final determination of the proceedings by the said supreme court. [L. '90, p. 299, § 7; 2 H. C., § 654.]

Cited in 22 Wash. 160; 52 Wash. 52; 66 Wash. 445; 73 Wash. 191, 193; 80 Wash. 420—424.

Reversion: See Remington's Digest, Em. Dom., § 179; Nicomen Boom Co. v. North Shore etc. Co., 40 Wash. 315, 82 Pac. 412; Reichling v. Covington Lumber Co., 57 Wash. 225, 106 Pac. 777, 135 Am. St. Rep. 976; Neitzel v. Spokane International R. Co., 80 Wash. 30, 141 Pac. 186.

Execution and Enforcement of Judgment—Stay Pending Proceedings to Assess Compensation: See Remington's Digest, Em. Dom., § 174; Owen v. St. Paul etc. R. Co., 12 Wash. 313, 41 Pac. 44; Hathaway v. Yakima Water L. & P. Co., 14 Wash.

469, 44 Pac. 896, 53 Am. St. Rep. 874; Patton v. Olympia Door etc. Co., 15 Wash. 210, 46 Pac. 237; New Whatcom v. Fairhaven Land Co., 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 662; Everett Water Co. v. Powers, 37 Wash. 143, 79 Pac. 617; Slaght v. Northern Pac. R. Co., 39 Wash. 576, 81 Pac. 1062.

Costs: See Remington's Digest, Em. Dom., § 159; Owsley v. Oregon R. & Nav. Co., 1 Wash. 491, 20 Pac. 782; Adams County v. Dobzschlag, 19 Wash. 356, 53 Pac. 339; Lewis County v. Schobey, 31 Wash. 357, 71 Pac. 1029; Kitsap County v. Melker, 52 Wash. 49, 100 Pac. 150.

§ 930. Disposition of Money—Conflicting Claims.

Any person, corporation, state, or county claiming to be entitled to any money paid into court, as provided in this act may apply to the court therefor, and upon furnishing evidence satisfactory to the court that he or it is entitled to the same, the court shall make an order directing the payment to such claimant the portion of such money as he or it shall be found entitled to; but if, upon application, the court, or judge thereof, shall decide that the title to the land, real estate, premises, or other property specified in the application of such claimant was in such condition as to require that an action be commenced to determine the conflicting claims thereto, he shall refuse such order until such action is commenced, and the conflicting claims to such land, real estate, premises, or other property be determined according to law. [Cf. L. '88, p. 61, § 8; L. '90, p. 299, § 8; 2 H. C., § 655.]

Cited in 18 Wash. 382; 56 Wash. 337; 80 Wash. 420—424.

Lien of Award or Judgment: See Rem-

ington's Digest, Em. Dom., § 148; North Coast R. Co. v. Hess, 56 Wash. 335, 105 Pac. 853.

§ 931. Appeal.

Either party may appeal from the judgment for damages entered in the superior court to the supreme court of the state within thirty days

after the entry of judgment as aforesaid, and such appeal shall bring before the supreme court the propriety and justness of the amount of damages in respect to the parties to the appeal; Provided, however, that no bond shall be required of any person interested in the property sought to be appropriated by such corporation, but in case the corporation appropriating such land, real estate, premises, or other property is appellant, it shall give a bond like that prescribed in the next following section, to be executed, filed, and approved in the same manner: And provided further, that if the owner of the land, real estate, premises, or other property accepts the sum awarded by the jury, the court, or the judge thereof, he shall be deemed thereby to have waived conclusively an appeal to the supreme court, and final judgment by default may be rendered in the superior court as in other cases. [Cf. L. '88, p. 61, § 9; L. '90, p. 300, § 9.]

Cited in 4 Wash. 17, 18; 22 Wash. 159; 25 Wash. 550; 28 Wash. 321; 30 Wash. 222; 38 Wash. 189, 190; 42 Wash. 689; 43 Wash. 93, 94, 112; 44 Wash. 556; 46 Wash. 36; 48 Wash. 92; 55 Wash. 393, 395; 56 Wash. 288; 58 Wash. 81; 65 Wash. 405; 73 Wash. 192, 193; 80 Wash. 420—424; 81 Wash. 209; 82 Wash. 471; 100 Wash. 488; 110 Wash. 468.

This section must be construed to mean that the appeal "must" be prosecuted within that period: *Seattle & Montana Ry. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835.

This section, regulating appeals in condemnation proceedings, being a special enactment, it is not repealed by the general statute of 1891 (Laws 1891, p. 146, § 2), providing that in civil actions and proceedings appeals shall be prosecuted within six months after judgment: *Seattle & Montana Ry. Co. v. O'Meara*, 4 Wash. 17, 29 Pac. 835.

Appeal—Decisions Reviewable: See Remington's Digest, Em. Dom., § 151; *Parker v. Superior Court*, 25 Wash. 544, 66 Pac. 154; *Oregon R. & Nav. Co. v. McCormick*, 46 Wash. 45, 89 Pac. 186; *Whatecom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892; *Tacoma v. Nisqually Power Co.*, 54 Wash. 292, 103 Pac. 49; *North Coast R. Co. v. Gentry*, 58 Wash. 80, 107 Pac. 1059; *Calispel Diking District v. McLeish*, 63 Wash. 331, 115 Pac. 508; *Spokane v. Cowles*, 67 Wash. 539, 121 Pac. 463; *Chicago, Mil. & Puget S. R. Co. v. Slosser*, 82 Wash. 467, 144 Pac. 706; *State ex rel. Grays Harbor Logging Co. v. Superior Court*, 100 Wash. 485, 171 Pac. 238.

— **Parties:** See Remington's Digest, Em. Dom., § 152; *Pearson v. Island County*, 3 Wash. 497, 28 Pac. 1108; *Olympia Light & P. Co. v. Tumwater Power & Water Co.*, 55 Wash. 392, 104 Pac. 778; *Northern Pac. R. Co. v. Smith*, 68 Wash. 269, 122 Pac. 1057.

— **Taking and Effecting Appeal:** See Remington's Digest, Em. Dom., § 153; *Pearson v. Island County*, 3 Wash. 497, 28 Pac. 1108; *Seattle & M. R. Co. v.*

O'Meara, 4 Wash. 17, 29 Pac. 835; *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158; *Port Angeles Pac. R. Co. v. Cook*, 38 Wash. 184, 80 Pac. 305; *Tacoma v. Birmingham Co.*, 50 Wash. 683, 97 Pac. 971; *State ex rel. Tumwater Power & Water Co. v. Superior Court*, 56 Wash. 287, 105 Pac. 815; *State ex rel. Washington Public Service Co. v. Superior Court*, 86 Wash. 155, 149 Pac. 652.

See, also, *Ham, Yearsley & Ryrie v. Northern Pac. R. Co.*, 110 Wash. 467, 188 Pac. 527.

— **Record:** See Remington's Digest, Em. Dom., § 155; *Long v. Billings*, 7 Wash. 267, 34 Pac. 936; *Seavey v. Seattle*, 17 Wash. 361, 49 Pac. 517; *Seattle v. Park*, 42 Wash. 151, 84 Pac. 644; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903.

Review on Appeal: See Remington's Digest, Em. Dom., § 156, and cases cited.

See, also, *Stimson Mill Co. v. Troxel*, 113 Wash. 108, 193 Pac. 213.

— **Determination and Disposition of Cause:** See Remington's Digest, Em. Dom., § 157; *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *State ex rel. Weyerhaeuser Timber Co. v. Superior Court*, 71 Wash. 84, 127 Pac. 591; *State ex rel. Washington Public Service Co. v. Superior Court*, 86 Wash. 155, 149 Pac. 652.

Review on Certiorari: See Remington's Digest, Em. Dom., § 158, and cases cited.

See, also, *State ex rel. McPherson Bros. Co. v. Superior Court*, 108 Wash. 58, 182 Pac. 962.

COSTS.—Costs of an appeal, successfully prosecuted by the petitioner from an award of damages, cannot be taxed against the land owner, on remanding the case for a retrial to determine the proper damages; since the petitioner must pay all costs of the proceedings to ascertain the damages: *Grays Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267.

A land owner, unsuccessfully appealing from an award in condemnation, is chargeable with the costs of the appeal: *Redmond v. Perrigo*, 84 Wash. 407, 146 Pac. 838.

Appealable judgments and orders in condemnation proceedings. 16 *Ann. Cas.* 1004; *Ann. Cas.* 1915D, 548.

Who may appeal in eminent domain proceedings. *Ann. Cas.* 1914D, 1139.

Liability of land owner to costs on appeal in condemnation proceedings. *Ann. Cas.* 1912C, 533; *Ann. Cas.* 1916E, 692; *Ann. Cas.* 1917E, 262; 36 *L. R. A.* (N. S.) 624.

§ 932. Prosecution of Work Pending Appeal.

The construction of any railway surface tramway, elevated cable tramway, or canal, or the prosecution of any works or improvements by any corporation as aforesaid shall not be hindered, delayed or prevented by the prosecution of the appeal of any party to the proceedings: Provided, the corporation aforesaid shall execute and file with the clerk of the court in which the appeal is pending a bond to be approved by said clerk, with sufficient sureties, conditioned that the persons executing the same shall pay whatever amount may be required by the judgment of the court therein, and abide any rule or order of the court in relation to the matter in controversy. [Cf. L. '88, p. 62, § 10; L. '90, p. 300, § 10; 2 H. C., § 657; L. '97, p. 64, § 2.]

Cited in 28 Wash. 319; 38 Wash. 186, 189, 190; 73 Wash. 190, 192, 193; 110 Wash. 469.

§ 933. Appropriation of Right of Way Through Defiles, etc.

Any railroad company whose right of way passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purpose of its road in common with the road first located or the crossing of other railroads at grade, and any railroad company authorized by law to appropriate land, real estate, premises, or other property for right of way, or any other corporate purpose, may present a petition in the manner and form hereinbefore provided for the appropriation of a right of way through any canyon, pass, or defile for the purpose of its road, where right of way has already been located, condemned or occupied by some other railroad company through such canyon, pass, or defile for the purpose of its road, and thereupon like proceedings shall be had upon such petition as herein provided in other cases; and at the time of rendering judgment for damages, whether upon default or trial, the court, or judge thereof, shall enter a judgment or decree authorizing said railroad company to occupy and use said right of way, roadbed, and track, if necessary, in common with the railroad company or companies already occupying or owning the same, and defining the terms and conditions upon which the same shall be so occupied and used in common. [L. '90, p. 301, § 12; 2 H. C., § 658.]

Cited in 7 Wash. 164; 29 Wash. 497; 77 Wash. 318.

This section provides for cases where it is necessary for a railroad to go through a canyon, pass, or defile already occupied by an earlier road: *Seattle & Mont. Ry.*

Co. v. State, 7 Wash. 150, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

As to construction, operation and effect of this section, see *North Coast R. Co. v. Northern Pac. R. Co.*, 48 Wash. 529, 94 Pac. 112.

§ 934. Appropriation by Electric Power Companies, etc.

The right of eminent domain is hereby extended to all corporations incorporated or that may hereafter be incorporated under the laws of

this state or any state or territory of the United States, and doing business in this state, for the purpose of transmitting electric power by wire, cable, or by any other means: Provided, however, that said right of eminent domain shall not be exercised in respect to any residence or business structure or structures. [L. '95, p. 80, § 1.]

Power of electric light and power company to exercise right of eminent domain. 5 Ann. Cas. 531; 7 Ann. Cas. 750, 1191; 14 Ann. Cas. 904;

21 Ann. Cas. 364; Ann. Cas. 1912D, 1004; 2 L. R. A. (N. S.) 842; 19 L. R. A. (N. S.) 725; 22 L. R. A. (N. S.) 136.

§ 935. Right to Enter Lands for Survey, etc.

Every corporation incorporated or that may hereafter be incorporated under the laws of this state or any state or territory of the United States, and doing business in this state, for the purpose of transmitting electric power by wire, cable or any other means, shall have the right to enter upon any land between the termini of the proposed lines for the purpose of examining, locating and surveying such lines, doing no unnecessary damage thereby. [L. '95, p. 80, § 2.]

§ 936. Procedure as in Other Cases.

Every such corporation shall have the right, subject to the proviso contained in section 934, to appropriate real estate or other property for right of way or for any corporate purpose in the same manner and under the same procedure as now is or may be hereafter provided by the law in the case of other corporations authorized by the laws of this state to exercise the right of eminent domain. [L. '95, p. 80, § 3.]

Cited in 84 Wash. 409; 86 Wash. 158.

CHAPTER VI.

WASTE, TRESPASS AND NUISANCE.

§ 937. Waste Actionable.

Wrongs heretofore remediable by action of waste shall be subjects of actions, as other wrongs. [Cf. L. '54, p. 206, § 403; L. '69, p. 143, § 554; Cd. '81, § 600; 2 H. C., § 659.]

§ 938. Action Against Guardian or Tenant — Damages — Forfeiture — Eviction.

If a guardian, tenant in severalty or in common, for life or for years, of real property, commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant; in which action there may be judgment for treble damages, forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice. [Cf. L. '54, p. 206, § 403; L. '69, p. 143, § 555; Cd. '81, § 601; 2 H. C., § 660.]

Cited in 2 Wash. 120; 72 Wash. 465.

Injuries to lands formerly cognizable in which a stranger to the land was the wrongdoer, and which had been cognizable the technical action of waste were as-

in the action of trespass, were collected and provided for in the two following sections: *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76.

The common-law remedies embraced in these sections are continued as before, though they are now to be known as actions for injuries to real property instead of waste in one case and trespass in the other: *Id.*

The fact that a mortgagee in possession of premises is committing waste will not authorize the appointment of a receiver in the absence of proof of the mortgagee's insolvency: *Brundage v. Home Savings & Loan Assn.*, 11 Wash. 277, 39 Pac. 666.

Right of tenant in common to main-

tain action against cotenant committing waste. 15 *Ann. Cas.* 271.

Remedy of contingent remainderman for waste. *Ann. Cas.* 1912A, 543.

Wife's right in action of divorce to recover for waste committed by husband. 21 *Ann. Cas.* 1104.

Liability of wife for waste committed by husband. 12 *A. L. R.* 1461.

Rights of cotenants inter se as to timber. 2 *A. L. R.* 993.

Alterations by tenants in structures on leased premises as waste. 13 *A. L. R.* 824.

Power as to waste of life tenant with power to anticipate or enjoy principal. 2 *A. L. R.* 1285, 1325.

§ 939. Trespass for Cutting Trees, etc.—Damage.

Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber, or shrub on the land of another person, or in the street or highway in front of any person's house, village, town, or city lot, or cultivated grounds, or on the commons or public grounds of any village, town, or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city, against the person committing such trespasses, or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be. [L. '69, p. 143, § 556; Cd. '81, § 602; 2 H. C., § 661.]

Cited in 2 Wash. 120, 122, 123; 27 Wash. 66, 358; 40 Wash. 45, 47; 54 Wash. 451, 452; 60 Wash. 560; 61 Wash. 574; 64 Wash. 96, 97; 65 Wash. 60; 67 Wash. 654; 91 Wash. 661; 92 Wash. 298; 99 Wash. 166; 100 Wash. 582; 102 Wash. 625, 626.

ACTS CONSTITUTING TRESPASS, AND LIABILITY THEREFOR: See Remington's Digest, Tresp., §§ A-1—2. Nature and elements of trespass in general: *Farrar v. Peterson & Co.*, 72 Wash. 482, 130 Pac. 753, 133 Pac. 594, 44 L. R. A. (N. S.) 1092. Trespass to real property—Property and rights subject of trespass: *White v. Territory*, 3 W. T. 397, 19 Pac. 37; *Hubert v. Connell Northern R. Co.*, 71 Wash. 567, 129 Pac. 105, 43 L. R. A. (N. S.) 447. Entry: *Laurendeau v. Fugelli*, 1 Wash. 559, 21 Pac. 29; *Bellingham Bay Ry. & Nav. Co. v. Loose*, 2 Wash. 500, 27 Pac. 174.

RIGHT OF ACTION: See Remington's Digest, Tresp., §§ 3—6. Nature and scope of remedy in general: *Meeker v. Gilbert*, 3 W. T. 369, 19 Pac. 18. Remote consequences of original trespass: *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881. Title to support action: *Spurlock v. Pt. Townsend So. R. Co.*, 13 Wash. 29, 42 Pac. 520. Possession or right of possession of plaintiff: *Colwell v. Smith*, 1

W. T. 92; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 825; *Olson v. Seattle*, 30 Wash. 687, 71 Pac. 201.

Defenses—Consent, License or Knowledge: See Remington's Digest, Tresp., § 7; *United States v. Kelly*, 3 W. T. 421, 17 Pac. 878; *Anderson v. Northern Pacific R. Co.*, 19 Wash. 340, 53 Pac. 345.

Evidence: See Remington's Digest, Tresp., §§ 14, 15. Admissibility: *Froelich v. Morse*, 15 Wash. 636, 47 Pac. 22. Weight and sufficiency: *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453; *Buyken v. Lewis Const. Co.*, 59 Wash. 220, 109 Pac. 608; *Hertzog v. Star Logging Co.*, 73 Wash. 197, 131 Pac. 806.

DAMAGES: See Remington's Digest, Tresp., §§ 16—20.

Entry on and Injuries to Real Property: *Taylor v. Howell-Hill Mill Co.*, 74 Wash. 66, 132 Pac. 726.

Cutting and Removal of Timber: *Healy v. Everett & Cherry Valley Traction Co.*, 78 Wash. 628, 139 Pac. 609; *Luedinghaus v. Pederson*, 100 Wash. 580, 171 Pac. 530.

Continuing Trespass to Real Property: *Doran v. Seattle*, 24 Wash. 182, 64 Pac. 230, 85 Am. St. Rep. 948, 54 L. R. A. 532.

Mesne Profits: Columbia & Puget S. R. Co. v. Histogenetic Med. Co., 14 Wash. 475, 45 Pac. 29.

Grounds for Double and Treble Damages—Cutting and Removal of Timber: Gardner v. Lovegren, 27 Wash. 356, 67 Pac. 615; Heybrook v. Index Lumber Co., 49 Wash. 378, 95 Pac. 324; Nethery v. Nelson, 51 Wash. 624, 99 Pac. 879; Northern Pac. R. Co. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453; Lytle Logging & Mercantile Co. v. Humptulips Driving Co., 60 Wash. 559, 111 Pac. 774; Simons v. Wilson, 61 Wash. 574, 112 Pac. 653; Skamania Boom Co. v. Youmans, 64 Wash. 94, 116 Pac. 645; Bailey v. Hayden, 65 Wash. 57, 117 Pac. 720; Tronsrud v. Puget Sound Traction, Light

& Power Co., 91 Wash. 660, 158 Pac. 348; Harold v. Toomey, 92 Wash. 297, 158 Pac. 986; Luedinghaus v. Pederson, 100 Wash. 580, 171 Pac. 530.

Damages in Actions for Conversion of Trees: See Remington's Digest, Trover, §§ 39, 40. **Questions for Jury:** Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391, 91 Am. St. Rep. 820; **Instructions:** McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76.

Instructions: See Remington's Digest, Tresp., § 21; Gardner v. Lovegren, 27 Wash. 356, 67 Pac. 615; Bice Fisheries Co. v. Pacific Realty Co., 35 Wash. 535, 77 Pac. 839; Bice v. Brown, 98 Wash. 416, 167 Pac. 1097; Rogers v. Kangley Timber Co., 74 Wash. 48, 132 Pac. 731.

§ 940. Casual or Involuntary Trespass—Damages.

If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from uninclosed woodlands, for the purpose of repairing any public highway or bridge upon the land, or adjoining it, judgment shall only be given for single damages. [L. '69, p. 143, § 557; Cd. '81, § 603; 2 H. C., § 662.]

Cited in 2 Wash. 120; 27 Wash. 66, 358; 40 Wash. 45, 47; 54 Wash. 451, 452; 64 Wash. 96, 97; 65 Wash. 60; 100 Wash. 582; 102 Wash. 625, 626.

Verdict and Findings: See Remington's Digest, Tresp., § 22; Northern Pac. R. Co. v. Myers-Parr Mill Co., 54 Wash. 447, 103 Pac. 453.

Where a boundary line between two

quarter section corners is in dispute, a land owner who adopts a line run on the magnetic variation called for in the field-notes, without resorting to a proper method for determining the true line, is guilty of voluntary and not a casual or involuntary trespass, if he cuts timber on the adjoining tract: Heybrook v. Index Lumber Co., 49 Wash. 378, 95 Pac. 324.

§ 941. Injunction to Prevent Waste on Public Lands.

When any two or more persons are opposing claimants under the laws of the United States to any land in this state, and one is threatening to commit upon such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, and there is imminent danger that unless restrained such waste will be committed, the party, on filing his complaint and satisfying the court or judge of the existence of the facts, may have an injunction to restrain the adverse party. In all cases he shall give notice and bond as is provided in other cases where injunction is granted, and the injunction when granted shall be set aside or modified as is provided generally for injunction and restraining orders. [L. '54, p. 206, § 404; Cd. '81, § 604; 2 H. C., § 663.]

Cited in 5 Wash. 153, 155, 156.

Actions for Waste—Injunction or Receiver.—Under this section, injunction is authorized by a claimant to land under the laws of the United States against another claimant who is threatening to commit waste, which tends materially to

lessen the value of the inheritance, and which cannot be compensated by damages: Arment v. Hensel, 5 Wash. 152, 31 Pac. 464.

Cutting of timber as waste which may be enjoined. 43 L. B. A. (N. S.) 262; 11 Ann. Cas. 456.

§ 942. Action by Occupant of Unsurveyed Land.

Any person now occupying and settled upon, or who may hereafter occupy or settle upon, any of the unsurveyed public land, not to exceed one hundred and sixty acres, in this state, for the purpose of holding and cultivating the same, may commence and maintain any action, in any court of competent jurisdiction, for interference with or injuries done to his or her possessions of said lands, against any person or persons so interfering with or injuring such lands or possession: Provided always, that if any of the aforesaid class of settlers are absent from their claims continuously for a period of six months in any one year, the said person or persons shall be deemed to have forfeited all rights under this section. [L. '83, p. 70, § 1; 2 H. C., § 545.]

Sufficiency of possessory title to sustain action of trespass. 49 **L. R. A. (N. S.)** 500, 503, 516.

Right of one in actual possession of

land under color of title to maintain action for trespass against mere trespasser. 4 **Ann. Cas.** 190; **Ann. Cas.** 1915D, 37.

§ 943. Actionable Nuisances, Defined.

The obstruction of any highway, or the closing of the channel of any stream used for boating or rafting logs, lumber, or timber, or whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance, and the subject of an action for damages and other and further relief. [Cf. L. '54, p. 207, § 405; L. '69, p. 144, § 559; Cd. '81, § 605; 2 H. C., § 664.]

Cited in 13 Wash. 618; 56 Wash. 309; 58 Wash. 569; 61 Wash. 290; 76 Wash. 48; 108 Wash. 440.

Obstruction of Highway as Nuisance: See Remington's Digest, Nuis., § 13; Johnson v. Maxwell, 2 Wash. 482, 27 Pac. 1071; Smith v. Mitchell, 21 Wash. 536, 58 Pac. 667, 75 Am. St. Rep. 858; Lund v. St. Paul M. & M. R. Co., 31 Wash. 286, 71 Pac. 1032, 96 Am. St. Rep. 906, 61 L. R. A. 506.

The fact that the remedy provided by this section for the abatement of a nuisance is an action at law, will not preclude the court from granting equitable relief when a suit at law for the abatement of the nuisance would prove entirely inadequate: Carl v. West Aberdeen Land & Imp. Co., 13 Wash. 616, 43 Pac. 890.

Injunction lies to abate the maintenance of a bawdy-house as a public nuisance specially injurious to plaintiff's adjoining property used for residence purposes, the common-law remedies of indictment and action on the case being inadequate, and this rule has not been changed by statute in this state: Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513, 1 Ann. Cas. 35.

An action by a husband and wife for damages to the reputation of their hotel business, through improper acts by the defendants in securing rooms for immoral

purposes, is an action for a private nuisance per se, under sections 943, 944: Hall v. Galloway, 76 Wash. 42, 135 Pac. 478.

A mail carrier whose route was over a bridge negligently destroyed by the defendant sustains special damage for which he may maintain action, under the common law and under this section: Sholin v. Skamania Boom Co., 56 Wash. 303, 105 Pac. 632, 28 L. R. A. (N. S.) 1053.

For text treatment of "Nuisance," see 20 **B. C. L.** 376.

Hospital or asylum as nuisance. **Ann. Cas.** 1916A, 126; 29 **L. R. A. (N. S.)** 49; 40 **L. R. A. (N. S.)** 647; 52 **L. R. A. (N. S.)** 1032.

Undertaking establishment as nuisance. **Ann. Cas.** 1912B, 1208; 31 **L. R. A. (N. S.)** 608; **L. R. A.** 1918A, 829.

Pesthouse or contagious disease hospital as nuisance. 4 **A. L. R.** 995; 6 **Ann. Cas.** 823; 15 **Ann. Cas.** 719; **Ann. Cas.** 1912B, 1131.

Penal or reformatory institution as nuisance. 14 **A. L. R.** 687; **Ann. Cas.** 1913E, 858.

Mausoleum and cemetery as nuisance. 1 **A. L. R.** 546; 5 **Ann. Cas.** 136; 20 **Ann. Cas.** 794; **Ann. Cas.** 1917B, 563; 31 **L. R. A. (N. S.)** 945; 34 **L. R. A. (N. S.)** 565.

Barking dog as nuisance. 10 *Ann. Cas.* 67; *L. R. A. (N. S.)* 349.

Keeping of pigs as nuisance. *L. R. A.* 1917C, 212.

Keeping bees as nuisance. *Ann. Cas.* 1917B, 691; 62 *L. R. A.* 133.

Garage as nuisance. *L. R. A.* 1917E, 369.

Picketing as a nuisance. 6 *A. L. R.* 934.

Steam whistle as nuisance. 4 *A. L. R.* 1343.

Trolley poles in street as nuisance. 2 *A. L. R.* 496.

Dust as nuisance. 3 *A. L. R.* 312; 11 *A. L. R.* 1401.

Noise arising from exercise of lawful business or amusement as nuisance.

4 *Ann. Cas.* 378; 19 *Ann. Cas.* 993; *Ann. Cas.* 1912B, 428; *Ann. Cas.* 1915B, 1059; 18 *L. R. A. (N. S.)* 699; 40 *L. R. A. (N. S.)* 75.

Noise with or without vibration incident to lawful business as nuisance. 17 *L. R. A. (N. S.)* 287; 44 *L. R. A. (N. S.)* 236.

Storing of explosives in highway as a nuisance. 11 *A. L. R.* 719.

Operation of railroad as nuisance to property. 6 *A. L. R.* 723.

Smoke as nuisance. 12 *Ann. Cas.* 846; *Ann. Cas.* 1912B, 1036; 13 *L. R. A. (N. S.)* 465; 6 *A. L. R.* 1575.

Liability of purchaser of premises for nuisance thereon created by predecessor. 14 *A. L. R.* 1094.

§ 944. Who may Maintain.

Such action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance. If judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance. Such motion shall be allowed, of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may have the defendant enjoined. [Cf. *L. '54*, p. 207, § 406; *L. '69*, p. 144, § 560; *Cd. '81*, § 606; *L. '91*, p. 89, § 1; 2 *H. C.*, § 665.]

Cited in 13 *Wash.* 618; 56 *Wash.* 309; 61 *Wash.* 290; 76 *Wash.* 48.

PARTIES: See Remington's Digest, Tresp., §§ 8, 8-1. Plaintiffs: *Washburn v. Case*, 1 *W. T.* 253; *Spurlock v. Port Townsend Southern R. Co.*, 13 *Wash.* 29, 42 *Pac.* 520. Defendants: *Sequim Bay Canning Co. v. Bugge*, 49 *Wash.* 127, 94 *Pac.* 922, 16 *Ann. Cas.* 196; *Heybrook v. Index Lumber Co.*, 49 *Wash.* 378, 95 *Pac.* 324.

Declaration or Complaint: See Remington's Digest, Tresp., §§ 9—11. Allegations of title or possession: *Maggs v. Morgatz*, 30 *Wash.* 604, 71 *Pac.* 188. Statement of acts constituting trespass: *Mecker*

v. Gilbert, 3 *W. T.* 369, 19 *Pac.* 18; *Wendel v. Spokane County*, 27 *Wash.* 121, 67 *Pac.* 576, 91 *Am. St. Rep.* 825. Waiver of defects and objections: *Columbia & Puget S. R. Co. v. Histagene-tic etc. Co.*, 14 *Wash.* 475, 45 *Pac.* 29.

Issues, Proof and Variance: See Remington's Digest, Tresp., §§ 12, 13; *Corliss v. Dunning*, 8 *Wash.* 332, 35 *Pac.* 1074; *Tacoma Mill Co. v. Perry*, 40 *Wash.* 44, 82 *Pac.* 140; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 *Wash.* 535, 77 *Pac.* 839.

Judgment—Operation and Effect: See Remington's Digest, Tresp., § 23; *Taylor v. Howell-Hill Mill Co.*, 74 *Wash.* 66, 132 *Pac.* 726.

§ 945. Warrant for Abatement of Nuisance.

If the order be made, the clerk shall thereafter, at any time within six months, when requested by the plaintiff, issue such warrant directed to the sheriff, requiring him forthwith to abate the nuisance at the expense of the defendant, and return the warrant as soon thereafter as may be, with his proceedings indorsed thereon. The expenses of abating the nuisance may be levied by the sheriff on the property of the defendant, and in this respect the warrant is to be deemed an execution against property. [Cf. *L. '54*, p. 207, § 407; *L. '69*, p. 145, § 561; *Cd. '81*, § 607; 2 *H. C.*, § 666.]

§ 946. Stay of Warrant.

At any time before the order is made or the warrant issues, the defendant may, on motion to the court or judge thereof, have an order to stay the issue of such warrant for such period as may be necessary, not exceeding six months, to allow the defendant to abate the nuisance himself, upon his giving bond to the plaintiff, in a sufficient amount, with one or more sureties, to the satisfaction of the court, or judge thereof, that he will abate it within the time and in the manner specified in such order. The sureties shall justify as bail upon arrest. If the defendant fails to abate such nuisance within the time specified, the warrant for the abatement of the nuisance may issue as if the same had not been stayed. [L. '69, p. 145, § 562; Cd. '81, § 608; 2 H. C., § 667.]

§ 946-1. Houses of Prostitution to be Abated.

Whoever shall erect, establish, maintain, continue, use, own or lease any building or place used for the purpose of lewdness, assignation or prostitution is guilty of a nuisance, and the building or place, or the ground itself, in or upon which lewdness, assignation or prostitution is conducted, permitted or carried on, continued or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. [L. '13, p. 391, § 1.]

Cited in 80 Wash. 262, 270; 81 Wash. 48; 83 Wash. 677; 90 Wash. 566; 95 Wash. 701; 103 Wash. 207.

In a prosecution under the "Redlight Law," a permanent abandonment, in good faith, of the use of a house for the purposes of prostitution, is not shown so as to warrant the court in denying a permanent injunction against the premises, where the facts merely show a hasty change in existing conditions after the prosecution was instituted, coupled with a declaration by the parties not to again engage in or permit the business at the place in question: *State ex rel. Kern v. Jerome*, 80 Wash. 261, 141 Pac. 753.

The "redlight" or abatement law, being penal in its nature, will not be con-

strued to authorize the seizure and sale of personal property held under a conditional sales contract, in the absence of a showing that the owner was charged with knowledge of the use of its property and given an opportunity to be heard in defense of the use to which it was put: *Simon-Piano Co. v. Fairfield*, 103 Wash. 206, 173 Pac. 457.

Abatement of bawdy-house. *Ann. Cas.* 1915D, 552; *L. R. A.* 1918D, 819.

Necessity of knowledge by owner of real estate of a nuisance maintained thereon by another, to subject him to the operation of the statute providing for the abatement of nuisances. 12 *A. L. R.* 431.

§ 946-2. Actions—Temporary Injunction.

Whenever a nuisance exists, as defined in this act, the prosecuting attorney or any citizen of the county may maintain an action in equity in the name of the state of Washington upon the relation of such prosecuting attorney or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or the agent of the building or ground upon which said nuisance exists. In such action, the court or judge may upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary injunction if it shall be made to appear to the satisfaction of the court or judge that such nuisance exists. At least three days' notice in writing shall be given the defendant of the hearing of the application. Any violation of the provisions of injunction herein provided shall be a contempt as hereinafter provided. [L. '13, p. 391, § 2.]

Cited in 81 Wash. 49; 83 Wash. 277; 94 Wash. 601.

A jury trial cannot be demanded in a civil action brought in equity in the name of the state to abate the same, as authorized by this section: *State ex rel. Dow v. Nichols*, 83 Wash. 676, 145 Pac. 986.

There is no defect of parties plaintiff, in an action charging defendant with maintaining a nuisance, because the caption failed to show that the action was brought "upon the relation of the prosecuting attorney": *State v. Knutson*, 81 Wash. 47, 142 Pac. 444.

§ 946-3. General Reputation of Place—Dismissal of Action.

In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal approved by the prosecuting attorney in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, he may direct the prosecuting attorney to prosecute such action to judgment, and if the action is continued more than once, upon the application of either party, any citizen of the county or the prosecuting attorney may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen who originally brought such action. [L. '13, p. 391, § 3.]

§ 946-4. Contempt—Punishment.

In case of the violation of any injunction granted under the provisions of this act, the court or judge may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause an attachment to issue, under which the defendant shall be arrested. The trial may be had upon affidavit, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred nor more than one thousand dollars, or by imprisonment in the county jail not less than three nor more than six months, or by both fine and imprisonment. [L. '13, p. 392, § 4.]

Cited in 99 Wash. 2. 8.

An injunction under this section, abating the nuisance and enjoining the illegal use of the premises by the defendants, their agents, and servants, and all other

persons, operates in rem against the specific property, and is constructive notice and binds all persons thereafter dealing with the property: *State v. Terry*, 99 Wash. 1, 168 Pac. 513.

§ 946-5. Order of Abatement—Effect.

If the existence of the nuisance be established in an action as provided in this act, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments or movable property used in conducting the nuisance, and may direct the sale thereof in the manner provided for the sale of chattels under execution and effectual closing of the

building or place against its use for any purpose, and so keeping it closed for a period not exceeding six months. If any person shall break and enter or use a building or place so directed to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling all movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution and for closing the premises and keeping them closed, a reasonable sum shall be allowed by the court. [L. '13, p. 392, § 5.]

§ 946-6. Proceeds of Sales.

The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement, and the balance, if any, shall be paid to the person owning such property prior to said sale. [L. '13, p. 396, § 6.]

§ 946-7. Voluntary Abatement—Release.

If the owner appears and pays all costs of the proceedings, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court or judge may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property, and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this action [section] shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [L. '13, p. 393, § 7.]

Cited in 80 Wash. 269; 90 Wash. 569.

The giving of a bond to abate a prosecution under the "Red-light Law" does not relieve the property from the tax of

\$300 assessed against the property, in view of this section: *State ex rel. Kern v. Jerome*, 80 Wash. 261, 141 Pac. 753.

§ 946-8. Penalty—Tax Lien.

Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purposes prohibited by this act, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of three hundred dollars. The assessment of said tax shall be made by the county assessor of the county in which the nuisance exists and shall be made within three months from the date of the granting of the permanent injunction. In case the assessor fails or neglects to make said assessment the same shall be made by the sheriff of the county, and a return of said assessment shall be made to the county treasurer. Said tax may be enforced and collected in the manner prescribed for the collection of taxes under the general revenue laws and shall be a per-

petual lien upon the real property, and personal property not already sold as provided by this act, used for the purpose of maintaining said nuisance, and the payment of said tax shall not relieve the person or building from any penalties provided by law, and when collected shall go into the county general fund. [L. '13, p. 393, § 8.]

Cited in 80 Wash. 270; 94 Wash. 601.

The provision for a fine of \$300 is unconstitutional as a taking of property without due process, where the owner was not in possession and had no notice, actual or constructive, of the purposes for which the house was used: State ex rel. Kern v. Emerson, 90 Wash. 565, 155 Pac. 579.

Under this section, it is not a defense to the action that the property was not being used for the purposes of prostitution at the time the action of abatement was commenced nor since, where it appears that the owners knew it was being so used and made no effort to abate the nuisance after arrests had been made: State ex rel. Lundin v. Humphrey, 94 Wash. 599, 162 Pac. 983.

CHAPTER VII.

ESTABLISHMENT OF BOUNDARIES OF LANDS.

§ 947. Establishment of Lost or Uncertain Boundary Lines.

Whenever the boundaries of lands between two or more adjoining proprietors shall have been lost, or by time, accident, or any other cause shall have become obscure or uncertain, and the adjoining proprietors cannot agree to establish the same, one or more of said adjoining proprietors may bring his civil action in equity, in the superior court for the county in which such lands, or part of them, are situated, and such superior court, as a court of equity, may, upon such complaint, order such lost or uncertain boundaries to be erected and established and properly marked. [L. '86, p. 104, § 1; 2 H. C., § 668.]

Cited in 9 Wash. 185; 44 Wash. 101; 47 Wash. 403; 69 Wash. 684; 70 Wash. 441; 82 Wash. 193; 83 Wash. 258; 93 Wash. 149; 94 Wash. 396, 406; 96 Wash. 419; 106 Wash. 604; 108 Wash. 511; 109 Wash. 508.

Establishment of Boundaries: See Remington's Digest, Bound., §§ 10—17.

Jurisdiction: Colwell v. Smith, 1 W. T. 92; Squire v. Greer, 2 Wash. 209, 26 Pac. 222.

Pleading: Porria v. Castle Rock, 82 Wash. 103, 143 Pac. 315.

Presumptions and Burden of Proof: Reed v. Tacoma Building & Sav. Assn., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851; Squire v. Greer, 2 Wash. 209, 26 Pac. 222; Cadeau v. Elliott, 7 Wash. 205, 34 Pac. 916; Greer v. Squire, 9 Wash. 359, 37 Pac. 545; Blair v. Brown, 17 Wash. 570, 50 Pac. 483.

Admissibility of Evidence: Reed v. Tacoma Bldg. & Sav. Assn., 2 Wash. 198, 26 Pac. 252, 26 Am. St. Rep. 851; Tacoma Bldg. & Sav. Assn. v. Clark, 8 Wash. 289, 36 Pac. 135; Wilkeson Coal & Coke Co. v. Driver, 13 Wash. 610, 43 Pac. 889; Simmons v. Jamieson, 32 Wash. 619, 73 Pac. 700; Stangair v. Roads, 41

Wash. 583, 84 Pac. 405; Strunz v. Hood, 44 Wash. 99, 87 Pac. 45; Inmon v. Pearson, 47 Wash. 402, 92 Pac. 279; Snell v. Stelling, 83 Wash. 248, 145 Pac. 466.

See, also, Rue v. Oregon & Wash. R. Co., 109 Wash. 436, 186 Pac. 1074.

Weight and Sufficiency of Evidence: Moore v. Brownfield, 7 Wash. 23, 34 Pac. 199; Thayer v. Spokane County, 36 Wash. 63, 78 Pac. 200; La Bounty v. Seattle, 46 Wash. 141, 89 Pac. 480; Stokes v. Curtis, 49 Wash. 235, 94 Pac. 1083; Aiken v. Boyd, 55 Wash. 696, 104 Pac. 1101; Rippey v. Harrison, 66 Wash. 109, 119 Pac. 178; Scheuerman Inv. Co. v. Land Owners Corporation, 72 Wash. 613, 131 Pac. 216; Sartori v. Denny-Renton Clay & Coal Co., 77 Wash. 166, 137 Pac. 494; Hope v. Brown, 74 Wash. 421, 133 Pac. 612; Koenig v. Whatcom Falls Mill Co., 67 Wash. 632, 122 Pac. 16; Hale v. Ball, 70 Wash. 435, 126 Pac. 942; Cunningham v. Weedon, 81 Wash. 96, 142 Pac. 453; Reed v. Firestack, 93 Wash. 148, 160 Pac. 292; Weidlich v. Independent Asphalt Paving Co., 94 Wash. 395, 162 Pac. 541.

See, also, Milwaukee Land Co. v. Weyerhaeuser Timber Co., 106 Wash. 604, 180 Pac. 879.

Meanders: *Rue v. Oregon & Wash. R. Co.*, 109 Wash. 436, 186 Pac. 1074.

Location of lines — Evidence — Sufficiency.—*Samples v. Kergan*, 109 Wash. 503, 187 Pac. 383; *Cartwright v. Hamilton*, 111 Wash. 685, 191 Pac. 797; *Charlton v. Graham*, 112 Wash. 437, 192 Pac. 936; *Smith v. Chambers*, 112 Wash. 600, 192 Pac. 891.

Agreements Between Parties: *Lindley v. Johnston*, 42 Wash. 257, 84 Pac. 822; *Inmon v. Pearson*, 47 Wash. 402, 92 Pac. 279; *Windsor v. Sarsfield*, 66 Wash. 576, 119 Pac. 1112; *Goldbach v. Gaines*, 67 Wash. 260, 121 Pac. 61.

Estoppel in General: *Phinney v. Campbell*, 16 Wash. 203, 47 Pac. 502; *Roe v. Walsh*, 76 Wash. 148, 135 Pac. 1031, 136 Pac. 1146; *Rose v. Fletcher*, 83 Wash. 623, 145 Pac. 989.

Recognition and Acquiescence: *Denny v. Northern Pac. R. Co.*, 19 Wash. 298, 53 Pac. 341; *Erickson v. Murlin*, 39 Wash. 43, 80 Pac. 853; *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084; *Sartori v. Denny-Renton Clay & Coal Co.*, 77 Wash. 166, 137 Pac. 494.

Practical Location by Parties: *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084; *Hruby v. Lonseth*, 63 Wash. 589, 116 Pac. 26.

Jurisdiction of equity to determine boundary lines. 11 *Ann. Cas.* 1127; *Ann. Cas.* 1915A, 354.

Admissibility of ancient map or survey to establish boundary. *Ann. Cas.* 1916C, 176.

Declarations of deceased surveyor as admissible evidence as to boundary line. 15 *Ann. Cas.* 874.

Admissibility of deceased former owner's declarations to prove boundary. 19 *Ann. Cas.* 551.

Necessity of writing for alteration of established boundary line by agreement. 8 *Ann. Cas.* 85.

Effect of compromise agreement locating division line at place known not to be the true boundary. 10 *L. R. A. (N. S.)* 610.

Effect of acquiescence in boundary lines. 4 *L. R. A.* 643.

§ 948. Commissioners Appointed—Duties of.

Said court may, in its discretion, appoint commissioners, not exceeding three competent and disinterested persons, one or more of whom shall be practical surveyors, residents of the state, which commissioners shall be, before entering upon their duties, duly sworn to perform their said duties faithfully, and the said commissioners shall thereupon survey, erect, establish, and properly mark said boundaries, and return to the court a plat of said survey, and the field-notes thereof, together with their report. Said report shall be advisory, and either party may except thereto, in the same manner as to a report of referees. [L. '86, p. 105, § 2; 2 H. C., § 669.]

Cited in 61 Wash. 382; 83 Wash. 258, 259; 93 Wash. 152, 154; 94 Wash. 406.

Adjudication by Court—Appointment of Commissioners: See *Remington's Digest*, Bound., § 18; *Stangair v. Roads*, 41 Wash. 583, 84 Pac. 405; *Jaggy v. Rooney*, 61 Wash. 381, 112 Pac. 367; *Hale v. Ball*, 70 Wash. 435, 126 Pac. 942; *Reed v. Firestack*, 93 Wash. 148, 160 Pac. 292.

See, also, *Samples v. Kergan*, 109 Wash. 503, 187 Pac. 383.

In an action in ejectment to recover

parts of a vacated street that had been in controversy in a previous action, equitable issues presented may make it proper to discharge the jury and try the case as an action to establish boundaries, under this section: *Weidlich v. Independent Asphalt Paving Co.*, 94 Wash. 395, 162 Pac. 541.

Action in ejectment, when reduced in its essence to restore a lost boundary as contemplated by this section: *Snell v. Stelling*, 83 Wash. 248, 145 Pac. 466.

§ 949. Proceedings, How Conducted—Decree.

The proceedings shall be conducted as other civil actions, and the court, on final decree, shall apportion the costs of the proceedings equitably, and the costs so apportioned shall be a lien upon the said lands, severally, as against any transfer or encumbrance made of or attaching to said lands, from the time of the filing of the complaint: Provided, a notice of lis pendens is filed in the auditor's office of the

proper county, in accordance with law. [L. '86, p. 105, § 3; 2 H. C., § 670.]

Cited in 44 Wash. 101; 69 Wash. 684; 82 Wash. 105; 83 Wash. 258; 94 Wash. 406.

This section does not apply where the evidence failed to establish that the boundary had been lost, and defendants

prevailed on cross-complaints alleging title by adverse possession to the line of a boundary fence: *Porria v. Castle Rock*, 82 Wash. 103, 143 Pac. 315.

CHAPTER VIII.

ACTIONS BY AND AGAINST PUBLIC CORPORATIONS.

§ 950. Actions by Public Corporations.

An action at law may be maintained by any county, incorporated town, school district, or other public corporation of like character in this state, in its corporate name, and upon a cause of action accruing to it, in its corporate character, and not otherwise, in either of the following cases:—

1. Upon a contract made with such public corporation;
2. Upon a liability prescribed by law in favor of such public corporation;
3. To recover a penalty or forfeiture given to such public corporation;
4. To recover damages for an injury to the corporate rights or property of such public corporation. [L. '69, p. 154, § 601; Cd. '81, § 661; 2 H. C., § 671.]

See supra, § 886, actions against the state.

See infra, § 3982, capacity of counties to sue and be sued.

See infra, § 3983, actions to be brought in corporate name.

See infra, § 4779, power and liability of school districts.

See infra, § 8981, power of cities of first class to sue and be sued.

Cited in 38 Wash. 106; 48 Wash. 88; 88 Wash. 170, 173, 177; 97 Wash. 145; 100 Wash. 268; 101 Wash. 382.

Actions by and Against Municipal Corporations in General: See Remington's Digest, Mun. Corp., §§ 574—582.

Actions by Counties: See Remington's Digest, Counties, §§ 93—103.

A county under the laws of this state

has the legal capacity to maintain an action in its own name to enjoin the obstruction of a public highway; since the restriction in this section relates only to actions at law: *Lincoln County v. Fish*, 38 Wash. 105, 80 Pac. 435.

Applicability of statute of limitations to action by county. 3 L. R. A. (N. S.) 746; 22 L. R. A. (N. S.) 921; L. R. A. 1916E, 97.

§ 951. Actions Against Public Corporations.

An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. [L. '69, p. 154, § 602; Cd. '81, § 662; 2 H. C., § 672.]

Actions against school districts, see infra, § 4706.

Cited in 4 Wash. 658; 20 Wash. 113; 21 Wash. 648; 48 Wash. 88; 88 Wash. 170, 173, 177; 95 Wash. 500, 501; 97 Wash. 146; 100 Wash. 268; 101 Wash. 382; 102 Wash. 344; 103 Wash. 178; 104 Wash. 271; 108 Wash. 426; 109 Wash. 654, 657; 110 Wash. 99, 101.

This section was continued in force by constitution, article XXVII, section 3, providing that all territorial laws not repugnant to the constitution shall remain in force until they expire by their own limitation or were altered or repealed by the legislature: *Orrock v. South Moran*

Township, 97 Wash. 144, 165 Pac. 1096.

This section is not impliedly repealed by section 3946, *infra*, defining the duties of the sheriff, and providing that the county is not responsible for the acts of the sheriff while engaged in his official duties as defined therein: *Arishin v. King County*, 103 Wash. 176, 173 Pac. 1020.

This section is not impliedly repealed as to torts by school districts, by the School Code: *Kelly v. School Dist. No. 71*, 102 Wash. 343, 173 Pac. 333.

A county is liable for injuries sustained through the operation of a county ferry, under this section, and it is immaterial that section 5477, *infra*, authorizing counties to operate ferries was passed subsequently, since the former was a general act: *Bergen v. Lewis County*, 95 Wash. 499, 164 Pac. 73.

This section is extended by inference to include townships, subsequently recognized as public corporations; since townships are a species of the genus municipal corporations, recognized by the constitution and laws: *Orrock v. South Moran Township*, 97 Wash. 144, 165 Pac. 1096.

The effect of this section, giving a right of action against a county for injury by some act or omission of the county where none existed at common law, is to make the county answerable under the general rules of procedure in the superior courts, and liable thereunder to suits in other counties where the venue is local: *State ex rel. King County v. Superior Court, Pierce County*, 104 Wash. 268, 176 Pac. 352.

Actions Against School Districts: See *Remington's Digest, Schools*, § 29-1, and cases cited and notes to § 4706, *infra*.

Rights and remedies where contracts, bonds or other instruments of a public corporation are invalid. **L. B. A.** 1915A, 904.

Applicability to public corporations of doctrine that corporation may be estopped to plead defense of *ultra vires* in action brought against it. **L. B. A.** 1917A, 850.

Liability of public corporation on implied contract. 39 **L. B. A. (N. S.)** 43, 72; 46 **L. B. A. (N. S.)** 921.

§ 952. Verification of Pleadings by Public Corporations.

In such actions, the pleadings of the public corporation shall be verified by any of the officers representing it in its corporate capacity, in the same manner as if such officer was a defendant in the action, or by the agent or attorney thereof, as in ordinary actions. [L. '69, p. 154, § 603; Cd. '81, § 663; 2 H. C., § 673.]

§ 953. Manner of Enforcing Judgments.

If judgment be given for the recovery of money or damages against such county or other public corporation, no execution shall issue thereon for the collection of such money or damages, but such judgment in such respect shall be satisfied as follows:—

1. The party in whose favor such judgment is given may, at any time thereafter, when execution might issue on a like judgment against a private person, present a certified transcript of the docket thereof to the officer of such county or other public corporation who is authorized to draw orders on the treasury thereof;

2. On the presentation of such transcript, such officer shall draw an order on such treasurer for the amount of the judgment, in favor of the party for whom the same was given. Thereafter such order shall be presented for payment and paid with like effect and in like manner as other orders upon the treasurer of such county or other public corporation;

3. The certified transcript herein provided for shall not be furnished by the clerk, unless at the time an execution might issue on such judgment if the same were against a private person, nor until satisfaction of the same judgment in respect to such money or damages be acknowledged as in ordinary cases. The clerk shall include in the tran-

script the memorandum of such acknowledgment of satisfaction and the entry thereof. Unless the transcript contain such memorandum, no order upon the treasurer shall issue thereon. [L. '69, p. 154, § 604; Cd. '81, § 664; 2 H. C., § 674.]

Cited in 9 Wash. 400; 14 Wash. 223; 16 Wash. 458; 18 Wash. 37, 227; 20 Wash. 398; 31 Wash. 539; 34 Wash. 352, 641; 45 Wash. 53; 50 Wash. 103, 63 Wash. 232, 242; 92 Wash. 592; 111 Wash. 108, 114.

This section did not contemplate the issue of warrants in satisfaction of judgments except against existing funds, but a general practice has grown out of issuing them like other warrants and paying them as the treasurer is able, with interest at the legal rate from time of presentation until paid: *Seymour v. Spokane*, 6 Wash. 362, 33 Pac. 832.

An action cannot be maintained upon a city warrant, but the holder's remedy, in case of refusal of the treasurer to make payment in the order of presentation, is by mandamus, and questions affecting the legality of the warrant can be tried therein: *Cloud v. Sumas*, 9 Wash. 399, 37 Pac. 305; *Union Savings Bank & Tr. Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359.

All that a judgment creditor of a city can obtain is a warrant for the payment of his claim according to the provisions of this section. No execution can be issued thereon, against the town: *Cloud v. Sumas*, supra; see *La France Fire Engine Co. v. Mt. Vernon*, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; *La France Fire Engine Co. v. Davis*, 9 Wash. 600, 38 Pac. 154; *Eidemiller v. Tacoma*, 14 Wash. 376, 44 Pac. 877.

This section does not preclude supplemental proceedings to enforce a judgment against the state dental board, which under section 10037, infra, handles its funds and satisfies its claims the same as any individual or corporation: *Stern v. State Board of Dental Examiners*, 50 Wash. 100, 96 Pac. 693.

In the absence of a special provision in the charter of a city relating to the payment of judgments, the method of payment is governed by this section: *Lorence v. Bean*, 18 Wash. 36, 50 Pac. 582.

Under this section, a transcript of the execution docket showing the judgment and its satisfaction is a sufficient compliance with the statute, without giving a transcript of the judgment in full: *Smith v. Ormsby*, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110.

An alternative writ of mandate to compel a municipal corporation to issue a warrant upon a judgment against it, is demurrable for want of facts, when it fails to allege that the judgment was satisfied by petitioner and a certified copy thereof presented to the city, as required by this section: *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117.

This section does not require that the order be made to the judgment creditor; but authorizes the issuance of an order to the attorney of the party, and the same operates to discharge the judgment: *State ex rel. Lane v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72.

After a city has condemned land, the owners, upon satisfying the judgment received by them for its value, and presenting a transcript thereof pursuant to this section, are entitled to a warrant against the fund provided for the redemption of such warrants: *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 348.

This section requires the judgment creditor to first satisfy his judgment and then present a certified copy of the judgment and satisfaction to the proper city officer: *Pratt v. Seattle*, 111 Wash. 104, 189 Pac. 565.

§ 954. Officer Refusing to Satisfy Judgment may be Attached.

Should the proper officer of said corporation fail or refuse to satisfy said judgment, as in the preceding section provided, an attachment may be issued to compel his performance of said duty. [L. '69, p. 155, § 605; Cd. '81, § 665; 2 H. C., § 675.]

Cited in 14 Wash. 223; 31 Wash. 541.

The remedy provided by attachment, under this section, would not exclude the remedy by mandamus, since the former

would not be wholly adequate to compel the specific act affording the necessary relief to be done: *Chapin v. Port Angeles*, 31 Wash. 535, 72 Pac. 117.

§ 955. Tender Condition Precedent to Action to Enjoin Tax Collection.

Hereafter no action or proceeding shall be commenced or instituted in any court of this state to enjoin the sale of any property for taxes,

or to enjoin the collection of any taxes, or for the recovery of any property sold for taxes, unless the person or corporation desiring to commence or institute such action or proceeding shall first pay, or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs justly due and unpaid from such person or corporation on the property sought to be sold or recovered. [L. '88, p. 43, § 1; 2 H. C., § 676.]

Cited in 7 Wash. 641; 16 Wash. 535; 19 Wash. 571; 22 Wash. 446, 448; 24 Wash. 374; 29 Wash. 183; 31 Wash. 541; 38 Wash. 497, 500; 43 Wash. 468; 44 Wash. 245; 49 Wash. 425; 53 Wash. 251, 253, 694; 55 Wash. 140; 69 Wash. 606; 91 Wash. 636.

Necessity of Tender: See Remington's Digest, Tax., § 205, and cases cited.

Payment or Tender of Taxes not in Controversy.—Where an action is brought to enjoin the collection of a tax alleged to be void, no tender is necessary, under this section, and it is sufficient to plead payment and tender of the taxes justly admitted to be due, without tendering such portion of the tax as is claimed to be illegal: *Lewiston Water & P. Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544; *Land's Estate Co. v. Clallam County*, 19 Wash. 569, 53 Pac. 670.

An action by a grantor in a deed to reform the same as a mortgage, and to redeem therefrom, brought against the grantee and successors in interest who had acquired a tax title since the date of the deed, is not an action affecting the validity of a tax title, within this section: *Shepard v. Vincent*, 38 Wash. 493, 80 Pac. 777.

Payment of tax due as condition of injunction against collection of illegal taxes. 22 L. B. A. 703.

Erroneous or invalid levy or assessment of tax as ground for enjoining collection. 3 Ann. Cas. 564; 12 Ann. Cas. 764; Ann. Cas. 1915C, 755.

Right of individual to enjoin assessment of illegal tax. 3 Ann. Cas. 1014.

§ 956. Complaint—Contents.

In all actions to enjoin the sale of any property for taxes, in all actions to enjoin the collection of any tax, and in all actions for the recovery of any property sold for taxes, the complainant must state and set forth specially in his complaint the tax that is justly due, with penalties, interest, and costs, the tax alleged to be illegal, and point out the illegality thereof; that the taxes for that and previous years have been paid; and when the action is for the recovery of lands or other property sold for taxes against the person or corporation in possession thereof, that all taxes, penalties, interest, and costs paid by the purchaser at tax sale, his assignees or grantees, have been fully paid or tendered, and payment refused. [L. '88, p. 44, § 2; 2 H. C., § 677.]

Cited in 19 Wash. 571; 38 Wash. 531; 43 Wash. 468; 47 Wash. 695; 49 Wash. 424, 425; 52 Wash. 515; 53 Wash. 694; 55 Wash. 140; 91 Wash. 636.

As to Sufficiency of Complaint: See Remington's Digest, Tax., § 208, and cases cited.

This section does not apply to an ordinary action of ejectment, where the plaintiff was ousted by one claiming under a void tax title which, under the law of 1897, was subject to collateral attack from the fact that the tax had already been paid: *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675.

§ 957. Construction of Act.

The provisions of sections 955 and 956 shall be construed as imposing additional conditions upon the power of the court or judge in granting injunctions to those already imposed, and of imposing additional conditions upon the complainant in actions for the recovery of property sold for taxes. [L. '88, p. 44, § 3; 2 H. C., § 678.]

Cited in 43 Wash. 468; 49 Wash. 425.

CHAPTER IX.

ACTIONS ON OFFICIAL BONDS, FINES AND FORFEITURES.

§ 958. Official Bonds, to Whom Deemed Security.

The official bond of a public officer to the state, or to any county, city, town, or other municipal or public corporation of like character therein, shall be deemed a security to the state, or to such county, city, town, or other municipal or public corporation, as the case may be, and also to all persons severally, for the official delinquencies against which it is intended to provide. [L. '69, p. 152, § 592; Cd. '81, § 652; 2 H. C., § 694.]

See *infra*, § 1159, action on contractor's bond to indemnify public corporations.

See *infra*, §§ 9932, 9933, actions on official bonds.

Liabilities on Official Bonds: See Remington's Digest, Officers, §§ 53—64.

Who is real party in interest by whom action on bond must be brought. 64 **L. R. A.** 607.

Right of action on official bond naming obligee other than one designated by statute. 3 **Ann. Cas.** 456.

Validity and effect of bond having less than required number of sureties. 9 **Ann. Cas.** 711.

Duration of liability of sureties on bond of officer appointed for definite term, but for whom law fixes no definite term. 5 **Ann. Cas.** 949.

Liability of sureties on official bond for default after expiration of term. **Ann. Cas.** 1912D, 293.

Liability on bond of public officer for the defaults and misfeasances of his clerks, assistants, or deputies. 12 **A. L. R.** 980; 1 **A. L. R.** 222.

Form of judgment in action on official bond. 62 **L. R. A.** 448.

Judgment against principal on official bond as judgment against surety. **Ann. Cas.** 1915D, 401; 52 **L. R. A.** 165; 40 **L. R. A.** (N. S.) 704, 732; **L. R. A.** 1918E, 816.

§ 959. Injured Party may Maintain Action.

When a public officer by official misconduct or neglect of duty shall forfeit his official bond, or render his sureties therein liable upon such bond, any person injured by such misconduct or neglect, or who is by law entitled to the benefit of the security, may maintain an action at law thereon in his own name against the officer and his sureties to recover the amount to which he may by reason thereof be entitled. [L. '69, p. 152, § 593; Cd. '81, § 653; 2 H. C., § 695.]

Cited in 19 Wash. 75; 97 Wash. 621.

§ 960. Leave to Commence Action.

Before an action can be commenced by a plaintiff, other than the state, or the municipal or public corporation named in the bond, leave shall be obtained of the court, or judge thereof, where the action is triable. Such leave shall be granted upon the production of a certified copy of the bond, and an affidavit of the plaintiff, or some person in his behalf, showing the delinquency. But if the matter set forth in his affidavit be such that, if true, the party applying would clearly not be entitled to recover in the action, the leave shall not be granted. If it does not appear from the complaint that the leave herein provided for has been granted, the defendant, on motion, shall be entitled to judgment of nonsuit; if it does, the defendant may controvert the allegation, and if the issue be found in his favor, the judgment shall be given accordingly. [L. '69, p. 152, § 594; Cd. '81, § 654; 2 H. C., § 696.]

Cited in 4 Wash. 633; 19 Wash. 75, 424; 103 Wash. 537; 110 Wash. 162.

In order to bring suit upon an administrator's bond, it is not necessary that application be first made to court and leave obtained, as an administrator is not a public officer within the purview of this section: *Bartels v. Gove*, 4 Wash. 632, 30 Pac. 675.

Leave of court is not required where the suit is prosecuted upon an official bond for the benefit of the state by its agents in their own names: *Nye v. Kelly*, 19 Wash. 73, 52 Pac. 528.

The objection is properly taken by demurrer, which answers the purpose of a motion, and is not waived by pleading over, after exceptions taken: *Hunter v. Berridge*, 103 Wash. 536, 175 Pac. 165.

The disability to begin action upon an official bond, imposed by this section until

leave of court shall be obtained therefor, would not enlarge the statute of limitations, when the plaintiff had the option at any time to obtain leave of court to bring its action, and the failure to obtain leave was due to its own delinquency: *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733.

Under this section requiring leave of court to a private party to sue upon an official bond, the failure of the complaint to show leave must be promptly moved against, and is waived by answer on which the case was tried and the point raised only by belated motion for nonsuit: *Eberhart v. Murphy*, 110 Wash. 158, 188 Pac. 17.

Leave of court as prerequisite to action on official bond. 2 A. L. R. 563.

§ 961. Judgment for Delinquency No Bar to Another Action.

A judgment in favor of a party for one delinquency shall not preclude the same or another party from maintaining another action on the same bond for another delinquency. [L. '69, p. 153, § 595; Cd. '81, § 655; 2 H. C., § 697.]

§ 962. Amount of Judgment.

In an action upon an official bond, if judgments have been recovered against the surety therein other than by confession, equal in the aggregate to the penalty, or any part thereof, of such bond, and if such recovery be established on the trial, judgment shall not be given against such surety for an amount exceeding such penalty, or such portion thereof as is not already recovered against him. [L. '69, p. 153, § 596; Cd. '81, § 656; 2 H. C., § 698.]

§ 963. Actions for Fines and Forfeitures.

Fines and forfeitures may be recovered by an action at law in the name of the officer or person to whom they are by law given, or in the name of the officer or person who by law is authorized to prosecute for them. [L. '69, p. 153, § 597; Cd. '81, § 657; 2 H. C., § 699.]

See *supra*, § 159, limitations of actions for.

§ 964. Amount of Recovery.

When an action shall be commenced for a penalty which by law is not to exceed a certain amount, the action may be commenced for that amount, and if judgment be given for the plaintiff, it may be for such amount or less, in the discretion of the court, in proportion to the offense. [L. '69, p. 153, § 598; Cd. '81, § 658; 2 H. C., § 700.]

§ 965. Collusive Judgment No Bar.

A recovery of a judgment for a penalty or forfeiture by collusion between the plaintiff and defendant, with intent to save the defendant wholly or partially from the consequences contemplated by law, in case

when the penalty or forfeiture is given wholly or partly to the person who prosecutes, shall not bar the recovery of the same by another person. [L. '69, p. 153, § 599; Cd. '81, § 659; 2 H. C., § 701.]

§ 966. Disposition of Fines and Forfeitures—Venue.

Fines and forfeitures not specially granted or otherwise appropriated by law, when recovered, shall be paid into the school fund of the proper county. Whenever, by the provisions of law, any property, real or personal, shall be forfeited to the state, or to any officer for its use, the action for the recovery of such property may be commenced in any county where the defendant may be found, or where such property may be. [L. '69, p. 153, § 600; Cd. '81, § 660; 2 H. C., § 702.]

Cited in 23 Wash. 578.

CHAPTER X.

ACTIONS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

§ 967. What Actions Survive.

All other causes of action [than those enumerated in section 183] by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or after his death, against his personal representatives. [L. '69, p. 165, § 659; Cd. '81, § 718; 2 H. C., § 704.]

"Section 183" refers to Rem. & Bal. Code, § 183, which was repealed, saving existing rights and rights accruing within three years, by L. '17, p. 495, § 4.

See Laws of 1869, p. 166, § 665; Laws of 1877, p. 147, § 728, omitted from Code of 1881, limitation of actions on claims against estates.

See supra, § 170, suspension of statute of limitation by death of party.

See supra, § 180, executors, etc., as parties.

See supra, § 193, action not to abate by disability if continued by or against representatives.

See supra, § 194, survival of action for personal injury.

See infra, § 1482 et seq., limitations of actions on claims against estates; see, also, on same subject, § 164, supra.

See infra, §§ 1518-1523, actions by and against executors and administrators in certain cases.

Cited in 4 Wash. 787; 5 Wash. 262; 15 Wash. 294; 35 Wash. 501; 69 Wash. 285; 89 Wash. 549; 102 Wash. 414; 107 Wash. 296, 297.

See notes to § 183, supra.

This section providing that "all other causes of action survive to the personal representatives," construed in connection with the preceding section, conferring upon heirs the right of action for death by wrongful act, must be held to relate only to causes of action which the law already provided should survive at common law, and as conferring rights upon the personal representatives as distinguished from the heirs, and hence actions for personal torts do not survive: *Slauson v. Schwacher*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948.

Under this section, and Rem. Code, § 1535, providing for the survival of certain causes of action, the death of a surety before the principal will not operate as a discharge of the former's liability: *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254.

The liability of a surety upon a supersedeas bond is continued after his death, by sections 193, 236, 967, providing that in certain cases where actions shall be prosecuted against the party if living, the same may be prosecuted against his representatives, which statute abrogates the common law rule that the death of a surety jointly liable with the principal ends the obligation as to both past and future defaults: *Olson v. Seldovio Salmon Co.*, 89 Wash. 547, 154 Pac. 1107.

Under this section and section 183, of Rem. & Bal. Code, cause of action for wrongful death survives only against the wrongdoer and abates upon his death: *Rinker v. Hurd*, 69 Wash. 257, 124 Pac. 687.

Necessity of alleging that suit by executor or administrator is brought in representative capacity. *Ann. Cas.* 1916E, 114.

Executor or administrator as real party in interest by whom action must be brought. 64 *L. R. A.* 611.

Right of personal representative to sue in forma pauperis. 1 *Ann. Cas.* 805.

Joinder of executor or administrator as defendant in both personal and representative capacity. 3 *Ann. Cas.* 287.

Right of personal representative to assail validity of chattel mortgage. 2 *Ann. Cas.* 712.

Right of personal representative of grantor to set aside conveyance as fraudulent as to creditors. 18 *Ann. Cas.* 37; *Ann. Cas.* 1915B, 212.

Rights of personal representative to maintain action to quiet title to

decedent's estate. *Ann. Cas.* 1913A, 966.

Right of personal representative to bring action of ejectment for lands of deceased. 15 *Ann. Cas.* 569; 18 *L. R. A.* 789.

Personal representative as necessary or proper party to foreclosure of mechanic's lien. *Ann. Cas.* 1918B, 16.

Right of administrator de bonis non to recover proceeds of personal property of the estate converted by his predecessor. 3 *A. L. R.* 1252.

Admissibility in evidence of admissions against interest by executor or administrator in pleading. 14 *A. L. R.* 89.

Declaratory judgments in matters respecting estates. 12 *A. L. R.* 76.

Right of executor or administrator to avoid contract or conveyance by decedent on ground of mental incapacity. 7 *A. L. R.* 237.

Right of creditors to maintain action in interest of decedent's estate. 7 *A. L. R.* 237.

§ 968. Several Representatives Regarded as One.

In an action against several executors or administrators, they shall all be considered as one person representing their testator or intestate, and judgment may be given and execution issued against all of them who are defendants in the action, although the notice be served only on part of them, in the same manner and with like effect as if served on all, except as provided in the next section. [L. '69, p. 165, § 660; Cd. '81, § 719; 2 H. C., § 705.]

§ 969. Judgment by Default—Not Evidence of Assets.

When a judgment is given against an executor or administrator for want of answer, such judgment is not to be deemed evidence of assets in his hands, unless it appear that the complaint alleged assets, and that the notice was served upon him. [L. '69, p. 166, § 661; Cd. '81, § 720; 2 H. C., § 706.]

§ 970. Inventory may be Contradicted.

In an action against executors and administrators, in which the fact of their having administered the estate of their testator or intestate, or any part thereof, is put in issue, and the inventory of the property of the deceased returned by them is given in evidence, the same may be contradicted or avoided by evidence,—

1. That any property has been omitted in such inventory, or was not returned therein at its full value, or that since the return thereof such property has increased in value;

2. That such property has perished or been lost without the fault of such executors or administrators, or that it has been fairly and duly sold

by them at a less price than the value so returned, or that since the return of the inventory such property has deteriorated in value. In such action the defendants cannot be charged for any things in action specified in their inventory, unless it appear that they have been collected, or with due diligence might have been. [L. '69, p. 166, § 662; Cd. '81, § 721; 2 H. C., § 707.]

§ 971. No Liability as Executor de Son Tort.

No person is liable to an action as executor of his own wrong for having taken, received, or interfered with the property of a deceased person, but is responsible to the executors or administrators of such deceased person for the value of all property so taken or received, and for all injury caused by his interference with the estate of the deceased. [L. '69, p. 166, § 663; Cd. '81, § 722; 2 H. C., § 708.]

Cited in 6 Wash. 203.

If a husband acts as executor of a deceased wife's will, but, at the time of his death, has not completed administration upon her estate, and the executors of his own will take possession and administer upon all the property the husband held,

including the separate and community estate of the deceased wife, such administration is merely irregular and not void, nor do the ordinary rules relating to liability of executors de son tort apply thereto: *Hill's Estate, In re*, 6 Wash. 285, 33 Pac. 585.

§ 972. Executor of Executor—Limit of Powers of.

An executor of an executor has no authority as such to commence or maintain an action or proceeding relating to the estate of the testator of the first executor, or to take any charge or control thereof. [L. '69, p. 166, § 664; Cd. '81, § 723; 2 H. C., § 709.]

§ 973. Provisional Remedies, When Authorized.

In an action against an executor or administrator as such, the remedies of arrest and attachment shall not be allowed on account of the acts of his testator or intestate; but for his own acts as such executor or administrator, such remedies shall be allowed for the same causes in the manner and with like effect as in actions at law generally. [L. '69, p. 167, § 666; Cd. '81, § 724; 2 H. C., § 710.]

CHAPTER XI.

PROTECTION OF SURETIES.

§ 974. Notice to Creditor to Institute Action.

Any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract. [L. '54, p. 210, § 426; Cd. '81, § 644; 2 H. C., § 756.]

.See *infra*, § 9942 et seq., provisions for the release of sureties on official bonds.

Cited in 6 Wash. 304; 10 Wash. 428; 11 Wash. 5; 13 Wash. 332; 16 Wash. 551.

Neglect of Creditor to Proceed Against Surety After Notice: See *Remington's Digest*, Prin. & S., § 42.

This section has no application to a case where the principals on the bond are

nonresidents, and it is not made to appear that they have property in the state liable to attachment: *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. Rep. 156.

A mere oral request upon the part of the surety to sue, and a promise upon the

part of the creditor to comply, will not constitute a waiver of the notice in writing required by this section, when it appears that the demand for suit had been made some ten months before suit was actually brought by the creditor: *Kittridge v. Stegmier*, 11 Wash. 3, 39 Pac. 242.

The statute permitting sureties, in an action against them and their principals, to have the question of suretyship adjudicated is not a limitation of their rights as existing before its enactment, but is intended as an additional and more complete remedy than existed under the common law: *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119.

Unreasonable delay in suing the principal at the request of a surety is not shown where notice to sue was given some time in February and a waiver of the notice was given on the 3d of the next month: *Rotting v. Cleman*, 20 Wash. 116, 54 Pac. 935.

Sureties cannot escape liability because of the failure of the obligee to inform them of the existence of a judgment held by him against the principal, nor because of a representation by the obligee that their responsibility as sureties would be merely nominal: *Oregon Nat. Bank v. Gardner*, 13 Wash. 154, 42 Pac. 545.

NOTICE TO SUE.—If the payee forbear suing after request in writing by surety, as provided in this section, such delay will operate to discharge the lia-

bility: *Harman v. Hale*, 1 W. T. 422. A verbal request is insufficient: *Id.* Fraudulent conduct by payee which lulls the surety into groundless confidence and prevents him from obtaining indemnity is sufficient to discharge him: *Id.*

EXTENSION OF TIME.—If, after maturity of note, the holder thereof takes from the principals thereon a new note extending the time of payment of the debt, without the knowledge of the sureties, the latter are discharged: *First Nat. Bank v. Harris*, 7 Wash. 139, 34 Pac. 466.

If a contract for the extension of time of payment of a promissory note executed by two principal makers and their sureties is made with one of the principals only, such contract is valid, and if not assented to by the sureties, will result in their discharge: *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140.

The request of a surety upon a promissory note that further time be granted him for payment will not estop him from claiming a discharge, when a contract for extension has been entered into with his principal without his knowledge or consent: *Id.*

If a payee, at the time of extending the time of payment of a promissory note, reserves his rights against sureties thereon, the extension will not operate as a discharge, although the sureties may not have been notified: *Boston Nat. Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026.

§ 975. Surety Discharged.

If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon. [L. '54, p. 210, § 427; Cd. '81, § 645; 2 H. C., § 757.]

Cited in 13 Wash. 332; 16 Wash. 551.

§ 976. Trial of Suretyship.

When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issues made by the parties at the trial of the cause, or at any time before or after the trial, but such proceedings shall not affect the proceedings of the plaintiff. [L. '54, p. 210, § 427; Cd. '81, § 646; 2 H. C., § 758.]

Cited in 13 Wash. 332; 18 Wash. 409; 54 Wash. 68.

Adjudication of Suretyship: See Remington's Digest, Prin. & S., § 57; *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119; *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045; *Kirkland Land & Imp. Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043; *First Nat. Bank v. Fowler*, 54 Wash. 65, 102

Pac. 1038; *Empire State Surety Co. v. Ballou*, 66 Wash. 76, 118 Pac. 923; *Puget Sound Bridge etc. Co. v. Guardian Casualty & Guar. Co.*, 90 Wash. 96, 155 Pac. 771.

Under this and the next section and section 3582, defining a person "primarily liable to be one who is absolutely required to pay the same," debtors who

are expressly made principal contractors cannot avail themselves of the statute to determine equities between themselves, as against objection by the plaintiff: *First Nat. Bank v. Fowler*, 54 Wash. 65, 132 Pac. 1038.

This section is not a limitation of the rights of sureties as existing before its enactment, but is intended as an additional and more complete remedy than existed under the common law: *Denny v. Sayward*, 10 Wash. 422, 39 Pac. 119.

§ 977. Order to Exhaust Principal's Property.

If the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution upon and first exhaust the property of the principal before a levy shall be made upon the property of the surety, and the clerk shall indorse a memorandum of the order upon the execution. [L. '54, p. 211, § 429; Cd. '81, § 647; 2 H. C., § 759.]

Cited in 13 Wash. 332; 54 Wash. 68.

§ 978. Subrogation of Surety.

When any defendant surety in a judgment or special bail or replevin [bail], or surety in a delivery bond or replevin bond, or any person being surety in any bond whatever, has been or shall be compelled to pay any judgment, or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer or other surety upon his official bond shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied upon, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use. [L. '54, p. 211, § 430; Cd. '81, § 648; 2 H. C., § 760.]

Cited in 5 Wash. 696; 28 Wash. 34; 74 Wash. 547.

Right to Subrogation, in General: See *Remington's Digest*, Subrog., §§ 1—11.

This section preserves to the surety not only the judgment, but also the benefit of any levy made on the judgment debtor's property under an execution issued on the judgment: *Murray v. Meade*, 5 Wash. 693, 696, 32 Pac. 780.

When the subrogation of the surety on the bond under this section must be in severalty against the parties found liable:

Northern Pac. R. Co. v. Fidelity & Deposit Co., 74 Wash. 543, 134 Pac. 498. .

Subrogation of surety who pays judgment against principal. 68 L. R. A. 520, 523, 528, 534, 572, 581.

Payment of entire claim as condition of subrogation of surety. 9 A. L. R. 1600; 6 Ann. Cas. 204; Ann. Cas. 1917C, 1183.

Right of surety to subrogation on payment of debt due creditor as affected by fact of becoming surety for a consideration. Ann. Cas. 1913A, 565; Ann. Cas. 1918E, 660.

§ 979. Contribution Among Sureties.

Any one of several judgment defendants, and any one of several replevin bail having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the codefendants and cosureties to collect of them the ratable proportion each is equitably bound to pay. [L. '54, p. 211, § 431; Cd. '81, § 649; 2 H. C., § 761.]

As to right of surety to contribution from cosurety: See *Remington's Digest*, Prin. & S., §§ 63, 64; *Belond v. Guy*, 20

Wash. 160, 54 Pac. 995; *Shoemaker v. Stimson*, 16 Wash. 1, 47 Pac. 218; *Lindblom v. Johnston*, 92 Wash. 171, 158

Pac. 972; *Amalgamated Gold Mines Co. v. Ridgley*, 100 Wash. 99, 170 Pac. 355.

Measure of contribution among sureties who are bound in different amounts. 18 *Ann. Cas.* 853.

Liability of person becoming surety

at request of cosurety for contribution to latter. 16 *Ann. Cas.* 856.

Running of statute of limitations against contribution between sureties. 15 *Ann. Cas.* 1030; *Ann. Cas.* 1918E, 518; 18 *L. R. A. (N. S.)* 585; 42 *L. R. A. (N. S.)* 1131.

§ 980. Surety shall not Suffer Judgment.

No surety or his representative shall confess judgment or suffer judgment by default in any case where he is notified that there is a valid defense, if the principal will enter himself defendant to the action and tender to the surety or his representatives good security to indemnify him, to be approved by the court. [L. '54, p. 211, § 432; Cd. '81, § 650; 2 H. C., § 762.]

§ 981. Provisions Extended to Heirs of Sureties.

The foregoing provisions of this chapter shall extend to heirs, executors, and administrators of deceased persons, but the provisions of section 975, shall not operate against persons under legal disabilities. [L. '54, p. 211, § 433; Cd. '81, § 651; 2 H. C., § 763.]

CHAPTER XII.

DIVORCE AND ALIMONY.

§ 982. Grounds for Divorce.

Divorces may be granted by the superior court on application of the party injured, for the following causes:

1. When the consent to the marriage of the party applying for the divorce was obtained by force or fraud, and there has been no subsequent voluntary cohabitation.

2. For adultery on the part of the wife or of the husband, when unforgiven, and the application is made within one year after it shall have come to the knowledge of the party applying for a divorce.

3. Impotency.

4. Abandonment for one year.

5. Cruel treatment of either party by the other, or personal indignities rendering life burdensome.

6. Habitual drunkenness of either party, or the neglect or refusal of the husband to make suitable provisions for his family.

7. The imprisonment of either party in a state penal institution if complaint is filed during the term of such imprisonment.

8. A divorce may be granted to either or both of the parties in all cases where they have heretofore lived or shall hereafter live separate and apart for a period of five consecutive years or more. In all such cases, the divorce may be granted on the application of either husband or wife, and either husband or wife shall be considered the injured party and the period of five years or more shall be computed from the time the separation took place.

9. In case of incurable, chronic mania or dementia of either spouse having existed for five years or more, while under confinement by order

of a court of record, the court may, in its discretion, grant a divorce. [L. '21, p. 331, § 1; Cf. L. 17, p. 353, § 1; L. '54, p. 405, § 1; Cd. '81, § 2000; L. '86, p. 120, § 1; L. '91, p. 42, § 1; 2 H. C., § 764.]

Cited in 7 Wash. 534; 15 Wash. 493; 24 Wash. 140, 465; 32 Wash. 403; 38 Wash. 492; 45 Wash. 186; 46 Wash. 672; 57 Wash. 643, 644; 66 Wash. 228; 68 Wash. 422, 423; 74 Wash. 671; 75 Wash. 390; 95 Wash. 620; 97 Wash. 395, 478; 107 Wash. 126, 133.

Grounds: See Remington's Digest, Divorce, §§ 4—10.

Grounds Existing at Time of Marriage: Stanley v. Stanley, 24 Wash. 460, 64 Pac. 732; Turner v. Turner, 82 Wash. 518, 144 Pac. 689.

Personal Infirmities and Conditions Arising After Marriage—Habitual Drunkenness: Lee v. Lee, 3 Wash. 236, 28 Pac. 355; Page v. Page, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L. R. A. (N. S.) 914.

— Insanity or Other Mental Incompetency: Hickman v. Hickman, 1 Wash. 257, 24 Pac. 445, 22 Am. St. Rep. 148.

Cruelty: Lee v. Lee, 3 Wash. 236, 28 Pac. 355; Scoland v. Scoland, 4 Wash. 118, 29 Pac. 930; Denison v. Denison, 4 Wash. 705, 30 Pac. 1100; Branschied v. Branschied, 27 Wash. 368, 67 Pac. 812; McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119; Markowski v. Markowski, 44 Wash. 594, 87 Pac. 914; Morris v. Morris, 57 Wash. 465, 107 Pac. 186; Nordlund v. Nordlund, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59.

See, also, Stolze v. Stolze, 113 Wash. 128, 193 Pac. 213.

Inability to Live Together: McDougall v. McDougall, 5 Wash. 802, 32 Pac. 749; Colvin v. Colvin, 15 Wash. 490, 46 Pac. 1029; Stanley v. Stanley, 24 Wash. 460, 64 Pac. 732; Wheeler v. Wheeler, 38 Wash. 491, 80 Pac. 762; Bickford v. Bickford, 57 Wash. 639, 107 Pac. 837; Pierce v. Pierce, 68 Wash. 415, 123 Pac. 598; Maloney v. Maloney, 83 Wash. 656, 145 Pac. 631.

Where a wife was quarrelsome and such incompatibility of temperament existed between the parties that they could no longer live together as husband and wife, the court properly granted a divorce to the husband: Freeburn v. Freeburn, 107 Wash. 646, 182 Pac. 620.

Indignities: Sullivan v. Sullivan, 52 Wash. 160, 100 Pac. 321; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126; Bloom v. Bloom, 57 Wash. 23, 106 Pac. 197, 135 Am. St. Rep. 965; Sabot v. Sabot, 97 Wash. 395, 166 Pac. 624.

Failure to Support: Swain v. Swain, 45 Wash. 184, 87 Pac. 1126; Seigmund v. Seigmund, 46 Wash. 572, 90 Pac. 913;

Garland v. Garland, 66 Wash. 226, 119 Pac. 386; Merriman v. Merriman, 75 Wash. 389, 135 Pac. 1058.

Where abandonment had existed for more than a year and the husband had failed to support the wife for a length of time which indicated a settled purpose to disregard his duty, it is error to refuse the wife a divorce: Barnhart v. Barnhart, 109 Wash. 110, 186 Pac. 267.

Desertion: Clemans v. Western, 39 Wash. 290, 81 Pac. 824; Lamere v. Lamere, 41 Wash. 475, 84 Pac. 26; Buell v. Buell, 42 Wash. 277, 84 Pac. 821; Patterson v. Patterson, 45 Wash. 296, 88 Pac. 196; Maloney v. Maloney, 83 Wash. 656, 145 Pac. 631; Appleton v. Appleton, 97 Wash. 199, 166 Pac. 61.

In a husband's action for divorce, after decree for separate maintenance for his fault, his mere word is not sufficient to sustain the burden of proof that his offer to resume relations was made in good faith and not for the purpose of laying a foundation for his divorce action, where there was direct conflict in the testimony: Appleton v. Appleton, 107 Wash. 280, 181 Pac. 861.

Causes Deemed by Court Sufficient: Colvin v. Colvin, 15 Wash. 490, 46 Pac. 1029; Poler v. Poler, 32 Wash. 400, 73 Pac. 372; Johnsen v. Johnsen, 78 Wash. 423, 139 Pac. 189, 1200.

PARTIES, PROCESS AND INCIDENTAL PROCEEDINGS: See Remington's Digest, Divorce, §§ 18—21.

Process or Notice—Service of Publication: Goore v. Goore, 24 Wash. 139, 63 Pac. 1092.

Appearance: Ferry v. Ferry, 9 Wash. 239, 37 Pac. 431.

Abatement on Death of Party: Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 111 Am. St. Rep. 919, 5 Ann. Cas. 890, 1 L. R. A. (N. S.) 551; Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885.

Pleading—Complaint: See Remington's Digest, Divorce, §§ 22—25. Residence of parties: Luce v. Luce, 15 Wash. 608, 47 Pac. 21; Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278. Grounds for divorce: Denison v. Denison, 4 Wash. 705, 30 Pac. 1100; Burdick v. Burdick, 7 Wash. 533, 35 Pac. 415; Stanley v. Stanley, 24 Wash. 460, 64 Pac. 732; McAlister v. McAlister, 28 Wash. 613, 69 Pac. 119; Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812; Page v. Page, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054; 6 L. R. A. (N. S.) 914; Sortore v. Sortore, 70 Wash. 410, 126 Pac. 915; Glenn v. Glenn, 84 Wash. 215,

146 Pac. 619; *Appleton v. Appleton*, 97 Wash. 199, 166 Pac. 61.

Answer—Form and Requisites in General: *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355.

Replication or Reply: *Potter v. Potter*, 45 Wash. 401, 88 Pac. 625.

Supplemental Pleadings: *Scotland v. Scotland*, 4 Wash. 118, 29 Pac. 930.

Issues, Proof and Variance: See *Remington's Digest*, Divorce, §§ 27, 28; *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812; *Burdick v. Burdick*, 7 Wash. 533, 35 Pac. 415.

EVIDENCE: See *Remington's Digest*, Divorce, §§ 29—39.

Presumptions: *Denison v. Denison*, 4 Wash. 705, 30 Pac. 1100.

Admissibility—In General: *Poler v. Poler*, 32 Wash. 400, 73 Pac. 372.

— Conduct Incompatible With Conjugal Relation: *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355.

Weight and Sufficiency of Evidence—Marriage: *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84.

— Residence: *Van Alstine v. Van Alstine*, 23 Wash. 310, 63 Pac. 243; *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84.

— Testimony of Parties and Corroboration: *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355; *McAllister v. McAllister*, 28 Wash. 613, 69 Pac. 119; *Page v. Page*, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L. R. A. (N. S.) 914.

— Adultery: *Denison v. Denison*, 4 Wash. 705, 30 Pac. 1100; *Gust v. Gust*, 70 Wash. 695, 127 Pac. 292.

— Cruelty or Other Ill-treatment: *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355; *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21; *O'Sullivan v. O'Sullivan*, 35 Wash. 481, 77 Pac. 806; *Guerin v. Guerin*, 45 Wash. 486, 88 Pac. 928; *Sullivan v. Sullivan*, 52 Wash. 160, 100 Pac. 321; *Wilhelm v. Wilhelm*, 57 Wash. 157, 106 Pac. 627; *Taylor v. Taylor*, 59 Wash. 306, 109 Pac. 1019; *Gould v. Gould*, 63 Wash. 484, 115 Pac. 1041; *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15; *Ellis v. Ellis*, 77 Wash. 247, 137 Pac. 453; *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189, 1200; *Averbuch v. Averbuch*, 80 Wash. 257, 141 Pac. 701, Ann. Cas. 1916B, 873; *Willson v. Willson*, 84 Wash. 240, 146 Pac. 615; *Hilleware v. Hilleware*, 92 Wash. 99, 158 Pac. 999; *Stolz v. Stolz*, 96 Wash. 227, 164 Pac. 920.

See, also, *Stolze v. Stolze*, 113 Wash. 128, 193 Pac. 213.

It is error to refuse a divorce to a wife on the ground of cruel treatment where it is undisputed that the husband did not go anywhere with her, spent his evenings with friends and refused to talk to her.

adopting a course of studied indifference for six months to such an extent as to constitute cruel treatment: *Kreplin v. Kreplin*, 110 Wash. 135, 188 Pac. 14.

— Failure to Support or Other Neglect: *Page v. Page*, 43 Wash. 293, 86 Pac. 582, 117 Am. St. Rep. 1054, 6 L. R. A. (N. S.) 914; *Potts v. Potts*, 81 Wash. 27, 142 Pac. 448; *Snyder v. Snyder*, 95 Wash. 619, 164 Pac. 209.

— Temper, Acts or Conduct Incompatible With Conjugal Relation: *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598; *Spute v. Spute*, 74 Wash. 665, 134 Pac. 175; *Glenn v. Glenn*, 84 Wash. 215, 146 Pac. 619.

— Recriminatory Charges: *Denison v. Denison*, 4 Wash. 705, 30 Pac. 1100; *Long v. Long*, 38 Wash. 18, 80 Pac. 432; *Rogers v. Rogers*, 81 Wash. 502, 142 Pac. 1150; *Glenn v. Glenn*, 84 Wash. 215, 146 Pac. 619; *Nordlund v. Nordlund*, 97 Wash. 475, 166 Pac. 795, L. R. A. 1918A, 59.

For text treatment of "Divorce," see 9 B. C. L. 232.

What constitutes duress for which marriage may be annulled. 27 L. B. A. (N. S.) 803.

Impotency as ground for divorce. Ann. Cas. 1913A, 128.

Desertion as affected by element of remonstrance or resistance. 3 A. L. B. 503.

Wife's refusal to follow husband to new domicile as desertion. 5 Ann. Cas. 852.

Insanity as affecting divorce for desertion, living apart, or nonsupport. 4 A. L. B. 1333.

Driving innocent spouse from home as constituting desertion. 21 Ann. Cas. 280.

Desertion as affected by intimations of a possible consent to the renewal of marital relations in the future. 12 A. L. B. 1391.

Habits or course of conduct of spouse as cruelty warranting divorce. Ann. Cas. 1918B, 480, 500.

Abuse by relatives of other spouse as cruelty constituting ground for divorce. 3 A. L. B. 803; Ann. Cas. 1914B, 633; Ann. Cas. 1916E, 209.

Refusal of marital intercourse as cruelty. 12 Ann. Cas. 547; L. B. A. 1915B, 772.

Concealment of unchastity or prior marriage as ground for divorce. Ann. Cas. 1914C, 1291.

Veneral disease as ground for divorce or separation. 5 A. L. B. 1016; 8 A. L. B. 1540.

Concealment of pregnancy as ground for divorce. 13 A. L. R. 1435.

Drunkenness as ground for divorce. Ann. Cas. 1912C, 655; 34 L. R. A. 449.

Conviction and sentence as ground for divorce. 31 L. R. A. 515.

Insanity as a ground for divorce. 34 L. R. A. 161; 39 L. R. A. 264.

§ 982-1. Nonsupport—Stay of Proceedings Pending Prosecution.

When, in the opinion of the court, the previous or present conduct of either of the parties to a divorce action shows a probable violation of any of the criminal laws of the state relative to nonsupport, he may in his discretion, refuse to grant an interlocutory order until the suspected party is prosecuted and finally found guilty or innocent. [L. '21, p. 332, § 1.]

§ 983. Annulment of Marriage.

When there is any doubt as to the facts rendering a marriage void, either party may apply for, and on proof obtain, a decree of nullity of marriage. [Cf. L. '54, p. 406, § 2; Cd. '81, § 2001; L. '91, p. 42, § 2; 2 H. C., § 765.]

Cited in 50 Wash. 216; 70 Wash. 413; 104 Wash. 229; 111 Wash. 290.

Under this section a divorced woman who remarries within six months may maintain the action where she did not know that the marriage was illegal, and was less in the wrong than the husband, who knew the facts as to the divorce: Sortore v. Sortore, 70 Wash. 410, 126 Pac. 915.

The statute providing for summons by publication against nonresidents in actions for divorce authorizes such summons in actions for annulment of the marriage, the legislature having invariably treated the two actions as belonging to one sub-

ject and established the same practice in both; and a legislative act treating of the same together does not embrace more than one subject, annulment being germane to a title which referred only to divorce: Piper v. Piper, 46 Wash. 671, 91 Pac. 189.

Where it appears that a woman entered into a contract of marriage in good faith without knowledge that the man was incompetent by reason of having another wife, the court has power to annul the marriage without regard to the form of action commenced by her for redress: Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900.

§ 984. Resident may Apply.

Any person who has been a resident of the state for one year may file his or her complaint for a divorce or decree of nullity of marriage, under oath, in the superior court of the county where he or she may reside, and like proceedings shall be had thereon as in civil cases. [L. '54, p. 406, § 3; Cd. '81, § 2002; 2 H. C., § 766.]

Cited in 7 Wash. 534; 14 Wash. 116; 23 Wash. 311; 30 Wash. 640; 46 Wash. 672; 50 Wash. 216; 55 Wash. 349; 69 Wash. 132; 87 Wash. 152.

This section has no application to actions for separate maintenance: State ex rel. Lloyd v. Superior Court, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387.

Verification of Pleadings: See Remington's Digest, Divorce, § 26; Burdick v. Burdick, 7 Wash. 533, 35 Pac. 415.

JURISDICTION AND VENUE—Jurisdiction of Cause of Action—Domicile or

Residence of Parties: See Remington's Digest, Divorce, § 16; Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049; Luce v. Luce, 15 Wash. 608, 47 Pac. 21; Van Alstine v. Van Alstine, 23 Wash. 310, 63 Pac. 243; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862; Kane v. Kane, 35 Wash. 517, 77 Pac. 842; Hill v. Hill, 87 Wash. 150, 151 Pac. 268.

Venue: See Remington's Digest, Divorce, § 17; Pfueller v. Superior Court, 14 Wash. 115, 44 Pac. 123; Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193; State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31; Kane v. Kane, 35 Wash. 517, 77 Pac. 842.

§ 985. Proof Required.

When the defendant does not answer, or, answering, admits the allegations in the complaint, the court shall require proof before granting a divorce or a decree of nullity. [L. '54, p. 406, § 4; Cd. '81, § 2003; 2 H. C., § 767.]

Cited in 23 Wash. 312; 46 Wash. 672.

§ 986. Defendant may File Cross-complaint.

The defendant may, in addition to his or her answer, file [a] cross-complaint for divorce, and the court may, in such case, grant a divorce, if any, in favor of either party, or as an [on] application of both. [L. '54, p. 406, § 5; Cd. '81, § 2004; 2 H. C., § 768.]

Cited in 23 Wash. 312; 34 Wash. 646.

DEFENSES: See Remington's Digest, Divorce, §§ 11—15.

Provocation: Scoland v. Scoland, 4 Wash. 118, 29 Pac. 930; Blurock v. Blurock, 4 Wash. 495, 30 Pac. 637; Richardson v. Richardson, 36 Wash. 272, 78 Pac. 920.

Condonation—Acts Constituting Condonation: Denison v. Denison, 4 Wash. 705, 30 Pac. 1100; Briggs v. Briggs, 56 Wash. 580, 106 Pac. 126; Egbers v. Egbers, 79 Wash. 72, 139 Pac. 767; Rogers v. Rogers, 81 Wash. 502, 142 Pac. 1150.

The fact of living with her husband until she brought suit for divorce does not operate as a condonation of conduct amounting to cruelty which consisted of a series of acts and continued course of conduct: Quient v. Quient, 105 Wash. 315, 177 Pac. 779.

— **Revival of Offenses Condoned:** Denison v. Denison, 4 Wash. 705, 30 Pac. 1100; Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935.

Recrimination—In General: Denison v. Denison, 4 Wash. 705, 30 Pac. 1100.

See, also, McMillan v. McMillan, 113 Wash. 250, 193 Pac. 673.

— **Grounds:** Denison v. Denison, 4 Wash. 705, 30 Pac. 1100.

Cross-complaint: See Remington's Di-

gest, Divorce, § 23-1; Powell v. Powell, 66 Wash. 561, 119 Pac. 1119.

In an action for divorce, affirmative relief may be granted on a cross-complaint for separate maintenance, as arising out of or relating to the subject matter of the original action: Larson v. Larson, 106 Wash. 305, 179 Pac. 841.

Condonation of matrimonial offense without cohabitation as a defense: 6 A. L. R. 1157.

Condonation as a defense to divorce action. 13 Ann. Cas. 216; Ann. Cas. 1912C, 3; Ann. Cas. 1918A, 651; 5 L. R. A. (N. S.) 729; 23 L. R. A. (N. S.) 240; 39 L. R. A. (N. S.) 1121, 1126.

Condonation of cruel treatment as defense in divorce action. 14 A. L. R. 931.

Right of recrimination as affected by comparative gravity of offenses. 6 Ann. Cas. 171; Ann. Cas. 1917A, 177.

Subsequent adultery as recriminatory defense to desertion or cruelty. L. R. A. 1915E, 972.

Desertion or cruelty as recriminatory defense to subsequent adultery. 39 L. R. A. (N. S.) 1135.

Collusion as bar to divorce. 2 A. L. R. 699; 10 Ann. Cas. 819; Ann. Cas. 1915C, 80.

§ 987. Both Parties Deemed Applying.

Both parties shall be considered as applying for a divorce when the complaints of both are filed in the same action, and when the defendant, by his or her cross-complaint, also applies for divorce. [Cf. L. '54, p. 406, § 6; Cd. '81, § 2005; L. '91, p. 42, § 3; 2 H. C., § 769.]

Where both parties sustained their case, it is immaterial to which party the court granted the divorce as the less blame-worthy of the two: Weidert v. Weidert, 106 Wash. 410, 180 Pac. 135.

§ 988. Interlocutory Orders—Powers of Court—Appeal Within Ninety Days.

Pending the action for the divorce, the court, or judge thereof, may make, and by attachment enforce, such orders for the disposition of the

persons, property and children of the parties as may be deemed right and proper, and such orders relative to the expenses of such action as will insure to the wife an efficient preparation of her case, and a fair and impartial trial thereof; at the conclusion of the trial the court must make and file findings of fact and conclusions of law. If it determines that no divorce shall be granted final judgment must thereupon be entered accordingly. If, however, the court determines that either party, or both, is entitled to a divorce an interlocutory order must be entered accordingly, declaring that the party in whose favor the court decides is entitled to a decree of divorce as hereinafter provided; which order shall also make all necessary provisions as to alimony, costs, care, custody, support and education of children and custody, management and division of property, which order as to the custody, management and division of property shall be final and conclusive upon the parties subject only to the right of appeal; but in no case shall such interlocutory order be considered or construed to have the effect of dissolving the marriage of the parties to the action, or of granting a divorce, until final judgment is entered: Provided, that the court shall, at all times, have the power to grant any and all restraining orders that may be necessary to protect the parties and secure justice. Appeals may be taken from such interlocutory order within ninety days after its entry. [L. '21, p. 332, § 2. Cf. L. '54, p. 406, § 7; Cd. '81, § 2006; L. '91, p. 43, § 4; 2 H. C., § 770.]

Cited in 4 Wash. 182; 21 Wash. 199; 22 Wash. 264; 42 Wash. 596; 47 Wash. 318; 49 Wash. 499, 501, 505; 55 Wash. 95, 378; 58 Wash. 99; 65 Wash. 311; 67 Wash. 478; 69 Wash. 282; 74 Wash. 285; 83 Wash. 673; 93 Wash. 351; 103 Wash. 571; 105 Wash. 401, 497, 499; 106 Wash. 306.

FEES AND COSTS—Counsel Fees and Expenses of Wife: See Remington's Digest, Divorce, § 56; Trumble v. Trumble, 26 Wash. 133, 66 Pac. 124; Hillman v. Hillman, 42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135; Pringle v. Pringle, 55 Wash. 93, 104 Pac. 135; Sullivan v. Sullivan, 52 Wash. 160, 100 Pac. 321; Van Gelder v. Van Gelder, 61 Wash. 146, 112 Pac. 86; Jones v. Jones, 72 Wash. 517, 130 Pac. 1125; Pierce v. Pierce, 68 Wash. 415, 123 Pac. 598; Powell v. Powell, 66 Wash. 561, 119 Pac. 1119; Gallagher v. Gallagher, 65 Wash. 310, 118 Pac. 4.

Fees and Costs, Rights of Attorneys on Settlement: Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474, 3 A. L. R. 1104.

Payment and Remedies for Collection of Costs—Liabilities of Husband or Wife: See Remington's Digest, Divorce, § 56-1; Humphries v. Cooper, 55 Wash. 376, 104 Pac. 606, 133 Am. St. Rep. 1036.

Temporary Alimony—Application and Proceedings Thereon: See Remington's Digest, Divorce, § 62; State ex rel. Clark v. Neal, 19 Wash. 642, 54 Pac. 31; Gust v. Gust, 69 Wash. 220, 124 Pac. 504; (reversed on rehearing): Griffith v. Griffith, 71 Wash. 56, 127 Pac. 585.

Grounds and Amount: See Remington's Digest, Divorce, §§ 62-1, 62-2; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095.

Allowance for Counsel Fees and Expenses—Nature and Right in General: See Remington's Digest, Divorce, § 63; Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049; Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923; Trumble v. Trumble, 26 Wash. 133, 66 Pac. 124; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; Gust v. Gust, 78 Wash. 414, 139 Pac. 228; Gibson v. Gibson, 67 Wash. 474, 122 Pac. 15; Griffith v. Griffith, 74 Wash. 284, 133 Pac. 443.

This section rests the matter of allowances for attorney's fees and suit money in an action for divorce wholly in the discretion of the court, which will not be disturbed in the absence of abuse: Fitzpatrick v. Fitzpatrick, 105 Wash. 394, 177 Pac. 790.

Proceedings for: See Remington's Digest, Divorce, §§ 64—67-1.

— **Condition of Cause:** Thorndike v. Thorndike, 1 W. T. 175.

— **Defenses and Objections:** Bachelor v. Bachelor, 30 Wash. 203, 70 Pac. 491; Dilatush v. Dilatush, 102 Wash. 504, 173 Pac. 431.

— **Application and Proceedings Thereon:** State ex rel. Trumbull v. Sachs, 3 Wash. 371, 28 Pac. 540.

— **Amount:** Madison v. Madison, 1 W. T. 60; Thorndike v. Thorndike, 1 W.

T. 175; Colvin v. Colvin, 15 Wash. 490, 46 Pac. 1029; Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923; Holcomb v. Holcomb, 49 Wash. 498, 95 Pac. 1091; Sullivan v. Sullivan, 49 Wash. 508, 95 Pac. 1095; State ex rel. Arthur v. Superior Court, 58 Wash. 97, 107 Pac. 876; Willson v. Willson, 84 Wash. 240, 147 Pac. 1137; State ex rel. Clark v. Superior Court, 90 Wash. 80, 155 Pac. 398; Dober v. Dober, 103 Wash. 283, 174 Pac. 14.

See, also, Yoder v. Yoder, 105 Wash. 491, 178 Pac. 474, 3 L. R. A. 1104; Pierce v. Pierce, 107 Wash. 125, 181 Pac. 24; Curtis v. Curtis, 110 Wash. 644, 188 Pac. 771; Brewster v. Brewster, 113 Wash. 551, 194 Pac. 542.

— **Modification, Vacation or Setting Aside of Order:** State ex rel. Arthur v. Superior Court, 58 Wash. 97, 107 Pac. 876; Dolby v. Dolby, 93 Wash. 350, 160 Pac. 950.

Appeal: See Remington's Digest, Divorce, § 93; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; McAllister v. McAllister, 28 Wash. 613, 69 Pac. 119; Mahneke v. Mahneke, 43 Wash. 425, 86 Pac. 645; Cain v. Cain, 90 Wash. 402, 156 Pac. 403.

Effect of Appeal: See Remington's Digest, Divorce, § 94; State ex rel. Holcomb v. Yakey, 48 Wash. 419, 93 Pac. 928; (reversed on rehearing): Griffith v. Griffith, 71 Wash. 56, 127 Pac. 585; Lewis v. Lewis, 83 Wash. 671, 145 Pac. 980.

§ 988-1. Final Decree of Divorce.

At any time after six months have expired, after the entry of such interlocutory order, and upon the conclusion of an appeal, if taken therefrom, the court, on motion of either party, shall confirm such order and enter a final judgment granting an absolute divorce, from which no appeal shall lie. [L. '21, p. 333, § 2.]

§ 989. Decree—Disposition of Property.

In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage. [Cf. L. '54, p. 406, § 8; Cd. '81, § 2007; L. '91, p. 43, § 5; 2 H. C., § 771.]

Cited in 2 Wash. 419, 443; 21 Wash. 32, 200; 26 Wash. 217; 27 Wash. 371; 34 Wash. 237; 36 Wash. 278; 38 Wash. 606; 43 Wash. 424, 426; 46 Wash. 465; 47 Wash. 201; 49 Wash. 499, 501; 50 Wash. 216, 223, 224, 302; 63 Wash. 127; 67 Wash. 689; 69 Wash. 132, 282; 75 Wash. 190;

— **Liability on Stay Bond:** See Remington's Digest, Divorce, § 94-1; Surry v. Surry, 84 Wash. 269, 146 Pac. 613.

Costs: See Remington's Digest, Divorce, § 95; Lee v. Lee, 3 Wash. 236, 28 Pac. 355.

Enforcement of Order or Decree—Striking Out Answer on Nonpayment: See Remington's Digest, Divorce, § 85; Bachelor v. Bachelor, 30 Wash. 639, 71 Pac. 193; State ex rel. Crombie v. Superior Court, 85 Wash. 607, 148 Pac. 882, L. R. A. 1915E, 567.

Liability of husband for counsel fees incurred by wife in divorce action. 15 Ann. Cas. 21; Ann. Cas. 1917A, 689, 702; 24 L. R. A. 629.

Power of court to allow attorney's fees in divorce action after reconciliation of parties. Ann. Cas. 1913A, 798; 36 L. R. A. (N. S.) 1001.

Earning capacity of husband as basis for determining alimony pendente lite. 6 A. L. R. 192.

Power to issue writ of ne exeat to prevent decree for alimony from becoming ineffective. 8 A. L. R. 327.

Right to impose fine for failure to pay alimony. 14 A. L. R. 717.

Right to counsel fees upon application to increase or decrease alimony after divorce. 14 A. L. R. 613.

77 Wash. 135, 137; 78 Wash. 421; 84 Wash. 4; 105 Wash. 397; 106 Wash. 306, 318.

Scope and Extent of Relief—Absolute Divorce: See Remington's Digest, Divorce, § 44; Smith's Estate, In re, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573; McDonall v. McDonall, 95 Wash. 553, 164 Pac. 204.

Amendment, Correction or Modification: See Remington's Digest, Divorce, § 46; State ex rel. Tufton v. Superior Court, 46 Wash. 395, 90 Pac. 258; State ex rel. Jones v. Superior Court, 78 Wash. 372, 139 Pac. 42.

Vacating or Setting Aside: See Remington's Digest, Divorce, §§ 45, 47—49.

By Default or Pro Confesso—Opening or Setting Aside: McCord v. McCord, 24 Wash. 529, 64 Pac. 748; Metler v. Metler, 32 Wash. 494, 73 Pac. 535; Tausick v. Tausick, 52 Wash. 301, 100 Pac. 757; Chaney v. Chaney, 56 Wash. 145, 105 Pac. 229.

Vacating—In General: Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 111 Am. St. Rep. 919, 5 Ann. Cas. 890, 1 L. R. A. (N. S.) 551; Scammon v. Scammon, 66 Wash. 217, 119 Pac. 383; Hendrix v. Hendrix, 101 Wash. 535, 172 Pac. 819.

— Fraud or Collusion: McDonald v. McDonald, 34 Wash. 293, 75 Pac. 865; State ex rel. Weidert v. Superior Court, 36 Wash. 81, 78 Pac. 198; Tausick v. Tausick, 52 Wash. 301, 100 Pac. 757; Graham v. Graham, 54 Wash. 70, 102 Pac. 891, 18 Ann. Cas. 999, L. R. A. 1917B. 405; Chaney v. Chaney, 56 Wash. 145, 105 Pac. 229; Robinson v. Robinson, 77 Wash. 663, 138 Pac. 288, 51 L. R. A. (N. S.) 534; Anderson v. Anderson, 97 Wash. 202, 166 Pac. 60.

See, also, Howell v. Dunning, 109 Wash. 591, 187 Pac. 365, 188 Pac. 30.

Estoppel to Attack Decree: Ferry v. Ferry, 9 Wash. 239, 37 Pac. 431; Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Eckert v. Smitt, 60 Wash. 23, 110 Pac. 635.

Actions to Vacate or Set Aside: Turner v. Turner, 33 Wash. 118, 74 Pac. 55; Winstone v. Winstone, 40 Wash. 272, 82 Pac. 268; Dwyer v. Nolan, 40 Wash. 459, 82 Pac. 746, 111 Am. St. Rep. 919, 5 Ann. Cas. 890, 1 L. R. A. (N. S.) 551; Tausick v. Tausick, 52 Wash. 301, 100 Pac. 757; Faulkner v. Faulkner, 90 Wash. 74, 155 Pac. 404; Cooper v. Cooper, 92 Wash. 87, 158 Pac. 1007; Anderson v. Anderson, 97 Wash. 202, 166 Pac. 60.

Conclusiveness: See Remington's Digest, Divorce, §§ 50, 50-1. Collateral attack: Peyton v. Peyton, 28 Wash. 278, 68 Pac. 757; Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945; Appleton v. Appleton, 97 Wash. 199, 166 Pac. 61. Merger and bar of causes of action and defenses: Stay v. Stay, 54 Wash. 534, 102 Pac. 420; Stay v. Stay, 59 Wash. 651, 110 Pac. 540; Schultz v. Christopher, 65 Wash. 496, 118 Pac. 629, 38 L. R. A. (N. S.) 780.

See, also, Hilleware v. Hilleware, 104 Wash. 361, 176 Pac. 330; Fullington v. Fullington, 106 Wash. 239, 179 Pac. 843.

The denial of a divorce to a husband upon the ground that he was at fault and

had caused the separation is conclusive and a bar to a second action by him upon the ground of estrangement and inability to live together: Pierce v. Pierce, 107 Wash. 125, 181 Pac. 24.

ALIMONY, ALLOWANCES AND DISPOSITION OF PROPERTY—Power to Make Allowance or Award: See Remington's Digest, Divorce, § 57; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736.

Jurisdiction of Person and Property: See Remington's Digest, Divorce, § 58; Carney v. Simpson, 15 Wash. 227, 46 Pac. 233; State ex rel. Smith v. McClinton, 17 Wash. 45, 48 Pac. 740; Griffith v. Griffith, 71 Wash. 56, 127 Pac. 585.

See, also, Stolze v. Stolze, 113 Wash. 128, 193 Pac. 213.

In an action brought by the wife for separate maintenance, the court has jurisdiction to determine the status of their real estate, under this section: Branscheid v. Branscheid, 27 Wash. 368, 67 Pac. 812.

In an action for the annulment of a marriage entered into in good faith by the woman without knowledge that the defendant had another wife, the court had jurisdiction to dispose of the property as in the case of a divorce, under this section: Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900.

Sufficiency of Service of Process or Appearance: See Remington's Digest, Divorce, § 59; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; Goore v. Goore, 24 Wash. 139, 63 Pac. 1092.

Sufficiency of Allegations and Prayers in Pleadings: See Remington's Digest, Divorce, § 60; Philbrick v. Andrews, 8 Wash. 7, 35 Pac. 358; Goore v. Goore, 24 Wash. 139, 63 Pac. 1092; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; Ambrose v. Moore, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103; Carpenter v. Brackett, 57 Wash. 460, 107 Pac. 359.

Permanent Alimony—Nature and Right in General: See Remington's Digest, Divorce, § 68; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; Herrett v. Herrett, 80 Wash. 474, 141 Pac. 1158; Spute v. Spute, 74 Wash. 665, 134 Pac. 175; Miller v. Miller, 103 Wash. 569, 175 Pac. 295.

See, also, Larson v. Larson, 106 Wash. 305, 179 Pac. 841.

Defenses and Objections: See Remington's Digest, Divorce, §§ 68-1—74.

In General: Van Gelder v. Van Gelder, 61 Wash. 146, 112 Pac. 86.

§ 69. After Judgment or Decree of Divorce: Adams v. Abbott, 21 Wash. 29, 56 Pac. 931.

§ 70. Stipulations and Agreements of Parties: Turner v. Turner, 33 Wash. 118,

74 Pac. 55; *Timm v. Timm*, 34 Wash. 228, Cas. 1914D, 885; *Schirmer v. Schirmer*, 84 75 Pac. 879; *Richardson v. Richardson*, 36 Wash. 272, 78 Pac. 920; *Glenn v. Glenn*, 84 Wash. 215, 146 Pac. 619.

See, also, *Howell v. Dunning*, 109 Wash. 591, 187 Pac. 365, 188 Pac. 30.

§ 71. Amount: *Tierney v. Tierney*, 1 W. T. 568; *Taylor v. Taylor*, 59 Wash. 306, 109 Pac. 1019; *Cooper v. Cooper*, 64 Wash. 219, 116 Pac. 673; *Masterson v. Ogden*, 78 Wash. 644, 139 Pac. 654, Ann. Wash. 1, 145 Pac. 981.

See, also, *Weidert v. Wiedert*, 106 Wash. 410, 180 Pac. 135.

§ 72. Award of Gross Sum: *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; *Cave, In re*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736.

§ 73. Award of Specific Property: *Prouty v. Prouty*, 4 Wash. 174, 29 Pac. 1049.

§ 73-1. Judgment or Decree: *Nelson v. McPhee*, 59 Wash. 103, 109 Pac. 305.

§ 74. — Lien for Amount Awarded: *Madison v. Madison*, 1 W. T. 60; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; *Trumble v. Trumble*, 26 Wash. 132, 66 Pac. 124; *Kane v. Kane*, 35 Wash. 517, 77 Pac. 842.

Vacation or Modification: See *Remington's Digest, Divorce*, §§ 75-77. Modification: *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *Beers v. Beers*, 74 Wash. 458, 133 Pac. 605; *Herrett v. Herrett*, 80 Wash. 474, 141 Pac. 1158; *Worden v. Worden*, 84 Wash. 614, 147 Pac. 403; *Van Horst v. Van Horst*, 96 Wash. 658, 165 Pac. 886; *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721; *Anderson v. Anderson*, 97 Wash. 202, 166 Pac. 60. Vacating or setting aside decree: *Mahncke v. Mahncke*, 43 Wash. 425, 86 Pac. 645. Effect of husband's remarriage: *State ex rel Brown v. Brown*, 31 Wash. 397, 72 Pac. 86, 62 L. R. A. 974.

See, also, *Holter v. Holter*, 108 Wash. 519, 185 Pac. 598.

Disposition of Property: See *Remington's Digest, Divorce*, §§ 78-82.

Rights in General: *State ex rel. Trumbull v. Sachs*, 3 Wash. 371, 28 Pac. 540; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931; *Carney v. Simpson*, 15 Wash. 277, 46 Pac. 233; *Cave, In re*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530; *Catton v. Catton*, 69 Wash. 130, 124 Pac. 387; *Stone v. Bayley*, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N. S.) 429; *Brogna v. Brogna*, 67 Wash. 687, 122 Pac. 1; *Gibson v. Gibson*,

67 Wash. 474, 122 Pac. 15; *Thompson v. Thompson*, 100 Wash. 671, 171 Pac. 1005.

See, also, *Stolze v. Stolze*, 113 Wash. 128, 193 Pac. 213.

§ 79. Recovery of Dower by Wife: *Madison v. Madison*, 1 W. T. 60.

§ 80. Division of Property: *Madison v. Madison*, 1 W. T. 60; *Cave, In re*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; *Webster v. Webster*, 2 Wash. 417, 26 Pac. 864; *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267; *O'Sullivan v. O'Sullivan*, 35 Wash. 481, 77 Pac. 806; *Richardson v. Richardson*, 36 Wash. 272, 78 Pac. 920; *Richardson v. Richardson*, 44 Wash. 431, 87 Pac. 511; *Cozard v. Cozard*, 48 Wash. 124, 92 Pac. 935; *Kolbe v. Kolbe*, 50 Wash. 298, 97 Pac. 236; *Dodds v. Dodds*, 51 Wash. 293, 98 Pac. 748; *Sullivan v. Sullivan*, 52 Wash. 160, 100 Pac. 321; *Leaser v. Leaser*, 53 Wash. 135, 101 Pac. 705; *Powell v. Powell*, 66 Wash. 561, 119 Pac. 1119; *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189, 1200; *Hale v. Hale*, 76 Wash. 34, 135 Pac. 481; *Mullin v. Mullin*, 65 Wash. 532, 118 Pac. 638; *Gust v. Gust*, 78 Wash. 414, 139 Pac. 228; *Schirmer v. Schirmer*, 84 Wash. 1, 145 Pac. 891; *Willson v. Willson*, 84 Wash. 240, 146 Pac. 615; *Williams v. Williams*, 86 Wash. 113, 149 Pac. 342; *McDonall v. McDonall*, 95 Wash. 553, 164 Pac. 204; *Cross v. Cross*, 98 Wash. 651, 168 Pac. 168; *Hendrix v. Hendrix*, 101 Wash. 535, 172 Pac. 819.

See, also, *Quient v. Quient*, 105 Wash. 315, 177 Pac. 779; *Freeburn v. Freeburn*, 107 Wash. 646, 182 Pac. 620; *Curtis v. Curtis*, 110 Wash. 644, 188 Pac. 771; *Brewster v. Brewster*, 113 Wash. 551, 194 Pac. 542; *Larson v. Larson*, 113 Wash. 564, 193 Pac. 579; *Fitzpatrick v. Fitzpatrick*, 105 Wash. 394, 177 Pac. 790; *Folsom v. Folsom*, 106 Wash. 315, 179 Pac. 847; *Peterson v. Peterson*, 113 Wash. 317, 194 Pac. 380.

§ 81. All Property to the Wife: *Carney v. Simpson*, 15 Wash. 227, 46 Pac. 233; *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267; *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054; *Ramsdell v. Ramsdell*, 47 Wash. 444, 92 Pac. 278; *Miller v. Miller*, 38 Wash. 605, 80 Pac. 816; *Mitchell v. Mitchell*, 39 Wash. 431, 81 Pac. 913; *Clemans v. Western*, 39 Wash. 290, 81 Pac. 824; *Markowski v. Markowski*, 44 Wash. 594, 87 Pac. 914; *Leaser v. Leaser*, 53 Wash. 135, 101 Pac. 705.

§ 83. Judgment or Decree: *Maynard v. Valentine*, 2 W. T. 3, 3 Pac. 195; *McSorley v. Hill*, 2 Wash. 638, 27 Pac. 552; *Mitchell v. Mitchell*, 39 Wash. 431, 81 Pac. 913; *Budlong v. Budlong*, 43 Wash. 359, 86 Pac. 648.

Property not Disposed of by Judgment or Decree of Divorce: See *Remington's*

Digest, Divorce, § 109; *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931; *Buckley v. Buckley*, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900; *James v. James*, 51 Wash. 60, 97 Pac. 1113; *Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005; *Hicks v. Hicks*, 69 Wash. 627, 125 Pac. 946.

Conclusiveness of Adjudication: See *Remington's Digest*, Divorce, § 83; *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *King v. Miller*, 10 Wash. 174, 38 Pac. 1020; *Herrett v. Herrett*, 80 Wash. 474, 141 Pac. 1158; *Loeper v. Loeper*, 81 Wash. 454, 142 Pac. 1138.

See, also, *Hilleware v. Hilleware*, 104 Wash. 361, 176 Pac. 330.

Lien of Decree: See *Remington's Digest*, Divorce, § 84; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Seattle Brewing & Malting Co. v. Talley*, 59 Wash. 168, 109 Pac. 600; *Smith v. Smith*, 63 Wash. 288, 115 Pac. 166.

ENFORCEMENT OF JUDGMENT—Attachment of the Person: See *Remington's Digest*, Divorce, § 86; *State ex rel. Smith v. Smith*, 17 Wash. 430, 50 Pac. 52; *State ex rel. Smith v. McClinton*, 17 Wash. 45, 48 Pac. 740; *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350; *Van Alstine, In re*, 21 Wash. 194, 57 Pac. 348; *Cave, In re*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; *Poland v. Poland*, 63 Wash. 597, 116 Pac. 2; *McGill v. McGill*, 67 Wash. 303, 121 Pac. 469; *Croft v. Croft*, 77 Wash. 620, 138 Pac. 6; *Surry v. Surry*, 78 Wash. 370, 139 Pac. 44; *Miller v. Miller*, 103 Wash. 569, 175 Pac. 295.

Failure to obey an order modifying a decree of divorce subjects the party to a judgment for contempt, where the court had jurisdiction and the order was unappealed from: *Holter v. Holter*, 108 Wash. 519, 185 Pac. 598.

— **Conditions Precedent:** See *Remington's Digest*, Divorce, § 87; *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350.

— **Defenses to Contempt Proceedings:** See *Remington's Digest*, Divorce, § 88; *State ex rel. Smith v. McClinton*, 17 Wash. 45, 48 Pac. 740; *State ex rel. Smith v. Smith*, 17 Wash. 430, 50 Pac. 52; *Cave, In re*, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653; *Croft v. Croft*, 77 Wash. 620, 138 Pac. 6; *McGill v. McGill*, 67 Wash. 303, 121 Pac. 469; *Boyle v. Boyle*, 74 Wash. 529, 133 Pac. 1009; *Gust v. Gust*, 78 Wash. 412, 139 Pac. 199; *Jones v. Jones*, 75 Wash. 50, 134 Pac. 528; *Crombie v. Crombie*, 88 Wash. 520, 152 Pac. 306; *Smiley v. Smiley*, 99 Wash. 577, 169 Pac. 962; *Wells v. Wells*, 99 Wash. 492, 169 Pac. 970;

Ruge v. Ruge, 97 Wash. 51, 165 Pac. 1063, L. R. A. 1917F, 721.

See, also, *Snook v. Snook*, 110 Wash. 310, 188 Pac. 502, 9 A. L. R. 262.

Proceedings: See *Remington's Digest*, Divorce, §§ 89—92. Order or judgment: *State ex rel. Geiger v. Geiger*, 20 Wash. 181, 54 Pac. 1129; *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535. Purging contempt: *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350. Actions on judgment or decree: *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; Actions to set aside fraudulent conveyances: *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267.

CUSTODY AND SUPPORT OF CHILDREN—Power to Control or Award in General: See *Remington's Digest*, Divorce, § 96; *Goore v. Goore*, 24 Wash. 139, 63 Pac. 1092; *Broгна v. Broгна*, 67 Wash. 687, 122 Pac. 1; *State ex rel. Clark v. Superior Court*, 90 Wash. 80, 155 Pac. 398; *Clark v. Clark*, 92 Wash. 450, 159 Pac. 702.

Jurisdiction of Person or Child: See *Remington's Digest*, Divorce, § 97; *State v. Rhoades*, 29 Wash. 61, 69 Pac. 389; *Schoennauer v. Schoennauer*, 77 Wash. 132, 137 Pac. 325.

Condition or Disposition of Cause—After Judgment or Decree of Divorce: See *Remington's Digest*, Divorce, § 98; *King v. Miller*, 10 Wash. 274, 37 Pac. 1020; *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817; *Lowe v. Lowe*, 53 Wash. 50, 101 Pac. 704.

Stipulations and Agreements of Parties: See *Remington's Digest*, Divorce, § 99; *Ackley v. Burchard*, 11 Wash. 128, 39 Pac. 372; *Curtis v. Curtis*, 46 Wash. 664, 91 Pac. 188.

A separation agreement providing for the custody and support of children and that the parties should not interfere with each other is avoided where the husband thereafter interfered with the wife, making threats to kill her; and the court in granting a divorce is not bound by the separation agreement: *Badolato v. Badolato*, 104 Wash. 194, 176 Pac. 24.

Grounds for Award of Custody: See *Remington's Digest*, Divorce, § 100; *Fields v. Fields*, 2 Wash. 441, 27 Pac. 267; *Kentzler v. Kentzler*, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21; *Smith v. Smith*, 15 Wash. 237, 46 Pac. 234; *Richardson v. Richardson*, 36 Wash. 272, 78 Pac. 920; *Kane v. Miller*, 40 Wash. 125, 82 Pac. 177; *Guerin v. Guerin*, 45 Wash. 486, 88 Pac. 928; *Curtis v. Curtis*, 46 Wash. 664, 91 Pac. 188; *Cozard v. Cozard*, 48 Wash. 124, 92 Pac. 935; *Pierce v. Pierce*, 52 Wash. 679, 101 Pac. 358; *Win-*

gard v. Wingard, 56 Wash. 354, 105 Pac. 833.

See, also, Sampson v. Sampson, 112 Wash. 1, 191 Pac. 840.

Access to Child by Parent Deprived of Custody: See Remington's Digest, Divorce, § 101; Smith v. Smith, 18 Wash. 158, 51 Pac. 355; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594; Herrett v. Herrett, 80 Wash. 474, 141 Pac. 1158.

Order or Decree as to Custody: See Remington's Digest, Divorce, § 102; Gibson v. Gibson, 18 Wash. 489, 51 Pac. 1041; 40 L. R. A. 587; Kane v. Miller, 40 Wash. 125, 82 Pac. 177; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594.

Modification of Order, Judgment or Decree as to Custody: See Remington's Digest, Divorce, § 104; Koontz v. Koontz, 25 Wash. 336, 65 Pac. 546; Irving v. Irving, 26 Wash. 122, 66 Pac. 123; Chappell v. Chappell, 45 Wash. 652, 89 Pac. 166; Curtis v. Curtis, 46 Wash. 664, 91 Pac. 188; Goerig v. Goerig, 51 Wash. 333, 98 Pac. 742; Pierce v. Pierce, 52 Wash. 679, 101 Pac. 358; Morin v. Morin, 66 Wash. 312, 119 Pac. 745, 37 L. R. A. (N. S.) 585; Harris v. Harris, 71 Wash. 307, 128 Pac. 73; White v. McDowell, 74 Wash. 44, 132 Pac. 734; Beers v. Beers, 74 Wash. 458, 133 Pac. 605; Herrett v. Herrett, 80 Wash. 474, 141 Pac. 1158; Freeland v. Freeland, 92 Wash. 482, 159 Pac. 698.

See, also, Smith v. Frates, 107 Wash. 13, 180 Pac. 880; Clark v. Clark, 107 Wash. 475, 182 Pac. 566; Groves, In re, 109 Wash. 112, 186 Pac. 300; Clark v. Clark, 110 Wash. 293, 188 Pac. 456; Wilkerson v. McGinn, 110 Wash. 454, 188 Pac. 472; Sorge v. Sorge, 112 Wash. 131, 191 Pac. 817; O'Neil v. O'Neil, 112 Wash. 160, 191 Pac. 849; Delle v. Delle, 112 Wash. 512, 192 Pac. 966; Sampson v. Sampson, 112 Wash. 1, 191 Pac. 840.

Duration and Termination of Custody: See Remington's Digest, Divorce, § 105; Tierney v. Tierney, 1 W. T. 568; Neff, In re, 20 Wash. 652, 56 Pac. 383.

Order or Decree as to Support: See Remington's Digest, Divorce, § 106; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; King v. Miller, 10 Wash. 274, 38 Pac. 1020; Fickett v. Fickett, 39 Wash. 38, 80 Pac. 1134; Claiborne v. Claiborne, 47 Wash. 200, 91 Pac. 763; Cozard v. Cozard, 48 Wash. 124, 92 Pac. 935; Hector v. Hector, 51 Wash. 434, 99 Pac. 13; Stone v. Bailey, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N. S.) 429.

See, also, Fitzpatrick v. Fitzpatrick, 105 Wash. 394, 177 Pac. 790; Sampson v. Sampson, 112 Wash. 1, 191 Pac. 840.

Enforcement of Order, Judgment or Decree as to Support: See Remington's Di-

gest, Divorce, § 106-1; Poland v. Poland, 63 Wash. 597, 116 Pac. 2.

Costs: See Remington's Digest, Divorce, § 107; Ditmar v. Ditmar, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817; Hector v. Hector, 51 Wash. 434, 99 Pac. 13.

Custody and Support of Children not Awarded by Judgment or Decree of Divorce: See Remington's Digest, Divorce, § 109-1; Hector v. Hector, 51 Wash. 434, 99 Pac. 13; Schoennauer v. Schoennauer, 77 Wash. 132, 137 Pac. 325.

Foreign Divorces: See Remington's Digest, Divorce, §§ 110-113. **Conclusiveness in General:** Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862; Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900; Douglas v. Teller, 53 Wash. 695, 102 Pac. 761; Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945.

Where a divorce was granted in another state awarding custody of a child to the mother, who acquired a domicile in this state, and the father acquiesced therein, the courts of this state may determine the custody of the child as its welfare may demand in case of changed conditions; and an ex parte modification of the original decree awarding the custody of the father is not binding upon our courts, under the "full faith and credit" clause of the federal constitution: Groves, In re, 109 Wash. 112, 186 Pac. 300.

Objections to Jurisdiction: Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862. **Fraud:** Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862; Douglas v. Teller, 53 Wash. 695, 102 Pac. 761. **Alimony and disposition of property:** Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204; Van Horn v. Van Horn, 48 Wash. 388, 93 Pac. 670, 125 Am. St. Rep. 940.

See, also, Groves, In re, 109 Wash. 112, 186 Pac. 300.

Division of property upon annulment of marriage. 11 A. L. R. 1394.

Power of court to vest title to husband's property in wife. 5 Ann. Cas. 469; Ann. Cas. 1912A, 894.

Proportion of husband's estate proper to be awarded to wife as permanent alimony: Ann. Cas. 1913A, 803; Ann. Cas. 1914D, 319.

Father's liability for support of children as affected by decree awarding custody to mother without provision for their maintenance. 7 Ann. Cas. 903; 14 Ann. Cas. 255; Ann. Cas. 1913, 926; Ann. Cas. 1915D, 813; 2 L. R. A. (N. S.) 851.

Power of court to provide for support or custody of children in absence of prayer for such relief in

divorce petition. **Ann. Cas.** 1914D, 753.

§ 990. Divorce Dissolves Marriage as to Both Parties.

Whenever judgment of divorce from the bonds of matrimony is granted by the courts in this state, the court shall order a full and complete dissolution of the marriage as to both parties. [Cf. L. '54, p. 407, § 9; Cd. '81, § 2008; L. '91, p. 43, § 6; 2 H. C., § 772.]

Cited in 4 Wash. 703, 705; 22 Wash. 116.

OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS—Right to Marry: See Remington's Digest, Divorce, § 108; Smith's Estate, In re, 4 Wash. 702, 30 Pac. 1098, 17 L. R. A. 573; Willey v. Willey, 22 Wash. 115, 60 Pac. 145, 79 Am. St. Rep. 923; Pierce v. Pierce, 58 Wash. 622, 109 Pac. 45.

The act prohibiting divorced parties from remarrying within six months after the decree, either within or without the

state, renders a remarriage during such period void, if contracted in this state, or if contracted in a foreign country by persons domiciled in this state with the purpose of evading the laws of this state; but if the parties were, at the time of the remarriage, domiciled in the foreign country, the marriage would be valid here if valid in such country, our statute having no extraterritorial force as to marriage by nonresidents: State v. Fenn, 47 Wash. 561, 92 Pac. 417, 17 L. R. A. (N. S.) 800.

§ 994. Name of Wife Changed.

In all actions for a divorce, if a divorce be granted, the court may, for just and reasonable cause, change the name of the female, who shall thereafter be known and called by such name as the court shall in its order or decree appoint. [Cf. L. '54, p. 407, § 9; Cd. '81, § 2009; L. '91, p. 43, § 7; 2 H. C., § 773.]

§ 995. Prosecuting Attorney to Resist Un defended Actions—Associate shall not Appear.

Each party to any divorce action shall serve the prosecuting attorney of the county in which the action is commenced with copies of all pleadings, notice of trial, motions or orders therein, at the time of or immediately after their service upon the opposite party or his or her counsel, and in case the summons is served by publication a copy of the summons and complaint shall be served upon the prosecuting attorney immediately after the filing of the complaint in the county clerk's office. It shall be the duty of the prosecuting attorney to appear upon the trial of every default or noncontested divorce case, and in such other divorce cases as the presiding judge may direct, in his county and advise the court, and to that end he shall have power upon order of the court to cause witnesses to be subpoenaed to testify at the trial, respecting any charges made in the complaint or answer or upon any vital matter touching the status of the parties or the performance or neglect of any duty by either, and the witness fees of such witnesses called by the prosecuting attorney shall be charged to the county. Neither the prosecuting attorney nor his deputy nor the law partner of either shall accept employment in any divorce case in his county or receive any fee or compensation from either party. [L. '21, p. 333, § 3; Cf. L. '54, p. 407, § 10; L. '79, p. 94, § 10; Cd. '81, § 2010; L. '85, p. 62, § 10; L. '91, p. 43, § 8; 2 H. C., § 774.]

§ 995-1. Act not Retroactive.

Actions for divorce filed prior to the taking effect of this act shall be governed by the law applicable thereto at the time of the commencement of the action. [L. '21, p. 334, § 3.]

This "Act" refers to §§ 982, 982-1, 988, 988-1, 995-1 to 995-5.

§ 995-2. Modification of Order, Judgment or Decree Relative to Children.

Hereafter every action or proceeding to change or modify any final order, judgment or decree heretofore or hereafter made and entered in any divorce action or proceeding in relation to the care, custody or control, or the support and maintenance, of the minor child or children of the marriage shall be brought in the county where said minor child or children affected are then residing, or in the county where the parent or other person who has the care, custody or control of the said minor child or children affected is then residing. [L. '21, p. 334, § 4.]

§ 995-3. Hearing on Petition to Modify.

Upon the filing of a properly verified petition, to be entitled as in the original divorce action or proceedings, together with a certified copy of the order, judgment or decree sought to be changed or modified thereby, the superior court of the county in which said petition is filed shall have full and complete jurisdiction of the cause and shall thereupon order such notice of the hearing of said petition to be given as the court shall determine. [L. '21, p. 335, § 4.]

§ 995-4. Filing of Records and Files in Original Action.

The court shall have power to cause either party to said action or proceeding to file so much or all of the records and files in the original divorce action or proceeding as the court shall deem necessary or proper: and to make and enter all necessary or proper orders for a full hearing and determination of said petition. [L. '21, p. 335, § 4.]

§ 995-5. Filing of Order, etc., in County of the Original Action.

Upon a full hearing and determination of said petition the court shall make and enter such order, judgment or decree in said cause as the evidence and the law requires; a certified copy of such order, judgment or decree to be filed and entered in the county wherein said original divorce action or proceeding was had within thirty days thereof. [L. '21, p. 335, § 4.]

§ 996. Trial—Appeal—Proceedings.

In all instances where the superior court shall grant a divorce, it shall be for cause distinctly stated in the complaint, and proved, and found by the court, and the court shall state the facts found upon which the decree is rendered; and when either party shall signify a desire to appeal from any of the orders of the court, in the disposition of the property or of the children, the court shall certify the evidence adduced on the trial, and the supreme court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm said judgment, according to the real merits of the case. [L. '60, p. 320, § 12; Cd. '81, § 2011; 2 H. C., § 775.]

Cited in 23 Wash. 312; 46 Wash. 398; 49 Wash. 500; 54 Wash. 76; 63 Wash. 128, 290; 65 Wash. 311; 69 Wash. 282, 283; 71 Wash. 389; 78 Wash. 647; 92 Wash. 103.

APPEAL: See Remington's Digest, Divorce, §§ 51—54.

Decisions Reviewable: Madison v. Madison, 1 W. T. 60; Tierney v. Tierney, 1 W. T. 568; McDonald v. McDonald, 34 Wash. 293, 75 Pac. 865; Wilkinson v. Wilkinson, 63 Wash. 126, 114 Pac. 915; Griffith v. Griffith, 71 Wash. 56, 127 Pac. 585.

Presentation and Reservation in Lower Court of Grounds of Review: McCord v. McCord, 24 Wash. 529, 64 Pac. 748; State ex rel. Griffith v. Superior Court, 71 Wash. 386, 128 Pac. 644.

Parties: Lee v. Lee, 19 Wash. 355, 28 Pac. 349.

Effect of Appeal: Masterson v. Ogden, 78 Wash. 644, 139 Pac. 654, Ann. Cas. 1914D, 885; State ex rel. Gibson v. Superior Court, 69 Wash. 280, 124 Pac. 686.

Review: Madison v. Madison, 1 W. T. 60; Tierney v. Tierney, 1 W. T. 568; Bounds v. Bounds, 23 Wash. 593, 63 Pac. 1134; Poler v. Poler, 32 Wash. 400, 73 Pac. 372; Miller v. Miller, 38 Wash. 605, 80 Pac. 816; Mitchell v. Mitchell, 39 Wash. 431, 81 Pac. 913; Swift v. Swift, 39

Wash. 600, 81 Pac. 1052; Wainwright v. Wainwright, 40 Wash. 117, 82 Pac. 1135; Dyer v. Dyer, 65 Wash. 535, 118 Pac. 634; Griffith v. Griffith, 74 Wash. 284, 133 Pac. 443; Schirmer v. Schirmer, 84 Wash. 1, 145 Pac. 981; Clark v. Clark, 92 Wash. 450, 159 Pac. 702; Cooper v. Cooper, 83 Wash. 85, 145 Pac. 66.

See, also, Weidert v. Weidert, 106 Wash. 410, 180 Pac. 135.

DISMISSAL, TRIAL OR HEARING, AND NEW TRIAL: See Remington's Digest, Divorce, §§ 40—43. Dismissal before hearing—Involuntary: Seoland v. Seoland, 4 Wash. 118, 29 Pac. 930. Mode of trial in general: Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049. Decision and findings by court: Madison v. Madison, 1 W. T. 60; State ex rel. Tufton v. Superior Court, 46 Wash. 395, 90 Pac. 258. New trial: Tierney v. Tierney, 1 W. T. 568; Egbers v. Egbers, 79 Wash. 72, 139 Pac. 767.

Under this section, the supreme court, on appeal by the husband from orders relating to alimony, has jurisdiction to grant suit money and attorney fees on the pending appeal, and before any final decree on the merits in the court below: Gallagher v. Gallagher, 65 Wash. 310, 118 Pac. 4.

Right to appeal from final decree of divorce. 13 Ann. Cas. 837.

§ 997. Practice—Trial Without Jury.

The practice in civil actions shall govern all proceedings in the trial of actions for divorce, except that trial by jury is dispensed with. [L. '60, p. 320, § 13; Cd. '81, § 2012; L. '91, p. 44, § 9; 2 H. C., § 776.]

Under the provision of the statute dispensing with trial by jury in divorce cases, fraudulent vendees of the husband are not entitled to have the charge of their conspiracy with him to defraud his wife tried by a jury: Prouty v. Prouty, 4 Wash. 174, 29 Pac. 1049.

The requirement in the practice act of 1854, that in case of waiver of a jury the trial court shall render its decision in writing, stating conclusions of law and facts separately, does not apply in divorce cases: Madison v. Madison, 1 W. T. 60; neither party can demand a jury in a divorce case: Id.

CHAPTER XIII.

CHANGE OF NAME.

§ 998. Name may be Changed upon Petition.

Any person desiring a change of his name or that of his child or ward may apply therefor to the superior court of the county in which he resides, by petition setting forth the reasons for such change; thereupon such court, in its discretion, may order a change of the name, and thenceforth the new name shall be in place of the former. [L. '77, p. 132, § 638; Cd. '81, § 635; 2 H. C., § 777.]

Cited in 17 Wash. 47.

SPECIAL PROCEEDINGS.

TITLE VII.

SPECIAL PROCEEDINGS.

CHAPTER I.—CERTIORARI, MANDAMUS AND PROHIBITION.

- | | |
|--|---|
| 999. Parties, how designated. | 1017. Notice. |
| 1000. Judgment and order in a special proceeding, defined. | 1018. Return of writ—Answer. |
| 1001. Certiorari, defined. | 1019. Question of fact, how determined. |
| 1002. Grounds for granting writ. | 1020. Applicant may demur to answer or countervail it by proof. |
| 1003. Application for, how made. | 1021. Motion for new trial, where made. |
| 1004. Writ, how directed. | 1022. Certification of verdict—Hearing. |
| 1005. Contents of writ. | 1023. Court to proceed to hearing—Answer. |
| 1006. Stay of proceedings. | 1024. Damages awarded — Peremptory mandate. |
| 1007. Bill of exceptions—Judgment on. | 1025. Service of writ. |
| 1008. Service of writ. | 1026. Penalty for disobeying writ. |
| 1009. Defective return—How perfected—Hearing—Judgment. | 1027. Prohibition, defined. |
| 1010. Questions involving merits—What are. | 1028. Courts entitled to issue—Grounds. |
| 1011. Copy of judgment transmitted to inferior tribunal. | 1029. Writ may be alternative or peremptory. |
| 1012. Judgment-roll. | 1030. Provisions relating to mandate applicable. |
| 1013. Mandamus, defined. | 1031. Writs of review, mandate and prohibition made returnable, when. |
| 1014. Courts entitled to issue—Grounds. | 1032. Rules of practice and proceedings. |
| 1015. Writ in absence of remedy at law—Affidavit. | 1033. Appeals. |
| 1016. Writ, alternative or peremptory. | |

CHAPTER II.—INFORMATION IN THE NATURE OF QUO WARRANTO.

- | | |
|---|--|
| 1034. Against whom filed. | 1042. Action for damages—Limitation. |
| 1035. By whom filed. | 1043. Judgment of ouster or forfeiture. |
| 1036. Information, contents of. | 1044. Judgment against corporation. |
| 1037. Information for usurping office—Contents—Damages claimed. | 1045. Action to recover escheated or forfeited property. |
| 1038. Summons—Pleadings—Proceedings. | 1046. Costs. |
| 1039. Judgment and damages. | 1047. Information to annul patent, etc. |
| 1040. Judgment for relator. | 1048. Proceedings to annul. |
| 1041. Order, how enforced. | |

CHAPTER III.—CONTEMPTS AND THEIR PUNISHMENT.

- | | |
|---|--|
| 1049. Contempts, defined. | 1055. Warrant, how executed. |
| 1050. Punishment for contempt. | 1056. Return of warrant—Investigation. |
| 1051. Contempts in presence of court, how punished. | 1057. Judgment and sentence. |
| 1052. Procedure in other cases. | 1058. Indemnity to injured party. |
| 1053. Defendant may be produced if in custody. | 1059. Imprisonment until performance. |
| 1054. How prosecuted. | 1060. Offender liable to indictment. |
| | 1061. Alias warrant—Prosecution of bond. |
| | 1062. Appeal. |

CHAPTER IV.—HABEAS CORPUS.

- | | |
|--|---|
| 1063. Who may prosecute writ. | 1071. Return—Attachment for refusal. |
| 1064. Parents, etc., may have writ. | 1072. Substance and form of return. |
| 1065. Application for, how made. | 1073. Proceedings—Pleadings. |
| 1066. By whom granted. | 1074. Hearing and determination. |
| 1067. To whom directed—Contents of. | 1075. Restrictions upon inquiry. |
| 1068. Delivery of writ to sheriff—Service. | 1076. Admission to bail instead of discharge. |
| 1069. Service of writ directed to person other than sheriff. | 1077. Writ for purpose of bail. |
| 1070. Service when person not found. | 1078. Compelling attendance of witnesses. |

- | | |
|-----------------------------------|--|
| 1079. Officer not liable, when. | 1083. Temporary orders. |
| 1080. Warrant to prevent removal. | 1084. Writ issued on Sunday, when. |
| 1081. What warrant may include. | 1085. Writs—Issuance, service and return |
| 1082. Warrant, how executed. | —Amendments. |

CHAPTER V.—ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

- | | |
|---|---|
| 1086. Must be general—Effect of. | 1096. Additional inventory. |
| 1087. Assent presumed. | 1097. Claims not due, limitation. |
| 1088. How made, procedure thereafter. | 1098. Authority of assignee—Sales. |
| 1089. Inventory and valuation—Bond. | 1099. Proceedings upon death or failure |
| 1090. Notice of assignment. | of assignee to act. |
| 1091. List of creditors. | 1100. Discharge of assignor, when. |
| 1092. Exceptions to claims. | 1101. Sheriff not to be receiver or as- |
| 1093. Dividends, accounts, compensation. | signee. |
| 1094. Assignee subject to control of court. | 1102. Right of exemption. |
| 1095. Not void, when—Citation to debtor. | 1103. How claimed—Objections. |

CHAPTER I.

CERTIORARI, MANDAMUS AND PROHIBITION.

CERTIORARI.

§ 999. Parties, How Designated.

The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant. [L. '95, p. 114, § 1.]

Cited in 15 Wash. 92; 16 Wash. 353; 21 Wash. 454; 24 Wash. 546; 50 Wash. 96; 57 Wash. 211; 66 Wash. 386; 70 Wash. 441.

Under this section it is not error to refuse to quash a proceeding commenced in the name of the real party in interest, instead of in the name of the state on his relation: *State ex rel. Cicoria v. Corgiat*, 50 Wash. 95, 96 Pac. 689.

An objection that an alternative writ of mandate did not run in the name of

the state is met by the fact that it bears the title of the court and cause, which was "*State of Washington on the relation,*" etc: *State ex rel. Prudential Sav. & Loan Assoc. v. Martin*, 101 Wash. 350, 172 Pac. 349.

This act furnishes a full and complete mode of procedure in certiorari proceedings, and necessarily repeals by implication prior statutes covering the same subject matter: *Leavitt v. Chambers*, 16 Wash. 353, 47 Pac. 755.

§ 1000. Judgment and Order in a Special Proceeding, Defined.

A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding. [L. '95, p. 115, § 2.]

Cited in 21 Wash. 255, 261.

A judgment of the superior court in habeas corpus proceedings remanding the prisoner is a final judgment from which an appeal to the supreme court will lie,

in view of this section: *Foye, In re*, 21 Wash. 250, 57 Pac. 825; *Baker, In re*, 21 Wash. 259, 57 Pac. 827; *Sylvester, In re*, 21 Wash. 263, 57 Pac. 829.

§ 1001. Certiorari, Defined.

The writ of certiorari may be denominated the writ of review. [L. '95, p. 115, § 3.]

Cited in 21 Wash. 149; 28 Wash. 51.

For text treatment of "Certiorari," see 5 R. O. L. 249.

§ 1002. Grounds for Granting Writ.

A writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board or officer, exercising judicial

functions, has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not according to the course of the common law, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy at law. [L. '95, p. 115, § 4.]

Cited in 18 Wash. 510; 19 Wash. 315; 26 Wash. 281; 32 Wash. 695; 34 Wash. 249; 35 Wash. 36, 126; 46 Wash. 304; 47 Wash. 509; 50 Wash. 655; 56 Wash. 356, 651; 73 Wash. 35, 36; 75 Wash. 95; 78 Wash. 560; 80 Wash. 190; 81 Wash. 364; 82 Wash. 34, 333; 90 Wash. 252; 91 Wash. 306.

Nature and Scope of Remedy in General: See Remington's Digest, Cert., § 1; Wilson v. Seattle, 2 Wash. 543, 27 Pac. 474; State ex rel. Boyd v. Superior Court, 6 Wash. 352, 33 Pac. 827.

Discretion as to Grant of Writ: See Remington's Digest, Cert., § 2; Gregory v. Dixon, 7 Wash. 27, 34 Pac. 212; State ex rel. Grady v. Lockhart, 18 Wash. 531, 52 Pac. 315.

Grounds for Writ: See Remington's Digest, Cert., §§ 3—9.

Grounds in General—Jurisdiction: Taylor v. Ringer, 3 W. T. 539, 19 Pac. 147; State ex rel. Boyd v. Superior Court, 6 Wash. 352, 33 Pac. 827; Gabriel v. Seattle & M. R. Co., 7 Wash. 515, 35 Pac. 410; State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895; State ex rel. Shattuck v. French, 82 Wash. 330, 144 Pac. 28.

Existence of Other Remedy in General: Elma v. Carney, 4 Wash. 418, 30 Pac. 732; Spooner v. Seattle, 6 Wash. 370, 33 Pac. 963; Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165; State ex rel. Sylvester v. Superior Court, 60 Wash. 583, 111 Pac. 787.

Existence of Remedy by Appeal: Wilson v. Seattle, 2 Wash. 543, 27 Pac. 474; Seattle & M. R. Co. v. Bellingham Bay & E. R. Co., 29 Wash. 491, 69 Pac. 1107, 92 Am. St. Rep. 907; State ex rel. Smith v. Superior Court, 30 Wash. 219, 70 Pac. 484; Lewis v. Gilbert, 5 Wash. 534, 32 Pac. 459; Seattle & M. R. Co. v. State, 5 Wash. 807, 32 Pac. 744; Gregory v. Dixon, 7 Wash. 27, 24 Pac. 212; State ex rel. Reser v. Superior Court, 13 Wash. 25, 42 Pac. 630; Falsetto v. Seattle, 18 Wash. 509, 52 Pac. 250; State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375; State ex rel. Weymouth v. Lockhart, 28 Wash. 460, 68 Pac. 894; State v. White, 8 Wash. 230, 35 Pac. 1100; Woodbury v. Henningsen, 11 Wash. 12, 39 Pac. 243; Seattle v. Pearson, 15 Wash. 575, 46 Pac. 1053; State ex rel. Sprague v. Superior Court, 32 Wash. 693, 73 Pac. 779; Sweeney v. County Commissioners, 43 Wash. 138, 86 Pac. 200; State ex rel. Smith v. Superior Court, 47

Wash. 508, 92 Pac. 349; State ex rel. Wilkerson Coal & Coke Co. v. Superior Court, 49 Wash. 203, 94 Pac. 920; State ex rel. Mohr v. Superior Court, 54 Wash. 225, 103 Pac. 17; State ex rel. Seattle General Contract Co. v. Superior Court, 56 Wash. 649, 106 Pac. 150, 28 L. R. A. (N. S.) 516; Jones v. Paul, 56 Wash. 355, 105 Pac. 625; Wilson v. McGillivray, 58 Wash. 291, 108 Pac. 620; State ex rel. Coplen v. Superior Court, 66 Wash. 225, 119 Pac. 383; State ex rel. Coombs v. Superior Court, 69 Wash. 439, 125 Pac. 779; State ex rel. Quigley v. Superior Court, 71 Wash. 503, 129 Pac. 83; State ex rel. Northern Pac. R. Co. v. Superior Court, 80 Wash. 190, 141 Pac. 365; State ex rel. Butter v. Superior Court, 91 Wash. 304, 157 Pac. 684; State ex rel. Stone v. Superior Court, 98 Wash. 377, 167 Pac. 1089.

Adequacy of Remedy by Appeal: Gabriel v. Seattle & M. R. Co., 7 Wash. 515, 35 Pac. 410; State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895; Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165; State ex rel. Smith v. Superior Court, 26 Wash. 278, 66 Pac. 385; State ex rel. Cann v. Moore, 23 Wash. 276, 62 Pac. 769; State ex rel. Meredith v. Tallman, 24 Wash. 426, 64 Pac. 759; Parker v. Superior Court, 25 Wash. 544, 66 Pac. 154; State ex rel. Oudin v. Superior Court, 28 Wash. 584, 68 Pac. 1052; State ex rel. Carran v. Superior Court, 30 Wash. 700, 71 Pac. 648; State ex rel. Nelson v. Superior Court, 31 Wash. 32, 71 Pac. 601; State ex rel. Young v. Denney, 34 Wash. 56, 74 Pac. 1021; State ex rel. Royce v. Superior Court, 46 Wash. 616, 91 Pac. 4, 123 Am. St. Rep. 948, 13 Ann. Cas. 870, 12 L. R. A. (N. S.) 1010; State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 Pac. 942; State ex rel. Schwabacher Bros. & Co. v. Superior Court, 61 Wash. 681, 112 Pac. 927, Ann. Cas. 1912C, 814; State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147; State ex rel. Sefrit v. Superior Court, 74 Wash. 601, 134 Pac. 183; State ex rel. Barnes v. Superior Court, 96 Wash. 581, 165 Pac. 493; Mills v. Nickeus, 81 Wash. 409, 142 Pac. 1145; State ex rel. Shattuck v. French, 82 Wash. 330, 144 Pac. 28; State ex rel. Griffith v. Superior Court, 96 Wash. 41, 164 Pac. 516; State ex rel. Secord v. Brinker, 99 Wash. 222, 169 Pac. 317.

Loss of Right to Other Remedy: Gregory v. Dixon, 7 Wash. 27, 34 Pac. 212.

Jurisdictional Amount Affecting the Right: State ex rel. Boyd v. Superior Court, 6 Wash. 352, 33 Pac. 827; State ex rel. Hamilton v. Superior Court, 8 Wash. 271, 36 Pac. 27; Warner v. Cowie, 15 Wash. 696, 45 Pac. 752; State ex rel. Gillette v. Superior Court, 22 Wash. 496, 61 Pac. 158; State ex rel. Corbin v. Superior Court, 35 Wash. 201, 77 Pac. 33; State ex rel. Simpson v. Smith, 102 Wash. 574, 173 Pac. 428.

Adequacy of Remedy by Certiorari: State ex rel. Case v. Mead, 52 Wash. 533, 100 Pac. 1033.

See, also, Adequacy of remedy by appeal: State ex rel. Lilly Co. v. Brawley, 104 Wash. 374, 176 Pac. 337; State ex rel. Hillman v. Superior Court, 105 Wash. 324, 177 Pac. 773; State ex rel. Kent v. Superior Court, 109 Wash. 336, 186 Pac. 851.

— Discretion — Change of venue: State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865.

— Order directing receiver's sale: State ex rel. Silver Basin Mining Co. v. Superior Court, 110 Wash. 559, 188 Pac. 384.

Writs in Aid of Appellate Jurisdiction: See Remington's Digest, Cert., § 10; State ex rel. Washington Bridge Co. v. Superior Court, 11 Wash. 366, 39 Pac. 644; State ex rel. Commercial Nat. Bank v. Superior Court, 14 Wash. 365, 44 Pac. 859; State ex rel. Sprague v. Superior Court, 32 Wash. 693, 73 Pac. 779; Sullivan's Estate, In re, 36 Wash. 217, 78 Pac. 945; State ex rel. Angeles Brewing & Malting Co. v. Superior Court, 89 Wash. 342, 154 Pac. 603.

Decisions and Proceedings of Justices' and Municipal Courts: See Remington's Digest, Cert., § 11; Taylor v. Ringer, 3 W. T. 539, 19 Pac. 147; Gabriel v. Seattle & M. R. Co., 7 Wash. 515, 35 Pac. 410; State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895; State v. White, 8 Wash. 230, 35 Pac. 1100; Woodbury v. Henningsen, 11 Wash. 12, 39 Pac. 243; Seattle v. Pearson, 15 Wash. 575, 46 Pac. 1053; Falsetto v. Seattle, 18 Wash. 509, 52 Pac. 250; State ex rel. Weymouth v. Lockhart, 28 Wash. 460, 68 Pac. 894.

Decisions of Courts—Finality of Determination: See Remington's Digest, Cert., § 12; State ex rel. Pugh v. Superior Court, 52 Wash. 484, 100 Pac. 978; State ex rel. Mohr v. Superior Court, 54 Wash. 225, 103 Pac. 17; State ex rel. Langley v. Superior Court, 73 Wash. 110, 131 Pac. 482; State ex rel. Grant Realty Co. v. Superior Court, 76 Wash. 376, 136 Pac. 144.

Particular Proceedings in Civil Actions: See Remington's Digest, Cert., § 13; State ex rel. Tibbals v. Superior Court, 6 Wash. 201, 33 Pac. 387; Lewis

v. Gilbert, 5 Wash. 534, 32 Pac. 459; State ex rel. McLeod v. Superior Court, 9 Wash. 366, 37 Pac. 454; State ex rel. Harris v. Superior Court, 34 Wash. 248, 75 Pac. 809; State ex rel. Young v. Superior Court, 43 Wash. 34, 85 Pac. 989.

— **Special Proceedings:** See Remington's Digest, Cert., § 14; State ex rel. McLaughlin v. Lichtenberg, 4 Wash. 231, 29 Pac. 999; State ex rel. Reser v. Superior Court, 13 Wash. 25, 42 Pac. 630; Falsetto v. Seattle, 18 Wash. 509, 52 Pac. 250; State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375; State ex rel. Young v. Denney, 34 Wash. 56, 74 Pac. 1021; State ex rel. Oudin v. Superior Court, 28 Wash. 584, 68 Pac. 1052; State ex rel. Norris Safe etc. Co. v. Superior Court, 30 Wash. 177, 70 Pac. 256; State ex rel. Whitehouse v. Superior Court, 38 Wash. 23, 80 Pac. 195; State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147.

Acts and Proceedings of Public Officers, Boards and Municipalities: See Remington's Digest, Cert., § 15; Gregory v. Dixon, 7 Wash. 27, 34 Pac. 212; Browne v. Gear, 21 Wash. 147, 57 Pac. 359; Wilsey v. Cornwall, 40 Wash. 250, 82 Pac. 303; Lewis v. Bishop, 19 Wash. 312, 53 Pac. 165; Wilson v. Seattle, 2 Wash. 543, 27 Pac. 474; Elma v. Carney, 4 Wash. 418, 30 Pac. 732; Spooner v. Seattle, 6 Wash. 370, 33 Pac. 963; State ex rel. Schroeder v. Superior Court, 29 Wash. 1, 69 Pac. 366; King v. Listman, 63 Wash. 271, 115 Pac. 93.

Under this chapter a full and ample remedy for reviewing the proceedings of the board of county commissioners is given by enlarging the functions of the writ of certiorari: State ex rel. Latimer v. Henry, 28 Wash. 38, 68 Pac. 368.

— **Legislative Acts and Ordinances:** See Remington's Digest, Cert., § 16; Tenny v. Seattle Elec. Co., 48 Wash. 150, 92 Pac. 895.

Right of Review—Persons Entitled: See Remington's Digest, Cert., § 17; State ex rel. Pugh v. Superior Court, 52 Wash. 484, 100 Pac. 978.

Governor's orders and acts as reviewable by writ of certiorari. 3 Ann. Cas. 393.

Who entitled to bring certiorari in eminent domain proceedings. Ann. Cas. 1914D, 1144.

Right of attorney to writ to review disbarment proceedings. 10 Ann. Cas. 546; Ann. Cas. 1918B, 838.

Right of state or public officer to review on certiorari of order in habeas corpus releasing one from custody. 10 A. L. R. 385.

Search-warrant proceedings as reviewable by certiorari. 6 Ann. Cas. 615.

Review of courts-martial proceedings by certiorari in civil courts. 17 *Ann. Cas.* 446.

Contempt proceedings as reviewable by writ of certiorari. *Ann. Cas.* 1914D, 216.

Who may bring writ to review highway proceedings. 18 *Ann. Cas.* 667.

Act of municipal corporation in letting public contract as reviewable by certiorari. 17 *Ann. Cas.* 653; 30 *L. R. A. (N. S.)* 130.

Exception to the rule that certiorari will not lie where there is an appeal. 50 *L. R. A.* 787.

§ 1003. Application for, How Made.

The application must be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice. [L. '95, p. 115, § 5.]

Cited in 15 *Wash.* 578; 23 *Wash.* 281.

PROCEEDINGS AND DETERMINATION—In General: See Remington's Digest, Cert., § 18; Leavitt v. Chambers, 16 *Wash.* 353, 47 *Pac.* 755.

Parties: See Remington's Digest, Cert., § 19; Woodbury v. Henningsen, 11 *Wash.* 12, 39 *Pac.* 243; Frederick v. Seattle, 13 *Wash.* 428, 43 *Pac.* 364; Seattle v. Pearson, 15 *Wash.* 575, 46 *Pac.* 1053; State ex rel. Cazedv v. Interstate Fisheries Co., 36 *Wash.* 80, 78 *Pac.* 202.

Time of Taking Proceedings: See Remington's Digest, Cert., § 20; Spooner v. Seattle, 6 *Wash.* 370, 33 *Pac.* 963; State ex rel. Lowary v. Superior Court, 41 *Wash.* 450, 83 *Pac.* 726; State ex rel. Alexander v. Superior Court, 42 *Wash.* 684, 85 *Pac.* 673; State ex rel. Tumwater

Power & Water Co. v. Superior Court, 56 *Wash.* 287, 105 *Pac.* 815; State ex rel. Blackman v. Superior Court, 82 *Wash.* 134, 143 *Pac.* 889; State ex rel. Jakubowski v. Superior Court, 84 *Wash.* 663, 147 *Pac.* 408; State ex rel. Neal v. Kauffman, 86 *Wash.* 172, 149 *Pac.* 656.

Petition or Other Application: See Remington's Digest, Cert., § 22; Taylor v. Ringer, 3 *W. T.* 539, 19 *Pac.* 147; State ex rel. Grady v. Lockhart, 18 *Wash.* 531, 52 *Pac.* 315; Corbett v. Civil Service Com., 33 *Wash.* 190, 73 *Pac.* 1116; State ex rel. Warner v. Superior Court, 97 *Wash.* 472, 166 *Pac.* 791.

Allowance and Issuance of Writ: See Remington's Digest, Cert., § 25; Corbett v. Civil Service Com., 33 *Wash.* 190, 73 *Pac.* 1116.

§ 1004. Writ, How Directed.

The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal the clerk, if there be one, must return the writ with the transcript required. [L. '95, p. 115, § 6.]

Cited in 75 *Wash.* 95.

A surety on the bond to discharge an attachment cannot be held upon a judgment upon additional causes of action added after the discharge of the attachment by amendment of the com-

plaint introducing new causes of action, notwithstanding this section requiring the discharge bond to be conditioned to pay any judgment rendered against the defendant: Petri v. Manny, 99 *Wash.* 601, 170 *Pac.* 127.

§ 1005. Contents of Writ.

The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and requiring the party, in the meantime, to desist from further proceedings in the matter to be reviewed. [L. '95, p. 115, § 7.]

Cited in 23 *Wash.* 282; 46 *Wash.* 171; 75 *Wash.* 82, 95.

Form and Requisites of Writ: See Remington's Digest, Cert., § 24; State ex rel. Cann v. Moore, 23 *Wash.* 276, 62 *Pac.* 769.

The return is necessary to confer jurisdiction within the time fixed by the court, which thereupon becomes the law of the case: State ex rel. North Shore Boom & Driving Co. v. Superior Court, 46 *Wash.* 169, 89 *Pac.* 479.

§ 1006. Stay of Proceedings.

If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These words may be inserted or omitted, in the sound discretion of the court, but if omitted the power of the inferior court or office is not suspended or the proceedings stayed. [L. '95, p. 115, § 8.]

Cited in 75 Wash. 82.

§ 1007. Bill of Exceptions—Judgment on.

Questions of fact not apparent of record may be presented by bill of exception, and the court shall review the same, and, in case there is error, shall render such judgment in the case as of right ought to be entered, or reverse and remand the cause for further proceedings. [L. '95, p. 115, § 9.]

Cited in 75 Wash. 95.

Bill of Exceptions: See Remington's Digest, Cert., § 27; Corbett v. Civil Service Com., 33 Wash. 190, 73 Pac. 1116.

A review of the city council's removal

of a city officer by writ of certiorari is an equitable proceeding, and the evidence cannot be reviewed unless settled in a statement of facts: Taylor v. City Council of Tacoma, 15 Wash. 92, 45 Pac. 641.

§ 1008. Service of Writ.

The writ may be served as follows, except where different directions respecting the mode of service thereof are given by the court granting it:—

1. Where it is directed to a person or persons by name or by his or her official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is directed, or upon the corporation, in the same manner as a summons;

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court or the judges thereof may be made by filing the writ with the clerk. [L. '95, p. 116, § 10.]

§ 1009. Defective Return—How Perfected—Hearing—Judgment.

If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court must hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming or annulling or modifying the proceedings below. [L. '95, p. 116, § 11.]

Cited in 18 Wash. 534; 46 Wash. 171.

Return and Record: See Remington's Digest, Cert., § 26; State ex rel. Coughill v. Sachs, 3 Wash. 496, 30 Pac. 503; Swope v. Seattle, 35 Wash. 69, 76 Pac. 517.

Quashing or Dismissal: See Remington's Digest, Cert., § 28; Spooner v. Seattle, 6 Wash. 370, 33 Pac. 963; Gregory v.

Dixon, 7 Wash. 27, 34 Pac. 212; State ex rel. Cann v. Moore, 23 Wash. 276, 62 Pac. 769; State ex rel. Clifford v. Superior Court, 47 Wash. 35, 91 Pac. 568.

Hearing on Writ. See Remington's Digest, Cert., § 29; State ex rel. Gilbert v. Moore, 5 Wash. 205, 31 Pac. 713; Spooner v. Seattle, 6 Wash. 370, 33 Pac. 963.

§ 1010. Questions Involving Merits—What are.

The questions involving the merits to be determined by the court upon the hearing are:—

1. Whether the body or officer had jurisdiction of the subject matter of the determination under review;

2. Whether the authority, conferred upon the body or officer in relation to that subject matter, has been pursued in the mode required by law, in order to authorize it or him to make the determination;

3. Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the relator;

4. Whether there was any competent proof of all the facts necessary to be proved, in order to authorize the making of the determination;

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence thereof, rendered in an action in a court, triable by a jury, [as] would be set aside by the court, as against the weight of evidence. [L. '95, p. 116, § 12.]

Cited in 24 Wash. 543; 60 Wash. 591; 78 Wash. 560; 83 Wash. 75; 109 Wash. 216.

Scope and Extent of Review: See Remington's Digest, Cert., § 30; State ex rel. Heilbron v. Van Brocklin, 8 Wash. 557, 36 Pac. 495; McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764; Hays v. Merchants' Bank, 10 Wash. 573, 39 Pac. 98; State ex rel. Grady v. Lockhart, 8 Wash. 531, 52 Pac. 315; Bringgold v. Spokane, 10 Wash. 333, 53 Pac. 368; Browne v. Gear, 21 Wash. 147, 57 Pac. 359; State ex rel. McCormick v. Superior Court, 43 Wash. 91, 86 Pac. 205; Crouch v. Ross, 83 Wash. 73, 145 Pac. 87.

See, also, State ex rel. Tingstead v. Johnson, 109 Wash. 214, 186 Pac. 671.

DECISION OR JUDGMENT: See Remington's Digest, Cert., §§ 31—33.

Determination and Disposition of Cause: State v. White, 8 Wash. 230, 35 Pac. 1100; McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764; State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375.

Judgment, Effect and Conclusiveness: State ex rel. Cougill v. Sachs, 3 Wash. 496, 30 Pac. 503; State v. White, 8 Wash. 230, 35 Pac. 1100; McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764.

Costs: State ex rel. Spokane Terminal Co. v. Superior Court, 40 Wash. 453, 82 Pac. 878.

§ 1011. Copy of Judgment Transmitted to Inferior Tribunal.

A copy of the judgment signed by the clerk, must be transmitted to the inferior tribunal, board or officer having the custody of the record or proceeding certified up. [L. '95, p. 117, § 13.]

Cited in 65 Wash. 390.

§ 1012. Judgment-roll.

A copy of the judgment signed by the clerk, entered upon or attached to the writ and return, constitute the judgment-roll. [L. '95, p. 117, § 14.]

MANDAMUS.

§ 1013. Mandamus, Defined.

The writ of mandamus may be denominated a writ of mandate. [L. '95, p. 117, § 15.]

For text treatment of "Mandamus," see 18 R. C. L. 78.

§ 1014. Courts Entitled to Issue—Grounds.

It may be issued by any court, except a justice's or a police court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person. [L. '95, p. 117, § 16.]

Cited in 15 Wash. 432; 16 Wash. 277; 19 Wash. 386, 525, 676; 20 Wash. 44, 636; 24 Wash. 543; 28 Wash. 6; 30 Wash. 599; 31 Wash. 541; 32 Wash. 553; 33 Wash. 392; 35 Wash. 45; 36 Wash. 169; 38 Wash. 313; 46 Wash. 477; 50 Wash. 103; 88 Wash. 592; 90 Wash. 489; 96 Wash. 167; 97 Wash. 174; 100 Wash. 288; 101 Wash. 95; 111 Wash. 103; 113 Wash. 215.

Nature of Remedy in General: See Remington's Digest, Mand., § 1; Clark County v. Brazee, 1 W. T. 199; Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372; Tacoma v. Lillis, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; State ex rel. Dudley v. Daggett, 28 Wash. 1, 68 Pac. 340; Edes v. Haley, 94 Wash. 232, 162 Pac. 50.

If judgment against the state dental board may be enforced by mandamus proceedings, under this section, it is no more than a concurrent remedy, and does not exclude proceedings supplementary to the judgment: Stern v. State Board of Dental Examiners, 50 Wash. 100, 96 Pac. 693.

Successive Writs or Proceedings: See Remington's Digest, Mand., § 9; State ex rel. King v. Trimbell, 12 Wash. 440, 41 Pac. 183.

Nature and Existence of Rights to be Protected or Enforced: See Remington's Digest, Mand., §§ 10, 11; Northwestern Warehouse Co. v. Oregon R. & Nav. Co., 32 Wash. 218, 73 Pac. 388; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394; State ex rel. Brown v. McQuade, 36 Wash. 579, 79 Pac. 207; Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609.

Nature of Acts to be Commanded: See Remington's Digest, Mand., §§ 12, 13; Mansfield v. First Nat. Bank, 6 Wash. 603, 34 Pac. 143; State ex rel. Osborne etc. Co. v. Nichols, 38 Wash. 309, 80 Pac. 462; State ex rel. Gorman v. Nichols, 40 Wash. 437, 82 Pac. 741; State ex rel. School District No. 301 v. Preston, 84 Wash. 79, 146 Pac. 175, 149 Pac. 352.

Conditions Precedent: See Remington's Digest, Mand., §§ 14, 15. In general: State ex rel. Dusenberre v. Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294; State ex rel. Smith v. Forrest, 8 Wash. 610, 36 Pac. 686, 1120; State ex rel. Roe v. Seattle, 88 Wash. 589, 153 Pac. 336.

Demand and Default: Northern Pac. R. Co. v. Territory, 3 W. T. 303, 13 Pac. 604; State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 548; State ex rel. Grinsfelder v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394; Clerf, In re, 55 Wash. 465, 104 Pac. 622; State ex rel. Olympia Nat. Bank v. Lewis, 62 Wash. 266, 113 Pac. 629.

Mandamus Ineffectual or not Beneficial:

See Remington's Digest, Mand., § 16; State ex rel. Dusenberre v. Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 284; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; State ex rel. Bauer v. Sunset Tel. & Tel. Co., 30 Wash. 676, 71 Pac. 198; Hindman v. Colvin, 46 Wash. 317, 89 Pac. 894; State ex rel. Bremerton v. Yakey, 68 Wash. 284, 123 Pac. 13; State ex rel. Bothell v. Woody, 90 Wash. 501, 156 Pac. 534.

Abatement of Proceedings: See Remington's Digest, Mand., § 17; State ex rel. Oudin etc. Co. v. Superior Court, 37 Wash. 30, 79 Pac. 483; State ex rel. Wheeler v. Irwin, 40 Wash. 413, 82 Pac. 420; State ex rel. Cook v. Fairley, 45 Wash. 52, 87 Pac. 1052.

SUBJECTS AND PURPOSES OF RELIEF—Courts and Judicial Officers Subject to Mandamus: See Remington's Digest, Mand., § 18; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071.

Matters of Discretion: See Remington's Digest, Mand., § 19; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; State ex rel. McDonald v. Steiner, 44 Wash. 150, 87 Pac. 66; Clerf, In re, 55 Wash. 465, 104 Pac. 622; State ex rel. Crombie v. Superior Court, 85 Wash. 607, 148 Pac. 882, L. R. A. 1915E, 567.

Mandamus does not lie to compel the superior court to enter judgment upon a remittitur where the supreme court did not direct a specific judgment, but the direction given was only such as the law gives, and the superior court was not refusing to exercise its discretion or proceed to a final determination of the case; since mandamus does not lie to control discretion or review error: State ex rel. Luketa v. Jurey, 108 Wash. 44, 182 Pac. 932.

Entertaining Jurisdiction and Proceeding With Cause: See Remington's Digest, Mand., § 20; State ex rel. Shannon v. Hunter, 3 Wash. 92, 27 Pac. 1076; State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895; State ex rel. Smith v. Parker, 12 Wash. 685, 42 Pac. 113; State ex rel. Puget Sound Nat. Bank v. Superior Court, 14 Wash. 686, 45 Pac. 670; State ex rel. Smith v. McClinton, 17 Wash. 45, 48 Pac. 740; State ex rel. Townsend Gas. etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29; State ex rel. McIntyre v. Superior Court, 21 Wash. 108, 57 Pac. 352; State ex rel. Stratton v. Tallman, 29 Wash. 317, 69 Pac. 1101; State ex rel. Murphy v. Superior Court, 73 Wash. 507, 131 Pac. 1136; State ex rel. Everett v. Superior Court, 99 Wash. 169, 169 Pac. 22; State

ex rel. Woods v. Mackintosh, 99 Wash. 553, 169 Pac. 990; State ex rel. Martin v. Superior Court, 101 Wash. 81, 172 Pac. 257.

Change of Venue: See Remington's Digest, Mand., § 21; State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395. Overruled in State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395; State ex rel. Hubbard v. Superior Court, 24 Wash. 438, 64 Pac. 727; State ex rel. Wyman etc. Co. v. Superior Court, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568; State ex rel. Scougale v. Superior Court, 55 Wash. 328, 104 Pac. 607, 133 Am. St. Rep. 1030; State ex rel. Furth v. Superior Court, 71 Wash. 147, 127 Pac. 1107; State ex rel. Nash v. Superior Court, 82 Wash. 614, 144 Pac. 898.

See, also, State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865; State ex rel. Duncan v. Superior Court, 106 Wash. 507, 180 Pac. 481.

Entry of Judgment: See Remington's Digest, Mand., § 22; State ex rel. Dusinberre v. Hunter, 4 Wash. 651, 3 Pac. 642, 32 Pac. 294; Mansfield v. First Nat. Bank, 6 Wash. 603, 34 Pac. 143; State ex rel. Gabe v. Main, 66 Wash. 381, 119 Pac. 844; State ex rel. Eilers Music House v. French, 100 Wash. 552, 171 Pac. 527.

Vacation of Judgment or Order: See Remington's Digest, Mand., § 23; State ex rel. Rohde v. Sachs, 2 Wash. 373, 26 Pac. 865, 26 Am. St. Rep. 857; State ex rel. Stratton v. Tallman, 25 Wash. 295, 65 Pac. 545; State ex rel. Gabe v. Main, 66 Wash. 381, 119 Pac. 844.

Execution: See Remington's Digest, Mand., §§ 24, 25; State ex rel. Commercial Inv. Co. v. Hartman, 26 Wash. 524, 67 Pac. 223; State ex rel. Jefferson County v. Hatch, 36 Wash. 164, 78 Pac. 796; State ex rel. Lewis v. Hodge, 90 Wash. 487, 156 Pac. 404.

Setting Apart and Restitution of Exempt Property: State ex rel. Achey v. Creech, 18 Wash. 186, 51 Pac. 363; State ex rel. Hill v. Gardner, 32 Wash. 550, 73 Pac. 690, 98 Am. St. Rep. 858; American Paper Co. v. Sullivan, 34 Wash. 391, 75 Pac. 991.

Proceedings for Review—Fixing Amount and Approval of Bond: See Remington's Digest, Mand., § 26; State ex rel. Smith v. Sachs, 3 Wash. 96, 27 Pac. 1075; State ex rel. Miller v. Lichtenberg, 4 Wash. 653, 30 Pac. 1056; State ex rel. Votaw v. Parker, 6 Wash. 411, 34 Pac. 149; State ex rel. Denham v. Superior Court, 28 Wash. 590, 68 Pac. 1051.

Preparation and Transmission of Record and Proceedings not in Record:

See Remington's Digest, Mand., § 27; State ex rel. Benham v. Armstrong, 5 Wash. 123, 31 Pac. 427; State ex rel. Hinchey v. Allyn, 7 Wash. 285, 34 Pac. 914; Scott v. Bourn, 13 Wash. 471, 43 Pac. 372; State ex rel. Klein v. Superior Court, 36 Wash. 44, 78 Pac. 137; State ex rel. Richardson v. Superior Court, 41 Wash. 439, 83 Pac. 1027; State ex rel. Hackett v. Arnest, 100 Wash. 286, 170 Pac. 563.

Civil Proceedings Other Than Actions: See Remington's Digest, Mand., § 28; State ex rel. Gordon Hardware Co. v. Langley, 13 Wash. 636, 43 Pac. 875; State ex rel. Hibbard & Co. v. Superior Court, 21 Wash. 631, 59 Pac. 505.

Criminal Prosecutions: See Remington's Digest, Mand., § 29; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; State ex rel. Lundin v. Superior Court, 102 Wash. 600, 174 Pac. 473.

Mandamus does not lie to compel the filing of an information and trial of accused, held by a committing justice, although accused had waived examination, where the justice retained the cause for examination; since the right of the superior court to control the action arises only after the justice's return: State ex rel. Cline v. Superior Court, 108 Wash. 603, 185 Pac. 605.

State Boards and Officers: See Remington's Digest, Mand., § 30; State ex rel. Stearns v. Smith, 6 Wash. 496, 33 Pac. 974; State ex rel. Gillette v. Clausen, 44 Wash. 437, 87 Pac. 498; State ex rel. Pacific American Fisheries v. Darwin, 81 Wash. 1, 142 Pac. 441; State ex rel. Progressive Motion Picture Co. v. Howell, 90 Wash. 163, 164 Pac. 917.

See, also, State ex rel. Home Tel. & Tel. Co. v. Hurn, 106 Wash. 362, 180 Pac. 400.

County Boards and Officers: See Remington's Digest, Mand., § 31; State ex rel. De Rackin v. Allen, 8 Wash. 168, 35 Pac. 609; State ex rel. Banks v. Snohomish County, 18 Wash. 160, 51 Pac. 368; State ex rel. O'Neil v. Wallace, 96 Wash. 107, 164 Pac. 741.

Official Character of Acts or Proceedings: See Remington's Digest, Mand., § 32; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; State ex rel. Porter v. Headlee, 19 Wash. 477, 53 Pac. 948; Townsend Gas. & Elec. Light Co. v. Hill, 24 Wash. 469, 64 Pac. 778; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 119; State ex rel. Rogers v. Jenkins, 21 Wash. 364, 58 Pac. 217.

See, also, State ex rel. Godfrey v. Turner, 113 Wash. 214, 193 Pac. 715.

Judicial or Quasi-judicial Powers and Functions: See Remington's Digest, Mand., § 33; Hester v. Thomson, 35

Wash. 119, 76 Pac. 734; State ex rel. Rosbach v. Pratt, 68 Wash. 157, 122 Pac. 987.

Ministerial Acts in General: See Remington's Digest, Mand., § 34; State ex rel. Rogers v. Jenkins, 20 Wash. 78, 54 Pac. 765; American Bridge Co. v. Wheeler, 35 Wash. 40, 76 Pac. 534.

A plain case is required before the prosecuting attorney will be required to file an information in quo warranto to test the validity of the incorporation of a town: State ex rel. Cummings v. Johnson, 105 Wash. 93, 177 Pac. 699.

Matters of Discretion: See Remington's Digest, Mand., § 35; Morris & Whitehead v. Williams, 23 Wash. 459, 63 Pac. 236; State ex rel. Buszell v. Callvert, 33 Wash. 380, 74 Pac. 523; State ex rel. Hawes v. Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, 4 Ann. Cas. 197; State ex rel. Cowles v. Schively, 63 Wash. 103, 114 Pac. 901; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 Pac. 1064; State ex rel. Taro v. Everett, 101 Wash. 561, 172 Pac. 752.

Specific Acts: See Remington's Digest, Mand., § 36; State ex rel. Hawes v. Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, 4 Ann. Cas. 197; Hodgeman v. Olsen, 86 Wash. 615, 150 Pac. 1122, L. R. A. 1916A, 739.

See, also, State ex rel. Cummings v. Johnson, 105 Wash. 93, 177 Pac. 699.

Approval or Acceptance of Bonds: See Remington's Digest, Mand., § 37; State ex rel. Reed v. Jones, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340; State ex rel. Independent Asphalt Paving Co. v. Gill, 87 Wash. 201, 151 Pac. 498.

Elections and Proceedings Relating Thereto: See Remington's Digest, Mand., § 38; State ex rel. Dyer v. Twichell, 4 Wash. 715, 31 Pac. 19; State ex rel. Swerdfger v. Whitney, 12 Wash. 420, 41 Pac. 189; State ex rel. King v. Trimbell, 12 Wash. 440, 41 Pac. 183; State ex rel. Cann v. Moore, 23 Wash. 115, 62 Pac. 441; State ex rel. Howe v. Kendall, 44 Wash. 542, 87 Pac. 821; State ex rel. Shepard v. Superior Court, 60 Wash. 370, 111 Pac. 233, 140 Am. St. Rep. 925.

Title to and Possession of Office: See Remington's Digest, Mand., §§ 39, 40; Lynde v. Dibble, 19 Wash. 328, 53 Pac. 370; Kimball v. Olmsted, 20 Wash. 629, 56 Pac. 377; State ex rel. Dudley v. Daggett, 28 Wash. 1, 68 Pac. 340; State ex rel. Roe v. Seattle, 88 Wash. 589, 153 Pac. 336; State ex rel. Cann v. Moore, 23 Wash. 115, 62 Pac. 441.

See, also, State ex rel. Dent v. McLennan, 110 Wash. 16, 187 Pac. 408.

Public Records—Inspection and Use of Records: See Remington's Digest, Mand.,

§ 41; State ex rel. Cook v. Reed, 36 Wash. 638, 79 Pac. 306.

Contracts in General: See Remington's Digest, Mand., § 42; Times Pub. Co. v. Everett, 9 Wash. 518, 37 Pac. 695, 43 Am. St. Rep. 865; Morris & Whitehead v. Williams, 23 Wash. 459, 63 Pac. 236.

Proceedings Relating to Public Lands: See Remington's Digest, Mand., §§ 43, 44; Ilwaco v. Ilwaco R. & Nav. Co., 17 Wash. 652, 50 Pac. 572; State ex rel. Buszell v. Bridges, 30 Wash. 268, 70 Pac. 506; State ex rel. Buszell v. Callvert, 33 Wash. 380, 74 Pac. 573; State ex rel. Smith v. Ross, 42 Wash. 439, 85 Pac. 29; State ex rel. Smith v. Forrest, 11 Wash. 158, 39 Pac. 450.

Proceedings to Procure and Grant of Licenses—Certificates, in General: See Remington's Digest, Mand., § 45; State ex rel. Thayer v. Mish, 13 Wash. 302, 43 Pac. 40; State ex rel. Osborne etc. Co. v. Nichols, 38 Wash. 309, 80 Pac. 462.

— **Professions:** See Remington's Digest, Mand., § 46; State ex rel. Brown v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544.

Public Improvements: See Remington's Digest, Mand., §§ 46-1—48. Performance of contracts: State ex rel. Warehouse & Realty Co. v. Spokane, 65 Wash. 385, 118 Pac. 321.

— **Levy of Assessments and Special Taxes:** Waldron v. Snohomish, 41 Wash. 566, 83 Pac. 1106; State ex rel. Barber Asphalt Pav. Co. v. Seattle, 42 Wash. 370, 85 Pac. 11.

— **Collection of Assessments and Special Taxes:** German-Am. Sav. Bank v. Spokane, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259.

Making and Enforcement of Police Regulations: See Remington's Digest, Mand., § 49; State ex rel. Hawes v. Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, 4 Ann. Cas. 197.

Appropriation or Other Disposition of Public Money—Payment to Municipalities or Officers: See Remington's Digest, Mand., § 50; Elder v. Territory, 3 W. T. 438, 19 Pac. 29.

Audit and Allowance of Accounts and Claims: See Remington's Digest, Mand., § 51; State ex rel. Carraher v. Graves, 13 Wash. 485, 43 Pac. 376; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599.

Issue of Warrants or Orders for Payment: See Remington's Digest, Mand., § 52; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; State ex rel. Dahlquist v. Van Wyck, 20 Wash. 39, 64 Pac. 768; State ex rel. Davey v. Cheetham, 20 Wash. 64, 54 Pac. 772; State ex rel. Hellar v. Young,

21 Wash. 391, 58 Pac. 220; American Bridge Co. v. Wheeler, 35 Wash. 40, 76 Pac. 534; State ex rel. Barto v. Board of Drainage Commrs., 46 Wash. 474, 90 Pac. 660; State ex rel. Maddaugh v. Ritter, 74 Wash. 649, 134 Pac. 492; State ex rel. Beach v. Olsen, 91 Wash. 56, 157 Pac. 34.

See, also, State ex rel. Clapp v. Urquhart, 108 Wash. 299, 183 Pac. 121.

Issue of Bonds: See Remington's Digest, Mand., § 53; Chalk v. White, 4 Wash. 156, 29 Pac. 979; State ex rel. Zylstra v. Clausen, 66 Wash. 324, 119 Pac. 797.

Payment of Debts and Claims: See Remington's Digest, Mand., §§ 54—59. In general: Abernethy v. Medical Lake, 9 Wash. 112, 37 Pac. 306; Cloud v. Sumas, 9 Wash. 399, 37 Pac. 305.

— **Appropriations and Special Funds:** State ex rel. Hellar v. Young, 18 Wash. 21, 50 Pac. 786.

— **Salaries and Wages:** State ex rel. Dudley v. Daggett, 28 Wash. 1, 68 Pac. 340; State ex rel. Brown v. McQuade, 36 Wash. 579, 79 Pac. 207.

— **Warrants or Orders:** Union Sav. Bank & T. Co. v. Gelbach, 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359; Cloud v. Sumas, 9 Wash. 399, 37 Pac. 305; La France Fire Engine Co. v. Davies, 9 Wash. 600, 38 Pac. 154; Mason v. Purdy, 11 Wash. 591, 40 Pac. 130; Bardley v. Sternberg, 17 Wash. 243, 49 Pac. 499; State ex rel. Titlow v. Centralia, 93 Wash. 401, 161 Pac. 74.

See, also, State ex rel. Clapp v. Urquhart, 108 Wash. 299, 183 Pac. 121.

— **Interest on Warrants:** Philadelphia Mtg. & T. Co. v. New Whatcom, 19 Wash. 225, 52 Pac. 1063.

— **Judgments:** Chambers v. Territory, 3 W. T. 280, 13 Pac. 336.

— **Defenses and Grounds of Opposition:** See Remington's Digest, Mand., § 60; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; State ex rel. Porter v. Headlee, 19 Wash. 477, 53 Pac. 948; Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110; State ex rel. Egbert v. Blumberg, 46 Wash. 270, 89 Pac. 708.

RELATING TO TAXES AND SECURITIES: See Remington's Digest, Mand., §§ 60-1—66. **Levy of Taxes—Purposes in General:** State ex rel. Polson v. Hardcastle, 68 Wash. 548, 124 Pac. 110; State v. Asotin County, 79 Wash. 634, 140 Pac. 914.

— **Payment of Claims, Warrants or Orders:** Portland Sav. Bank v. Montesano, 14 Wash. 570, 45 Pac. 158; State Sav. Bank v. Davis, 22 Wash. 406, 61 Pac. 43.

— **Payment of Bonds or Other Securities:** State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 543; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394; Gay v. New Whatcom, 67 Wash. 88, 26 Pac. 389.

— **Payment of Judgments:** Lorence v. Bean, 18 Wash. 36, 50 Pac. 582.

Assessment of Taxes: Gay v. New Whatcom, 26 Wash. 369, 68 Pac. 88; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394.

Redemption from Tax Sales: State ex rel. McClaine v. Reed, 29 Wash. 383, 69 Pac. 1096.

Disposition of Taxes Collected: State ex rel. Thayer v. Mish, 13 Wash. 302, 43 Pac. 40.

ACTS AND PROCEEDINGS OF PRIVATE CORPORATIONS: See Remington's Digest, Mand., §§ 67, 68.

Custody of, and Access to Corporate Records and Books: Paul v. McGraw, 3 Wash. 296, 28 Pac. 532; State ex rel. Weinberg v. Pacific Brewing etc. Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208.

Exercise of Corporate Franchises and Powers—Operation of Works, and Public Service and Accommodation: Northern Pacific R. Co. v. Territory, 3 W. T. 303, 13 Pac. 604; State ex rel. Grinsfelder v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515.

JURISDICTION, PROCEEDINGS AND RELIEF—Jurisdiction: See Remington's Digest, Mand., §§ 69, 70. In general: Paul v. McGraw, 3 Wash. 296, 28 Pac. 532. Supreme and appellate courts: State ex rel. Shannon v. Hunter, 3 Wash. 92, 27 Wash. 1076; State ex rel. McIntyre v. Superior Court, 21 Wash. 108, 57 Pac. 352; State ex rel. Gillette v. Superior Court, 22 Wash. 496, 61 Pac. 158; State ex rel. Wallace v. Superior Court, 24 Wash. 605, 64 Pac. 778; Spokane v. Smith, 37 Wash. 583, 79 Pac. 1125.

See, also, State ex rel. Swan v. Superior Court, 105 Wash. 167, 177 Pac. 679.

Parties Plaintiff or Petitioners: See Remington's Digest, Mand., §§ 72—75-1. **Use of Name of State:** Northern Pac. R. Co. v. Territory, 3 W. T. 303, 13 Pac. 604; State ex rel. Weinberg v. Pacific Brewing etc. Co., 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; State ex rel. Richardson v. Superior Court, 41 Wash. 439, 83 Pac. 1027; State ex rel. Cicoria v. Corgiat, 50 Wash. 95, 96 Pac. 689.

— **Public Officers:** State ex rel. Ross v. Headlee, 22 Wash. 126, 66 Pac. 126; American Bridge Co. v. Wheeler, 35 Wash. 40, 76 Pac. 534.

— **Private Persons—Interest in Subject Matter:** State ex rel. Starrett v.

James, 14 Wash. 82, 44 Pac. 116; State ex rel. Grinsfelder v. Spokane St. R. Co., 19 Wash. 518, 53 Pac. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; State ex rel. Pacific American Fisheries v. Darwin, 81 Wash. 1, 142 Pac. 441; State ex rel. Taro v. Everett, 101 Wash. 561, 172 Pac. 572; State ex rel. Ellertsen v. Home Tel. & Tel. Co., 102 Wash. 196, 172 Pac. 899.

— **Persons Having Interest and Seeking Relief Common to Others:** State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394.

— **Joinder:** State ex rel. Howe v. Kendall, 41 Wash. 542, 87 Pac. 821.

Parties Defendant or Respondents: See Remington's Digest, Mand., §§ 76, 77; Espy Estate Co. v. Pacific County, 40 Wash. 67, 82 Pac. 129; State ex rel. Hill v. Superior Court, 4 Wash. 327, 30 Pac. 82; State ex rel. Witherop v. Brown, 19 Wash. 383, 53 Pac. 548; Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; State ex rel. Race v. Cranney, 30 Wash. 594, 71 Pac. 50; State ex rel. Howe v. Kendall, 44 Wash. 542, 87 Pac. 821.

Original jurisdiction of state court of last resort to issue writ. 20 Ann. Cas. 184; 58 L. R. A. 833; 38 L. R. A. (N. S.) 1000.

Inadequacy of remedy by appeal or writ of error as affecting right to mandamus to inferior court. 4 A. L. R. 632.

Mandamus to compel a court to take jurisdiction of a cause that it has erroneously dismissed for supposed insufficiency or lack of service. 4 A. L. R. 610.

Mandamus to compel court to assume or exercise jurisdiction where it has erroneously dismissed the cause or refused to proceed on the ground of supposed lack of jurisdiction. 4 A. L. R. 582.

Mandamus to compel a court to reinstate or proceed with the hearing of an appeal that it has erroneously dismissed. 4 A. L. R. 655.

Mandamus as remedy on refusal of court to entertain jurisdiction on

ground of discretion when it has no discretion. Ann. Cas. 1915D, 199.

Right to mandamus to compel proper official to enter judgment by default. Ann. Cas. 1913B, 344.

Right of private person to mandamus to enforce performance of duty by court or magistrate. 9 Ann. Cas. 1074; Ann. Cas. 1912A, 1118.

Contractual duty of public officer as enforceable by mandamus. 20 L. R. A. (N. S.) 801.

Mandamus to compel performance of continuous acts or control general course of official conduct. 4 Ann. Cas. 198; 20 Ann. Cas. 220; 39 L. R. A. (N. S.) 810.

Mandamus as proper remedy to compel payment of soldier's bounty. 13 A. L. R. 604.

Mandamus to compel payment of salary of public officer or employee. 5 A. L. R. 579.

Mandamus to compel acceptance or surrender of office. 24 L. R. A. 493; 31 L. R. A. 343.

Remedy by mandamus to restore party to office. 12 Ann. Cas. 14; Ann. Cas. 1912A, 230; 19 L. R. A. (N. S.) 49.

Mandamus to compel election officers to act after they have adjourned. Ann. Cas. 1913C, 1257; 36 L. R. A. (N. S.) 1089.

Mandamus as to initiative, or referendum, or recall election. 50 L. R. A. (N. S.) 216, 229; L. R. A. 1916D, 1104; L. R. A. 1917B, 31.

Governor of state as subject to mandamus. 3 Ann. Cas. 391; 11 Ann. Cas. 620; Ann. Cas. 1913B, 789; 6 L. R. A. (N. S.) 750; 32 L. R. A. (N. S.) 355; L. R. A. 1917F, 774.

Mandamus for construction or repair of school building. 1 A. L. R. 1559.

Reinstatement of teacher by writ of mandate. 49 L. R. A. (N. S.) 62.

Mandamus to compel grant of diploma or other evidence of pupil's completion of course. 6 A. L. R. 1533; 3 L. R. A. (N. S.) 1115; L. R. A. 1916B, 616.

§ 1015. Writ in Absence of Remedy at Law—Affidavit.

The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It must be issued upon affidavit on the application of the party beneficially interested. [L. '95, p. 117, § 17.]

Cited in 20 Wash. 44, 397; 32 Wash. 552; 36 Wash. 168; 39 Wash. 409; 74 Wash. 592; 97 Wash. 174; 101 Wash. 96; 111 Wash. 103.

Existence and Adequacy of Other Remedy in General: See Remington's Digest, Mand., § 2; Paul v. McGraw, 3 Wash. 296, 28 Pac. 532; Lewis v. Seattle, 5 Wash.

741, 32 Pac. 794; State ex rel. Gannon v. Hitt, 13 Wash. 547, 43 Pac. 638; Quaker City Nat. Bank v. Tacoma, 27 Wash. 259, 67 Pac. 710; State ex rel. Dudley v. Daggett, 28 Wash. 1, 68 Pac. 340; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State ex rel. Krutz v. Washington Irr. Co., 41 Wash. 283, 83 Pac. 308, 111 Am. St. Rep. 1019; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 135 Pac. 1064; State ex rel. Whitten v. Spokane, 92 Wash. 667, 159 Pac. 805.

See, also, State ex rel. Godfrey v. Turner, 113 Wash. 214, 193 Pac. 715.

Remedy by Appeal or Writ of Error: See Remington's Digest, Mand., § 3; State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395 (overruled); State ex rel. Townsend Gas etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Washington Dredg. etc. Co. v. Moore, 21 Wash. 629, 59 Pac. 505; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395; State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29; State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177.

See, also, State ex rel. Godfrey v. Superior Court, 111 Wash. 101, 189 Pac. 256; State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865.

— **Acts and Proceedings of Courts, Judges and Judicial Officers in General:** See Remington's Digest, Mand., § 4; Scott v. Bourn, 13 Wash. 471, 43 Pac. 372; State ex rel. Hibbard & Co. v. Superior Court, 21 Wash. 631, 59 Pac. 505; State ex rel. Stratton v. Tallman, 25 Wash. 295, 65 Pac. 545; State ex rel. Stratton v. Tallman, 29 Wash. 317, 69 Pac. 1101; State ex rel. Townsend Gas. etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Barbo v. Hadley, 20 Wash. 520, 56 Pac. 29; State ex rel. Strohl v. Superior Court, 20 Wash. 545, 56 Pac. 35, 45 L. R. A. 177; State ex rel. Hubbard v. Superior Court, 24 Wash. 438, 64 Pac. 727; State ex rel. McIntyre v. Superior Court, 21 Wash. 108, 57 Pac. 352; State ex rel. Washington Dredg. & Imp. Co. v. Moore, 21 Wash. 629, 59 Pac. 505; State ex rel. Piper v. Superior Court, 45 Wash. 196, 87 Pac. 1120; State ex rel. Brunn v. State Board of Medical Examiners, 61 Wash. 623, 112 Pac. 746; State ex rel. Langley v. Superior Court, 74 Wash. 556, 134 Pac. 173; State ex rel. Stone v. Superior Court, 97 Wash. 172, 166 Pac. 69.

See, also, State ex rel. Godfrey v. Superior Court, 111 Wash. 101, 189 Pac.

256; State ex rel. Schlosberg v. Superior Court, 106 Wash. 320, 179 Pac. 865.

— **Acts and Proceedings of Public Officers and Boards of Municipalities:** See Remington's Digest, Mand., § 5; Elder v. Territory, 3 W. T. 438, 19 Pac. 29; State ex rel. De Rackin v. Allen, 8 Wash. 168, 35 Pac. 609; State ex rel. Banks v. Snohomish County, 18 Wash. 160, 51 Pac. 368; State ex rel. Porter v. Headlee, 19 Wash. 477, 53 Pac. 948; Ilwaco v. Ilwaco Riv. & Nav. Co., 17 Wash. 652, 50 Pac. 572; State ex rel. Smith v. Ross, 42 Wash. 439, 85 Pac. 29; State ex rel. Brunn v. State Board of Medical Examiners, 61 Wash. 623, 112 Pac. 746; State ex rel. Yeargin v. Maschke, 90 Wash. 249, 155 Pac. 1064.

Adequacy of Remedy: See Remington's Digest, Mand., §§ 6—8.

§ 6. Recourse to Other Proceeding: State ex rel. Miller v. Lichtenberg, 4 Wash. 653, 30 Pac. 1056; Achey v. Creech, 21 Wash. 319, 58 Pac. 208; State ex rel. Kinnear v. Bridges, 21 Wash. 591, 59 Pac. 487.

§ 7. Conflict With Other Proceeding: State ex rel. Anderson v. Bell, 36 Wash. 196, 78 Pac. 908; State ex rel. Drasdo v. Frater, 39 Wash. 594, 81 Pac. 1135.

§ 8. Adequacy of Remedy: German-American Sav. Bank v. Spokane, 17 Wash. 315, 49 Pac. 542, 38 L. R. A. 259.

Petition or Complaint, or Other Application: See Remington's Digest, Mand., §§ 78, 79; Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372; State ex rel. Dusingberre v. Hunter, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294; State ex rel. Smith v. Forrest, 11 Wash. 158, 39 Pac. 450; State ex rel. Megler v. Forrest, 13 Wash. 268, 43 Pac. 51; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394; Smith v. Ormsby, 20 Wash. 396, 55 Pac. 570, 72 Am. St. Rep. 110; State ex rel. Evers v. Byrne, 32 Wash. 264, 73 Pac. 394; State ex rel. Cicoria v. Corgiat, 50 Wash. 95, 96 Pac. 689; State ex rel. Cowles v. Schively, 63 Wash. 103, 114 Pac. 901; State ex rel. Adams v. Irwin, 74 Wash. 589, 134 Pac. 484, 135 Pac. 472; State ex rel. Mills v. Howell, 93 Wash. 257, 160 Pac. 760; State ex rel. McGhee v. Superior Court, 99 Wash. 619, 170 Pac. 130.

Laches: See Remington's Digest, Mand., § 71; State ex rel. Brown v. Superior Court, 15 Wash. 314, 46 Pac. 232; State ex rel. Seymour v. Slater, 53 Wash. 608, 102 Pac. 651; State ex rel. Langley v. Superior Court, 74 Wash. 556, 134 Pac. 173; State ex rel. Murphy v. Superior Court, 73 Wash. 507, 131 Pac. 1136.

§ 1016. Writ, Alternative or Peremptory.

The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is

directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place, why he has not done so. The peremptory writ must be in some similar form, except the words requiring the party to show cause why he has not done as commanded must be omitted and a return inserted. [L. '95, p. 117, § 18.]

Cited in 31 Wash. 539; 66 Wash. 80; 101 Wash. 353.

Alternative Writ: See Remington's Digest, Mand., §§ 80—83.

Nature and Grounds: Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372.

— **Issuance, Form and Requisites:** Parrish v. Reed, 2 Wash. 491, 27 Pac. 230, 28 Pac. 372; State ex rel. King v. Trimbell, 12 Wash. 440, 41 Pac. 183; State ex rel. Wolf v. Moore, 15 Wash. 432, 46 Pac. 647; Chapin v. Port Angeles, 31 Wash. 535, 72 Pac. 117; State ex rel. Hackett v. Arnest, 100 Wash. 286, 170

Pac. 563; State ex rel. Prudential Sav. & Loan Assoc. v. Martin, 101 Wash. 350, 172 Pac. 349.

— **Waiver of Objections to Writ:** Clarke County v. Brazee, 1 W. T. 199; State ex rel. Abernethy v. Moss, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

Motion to Quash or Dismiss Alternative Writ—Operation and Effect: Hester v. Thomson, 35 Wash. 119, 76 Pac. 734.

Necessity of conformity of peremptory with alternative writ. **Ann. Cas.** 1912D, 671.

§ 1017. Notice.

When the application to the court is made without notice to the party, and the writ be allowed, the alternative must be first issued; and if the application be upon due notice and the writ be allowed, the peremptory writ may be issued in the first instance. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appear or not. [L. '95, p. 117, § 19.]

Cited in 80 Wash. 654.

Under this section, a writ cannot be granted by default: State ex rel. Goss v.

Metaline-Falls Light & Water Co., 80 Wash. 652, 141 Pac. 1142.

§ 1018. Return of Writ—Answer.

On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer, under oath, made in the same manner as an answer to a complaint in a civil action. [L. '95, p. 118, § 20.]

Cited in 14 Wash. 204; 15 Wash. 677; 19 Wash. 676; 60 Wash. 83; 73 Wash. 557.

Demurrer to Petition or Complaint, or to Alternative Writ: See Remington's Digest, Mand., § 84; State ex rel. Sheehan v. Headlee, 17 Wash. 637, 50 Pac. 493;

State ex rel. Howes v. Brewer, 39 Wash. 65, 80 Pac. 1001, 109 Am. St. Rep. 858, 4 Ann. Cas. 197; State ex rel. Wolfe v. Parmenter, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707.

§ 1019. Question of Fact, How Determined.

If an answer be made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct

the jury to assess any damages which the appellant [applicant] may have sustained, in case they find for him. [L. '95, p. 118, § 21.]

Cited in 14 Wash. 204; 15 Wash. 677; 19 Wash. 676; 25 Wash. 619; 30 Wash. 599.

Return or Answer: See Remington's Digest, Mand., § 85; State ex rel. Smith v. Forrest, 8 Wash. 610, 36 Pac. 686, 1120; State ex rel. Trickle v. Superior Court, 52 Wash. 13, 100 Pac. 155; State ex rel. Hallett v. Seattle Lighting Co., 60 Wash. 81, 110 Pac. 799, 30 L. R. A. (N. S.) 492; State ex rel. Deavers v. French, 78 Wash. 260, 138 Pac. 869.

The fact that this section authorizes the court to order questions of fact in an application for mandamus to be tried before a jury would not excuse the applicant from replying or demurring to an answer therein until the cause had been assigned for trial by jury: Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95.

Evidence—Presumptions and Burden of Proof: See Remington's Digest, Mand., § 88; State ex rel. Ferguson v. Grady, 71 Wash. 1, 127 Pac. 305; State ex rel. Upper v. Hanna, 87 Wash. 29, 151 Pac. 83, 1087.

Scope of Inquiry and Powers of Court: See Remington's Digest, Mand., § 89;

Bardsley v. Sternberg, 17 Wash. 243, 49 Pac. 499; Bacon v. Tacoma, 19 Wash. 674, 54 Pac. 609; State ex rel. Romano v. Yakey, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071; State ex rel. Shores v. Ross, 44 Wash. 246, 87 Pac. 262; State ex rel. Harris v. Ward, 69 Wash. 342, 124 Pac. 913; State ex rel. Rowe v. Seattle, 88 Wash. 589, 153 Pac. 336; State ex rel. Hackett v. Arnest, 100 Wash. 286, 170 Pac. 563.

Scope and Extent of Relief: See Remington's Digest, Mand., § 90; State ex rel. Maltbie v. Will, 54 Wash. 453, 103 Pac. 479, 104 Pac. 797; State ex rel. Washington Water Power Co. v. Savidge, 75 Wash. 116, 134 Pac. 680; State ex rel. Empire Voting Machine Co. v. Carroll, 78 Wash. 83, 138 Pac. 306.

An application for a writ of mandate does not require the court to either grant or reject it in toto: Shoultes v. Quast, 109 Wash. 510, 187 Pac. 356.

Peremptory Writ—Issuance on the Pleadings or on Demurrer: See Remington's Digest, Mand., § 91; State ex rel. Jefferson County v. Hatch, 36 Wash. 164, 78 Pac. 796; State ex rel. Billings v. Lamprey, 57 Wash. 84, 106 Pac. 501.

§ 1020. Applicant may Demur to Answer or Countervail It by Proof.

On the trial the applicant is not precluded by the answer from any valid objections to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance. [L. '95, p. 118, § 22.]

Cited in 25 Wash. 618; 74 Wash. 557.

Demurrer or Reply to Return or Answer: See Remington's Digest, Mand.,

§§ 86, 87; Wilson v. Aberdeen, 25 Wash. 614, 66 Pac. 95; State ex rel. Brown v. McQuade, 36 Wash. 579, 79 Pac. 207.

§ 1021. Motion for New Trial, Where Made.

The motion for new trial must be made in the court in which the issue of fact is tried. [L. '95, p. 118, § 23.]

§ 1022. Certification of Verdict—Hearing.

If no notice of a motion for new trial be given, or if given, the motion be denied, the clerk, within five days after rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial, after which either party may bring on the argument of the application, upon reasonable notice to the adverse party. [L. '95, p. 118, § 24.]

§ 1023. Court to Proceed to Hearing—Answer.

If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements not affecting the substantial rights of the party, the court must proceed to hear or fix a day for hearing the argument of the case. [L. '95, p. 118, § 25.]

Cited in 14 Wash. 205.

Affidavits submitted by respondent upon the return of an alternative writ of prohibition cannot be considered where the respondent has not answered in the man-

ner required by statute, as, under this section, the cause must be heard on the papers of the applicant if no answer be made: *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 131.

§ 1024. Damages Awarded—Peremptory Mandate.

If judgment be given for the applicant he may recover the damages which he has sustained, as found by the jury or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay. [L. '95, p. 118, § 26.]

Cited in 21 Wash. 321; 88 Wash. 592.

Appeal and Error: See Remington's Digest, Mand., § 94; *State ex rel. Nooksack River Boom Co. v. Superior Court*, 2 Wash. 9, 25 Pac. 1007; *State ex rel. Dudley v. Daggett*, 28 Wash. 1, 68 Pac. 340; *State ex rel. Smith v. Forrest*, 11 Wash. 158, 39 Pac. 450; *State ex rel. Thayer v. Mish*, 13 Wash. 302, 43 Pac. 40.

Right of respondent who has obeyed writ of mandate to appeal therefrom. 2 Ann. Cas. 627.

Dismissal of appeal in mandamus where question involved has become immaterial. 5 Ann. Cas. 626; Ann. Cas. 1912C, 247.

§ 1025. Service of Writ.

The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not. [L. '95, p. 119, § 27.]

Cited in 44 Wash. 544; 100 Wash. 287.

Under this section the copy of the writ

need not be certified: *State ex rel. Hackett v. Arnest*, 100 Wash. 286, 170 Pac. 563.

§ 1026. Penalty for Disobeying Writ.

When a temporary mandate has been issued and directed to any inferior tribunal, corporation, board or person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal or disobedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ. [L. '95, p. 119, § 28.]

Performance and Enforcement of Command: See Remington's Digest, Mand.,

§ 93; *State ex rel. O'Neil v. Wallace*, 101 Wash. 410, 172 Pac. 581.

PROHIBITION.

§ 1027. Prohibition, Defined.

The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. [L. '95, p. 119, § 29.]

Cited in 15 Wash. 675; 23 Wash. 121; 24 Wash. 543; 31 Wash. 99; 39 Wash. 408; 47 Wash. 157; 54 Wash. 152; 74 Wash. 693; 76 Wash. 379; 78 Wash. 560; 84 Wash.

273; 86 Wash. 497; 97 Wash. 360, 363; 107 Wash. 626; 112 Wash. 505.

For text treatment of "Prohibition," see 22 R. C. L. 1.

§ 1028. Courts Entitled to Issue—Grounds.

It may be issued by any court, except police or justices' courts, to an inferior tribunal, or to a corporation, board or person, in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested. [L. '95, p. 119, § 30.]

Cited in 15 Wash. 675; 47 Wash. 157; 62 Wash. 243; 74 Wash. 693; 76 Wash. 379; 97 Wash. 360, 366; 107 Wash. 626; 112 Wash. 505.

NATURE AND GROUNDS—Nature and Scope of Remedy: See Remington's Digest, Prohib., § 1; State ex rel. Tilton v. Superior Court, 7 Wash. 74, 34 Pac. 431, State ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143; State ex rel. Mackintosh v. Superior Court, 45 Wash. 248, 88 Pac. 207; State ex rel. Rose v. Ralston, 102 Wash. 268, 173 Pac. 51.

EXISTENCE AND ADEQUACY OF OTHER REMEDY: See Remington's Digest, Prohib., §§ 2—12.

§ 2. Existence and Adequacy of Other Remedies: State ex rel. Stopper v. Hunter, 4 Wash. 712, 30 Pac. 1055; Guye's Estate, In re, 54 Wash. 264, 103 Pac. 25, 132 Am. St. Rep. 1111; State ex rel. Wood v. Superior Court, 76 Wash. 27, 135 Pac. 494.

§ 3. Remedy by Writ of Review: State ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143; State ex rel. Puyallup v. Superior Court, 50 Wash. 650, 97 Pac. 778; State ex rel. Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650.

§ 4. Adequacy of Remedy by Appeal in General: State ex rel. Schwabacher Bros. Co. v. Superior Court, 13 Wash. 638, 43 Pac. 877; State ex rel. Carrau v. Superior Court, 30 Wash. 700, 71 Pac. 648; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395; State ex rel. Martin v. Hinkle, 47 Wash. 156, 91 Pac. 640; State ex rel. McCalley v. Superior Court, 51 Wash. 572, 99 Pac. 740; State ex rel. Murphy v. Wright, 76 Wash. 383, 136 Pac. 482.

The fact that one convicted of crime cannot give bail is no reason for reviewing errors of the trial court by the extraordinary writ of prohibition: State ex rel. Sowders v. Superior Court, 105 Wash. 684, 179 Pac. 79.

§ 5. Proceedings in Civil Actions in General: State ex rel. Reed v. Jones, 2 Wash. 662, 27 Pac. 452, 26 Am. St. Rep. 897; State ex rel. Baldwin v. Superior Court, 11 Wash. 111, 39 Pac. 818; State ex rel. Sligh v. Superior Court, 19 Wash. 118, 52 Pac. 1009; State ex rel. Vincent v. Benson, 21 Wash. 571, 58 Pac. 1066; State ex rel. Hibbard & Co. v. Superior Court, 21 Wash. 631, 59 Pac. 505; State

ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143; State ex rel. Cann v. Moore, 23 Wash. 115, 62 Pac. 441; State ex rel. Carrau v. Superior Court, 30 Wash. 700, 71 Pac. 648; State ex rel. Zent v. Neal, 30 Wash. 702, 71 Pac. 647; State ex rel. Port Orchard Irr. Co. v. Superior Court, 31 Wash. 410, 71 Pac. 1100; State ex rel. Stetson & Post Mill Co. v. Superior Court, 32 Wash. 498, 73 Pac. 479; State ex rel. West Seattle v. Superior Court, 36 Wash. 566, 79 Pac. 29; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395; State ex rel. Goupille v. Superior Court, 41 Wash. 128, 83 Pac. 14; Hindman v. Colvin, 46 Wash. 317, 89 Pac. 894; State ex rel. Korsstrom v. Superior Court, 48 Wash. 671, 94 Pac. 472; State ex rel. Biddle v. Superior Court, 63 Wash. 312, 115 Pac. 307, Ann. Cas. 1913D, 1119; State ex rel. Skamzer v. Superior Court, 65 Wash. 457, 118 Pac. 344; State ex rel. Griffith v. Superior Court, 71 Wash. 386, 128 Pac. 644; State ex rel. Neal v. Kauffman, 86 Wash. 172, 149 Pac. 656; State ex rel. Pierce County v. Superior Court, 86 Wash. 685, 151 Pac. 108; State ex rel. Robertson v. Superior Court, 95 Wash. 447, 164 Pac. 63; State ex rel. Bellingham v. Abrahamson, 98 Wash. 370, 168 Pac. 3.

Prohibition does not lie to control the action of the trial court in ruling as to the bar of the statute of limitations, where it had jurisdiction of the subject matter of the action and the ruling would merely be error occurring in the progress of the cause: State ex rel. Teeter v. Superior Court, 110 Wash. 255, 188 Pac. 391.

§ 7. Change of Venue and Transfer of Cause: State ex rel. Cummings v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771; State ex rel. Campbell v. Superior Court, 7 Wash. 306, 34 Pac. 1103; State ex rel. Rucker v. Stallcup, 11 Wash. 713, 40 Pac. 341; State ex rel. Allen v. Superior Court, 9 Wash. 668, 38 Pac. 206; State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395 (overruled in State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395); State ex rel. Wyman etc. Co. v. Superior Court, 40 Wash. 443, 82 Pac. 875, 111 Am. St. Rep. 915, 5 Ann. Cas. 775, 2 L. R. A. (N. S.) 568; State ex rel. La Furgey v. Superior Court, 47 Wash. 154, 91 Pac. 639; State ex rel. Lyon v. Police Court of Hoquiam,

53 Wash. 361, 101 Pac. 1082; State ex rel. Jones v. Gay, 65 Wash. 629, 118 Pac. 830; State ex rel. Moore v. Superior Court, 70 Wash. 362, 126 Pac. 926; State ex rel. Martin v. Superior Court, 97 Wash. 358, 166 Pac. 630, L. R. A. 1917F, 905.

Prohibition does not lie to enforce a change of venue to the county of defendant's residence, where the fact of residence was denied and conflicting evidence offered, and the court was called upon to exercise its discretion as to changing the place of trial for the convenience of witnesses: State ex rel. Conley v. Superior Court, 106 Wash. 569, 181 Pac. 50.

Prohibition lies to compel a change of venue to the county of defendant's residence, since the remedy by appeal is inadequate: State ex rel. Owen v. Superior Court, 110 Wash. 49, 187 Pac. 708.

§ 8. Vacating Judgment or Order: State ex rel. Post v. Superior Court, 31 Wash. 53, 71 Pac. 740; State ex rel. Twigg v. Superior Court, 34 Wash. 643, 76 Pac. 282; State ex rel. Cleek v. Tallman, 38 Wash. 132, 80 Pac. 272; State ex rel. Pacific Loan & Inv. Co. v. Superior Court, 84 Wash. 392, 146 Pac. 834.

§ 9. Proceedings Relating to Injunction: State ex rel. Reed v. Jones, 2 Wash. 662, 27 Pac. 452, 26 Am. St. Rep. 897; State ex rel. Fisher v. Kennan, 35 Wash. 52, 76 Pac. 516; State ex rel. Murphy v. Wright, 76 Wash. 383, 136 Pac. 482; State ex rel. Seaborn etc. Co. v. Superior Court, 102 Wash. 215, 172 Pac. 826.

See, also, State ex rel. McGlothorn v. Superior Court, 112 Wash. 501, 192 Pac. 937.

§ 10. Proceedings Relating to Receiverships: State ex rel. Arthur Mach. Co. v. Superior Court, 7 Wash. 77, 34 Pac. 430; State ex rel. Newland v. Superior Court, 16 Wash. 444, 47 Pac. 965; State ex rel. Oudin v. Superior Court, 34 Wash. 481, 71 Pac. 1095.

§ 11. — Contests Over Right to Office: Fawcett v. Superior Court, 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894; State ex rel. Fairbanks v. Superior Court, 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 893.

§ 12. Acts and Proceedings of Public Officers and Boards: State ex rel. Barnard v. Board of Education, 19 Wash. 8, 52 Pac. 317, 67 Am. St. Rep. 706, 40 L. R. A. 317; State ex rel. Puyallup v. Superior Court, 50 Wash. 650, 97 Pac. 778.

SUBJECTS AND PURPOSES OF RELIEF: See Remington's Digest, Prohib., §§ 13—17.

§ 13. Proceedings of Courts and Judicial Officers—Matters of Fact and Dis-

cretion: State ex rel. Bagley v. Superior Court, 3 Wash. 705, 29 Pac. 213; State ex rel. Gardner v. Superior Court, 9 Wash. 307, 37 Pac. 448; State ex rel. Burrows v. Superior Court, 43 Wash. 225, 86 Pac. 632; State ex rel. Olsen v. Christopher, 43 Wash. 72, 86 Pac. 382.

§ 14. Particular Proceedings in Civil Actions: State ex rel. Schwabacher Bros. Co. v. Superior Court, 11 Wash. 63, 39 Pac. 244; State ex rel. Boyle v. Superior Court, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. Rep. 724; State ex rel. Holgate v. Superior Court, 21 Wash. 33, 56 Pac. 932.

§ 15. Acts and Proceedings of Public Officers and Boards and Private Persons: State ex rel. Stimson Mill Co. v. Harbor Line Commrs., 4 Wash. 6, 29 Pac. 938; Clifford v. Parker, 13 Wash. 518, 43 Pac. 717.

§ 16. Judicial Nature of Proceedings, in General: State ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143; State ex rel. White v. Board of State Land Commrs., 23 Wash. 700, 63 Pac. 532.

§ 17. Acts of Private Persons: State ex rel. Gunderson v. Superior Court, 13 Wash. 226, 43 Pac. 43.

GROUND FOR RELIEF: See Remington's Digest, Prohib., §§ 18—26. **Grounds for Relief—In General:** State ex rel. Gunderson v. Superior Court, 13 Wash. 226, 43 Pac. 43; State ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143.

§ 19. Errors and Irregularities: State ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143; State ex rel. Vincent v. Benson, 21 Wash. 571, 58 Pac. 1066; State ex rel. Townsend Gas etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Cann v. Moore, 23 Wash. 115, 62 Pac. 441; State ex rel. White v. Board of State Land Commrs., 23 Wash. 700, 63 Pac. 532; State ex rel. Foster v. Superior Court, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690; State ex rel. Fisher v. Kennan, 35 Wash. 52, 76 Pac. 516.

§ 20. Want or Excess of Jurisdiction: State ex rel. Cummings v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771; State ex rel. Allen v. Superior Court, 9 Wash. 668, 38 Pac. 206; State ex rel. Campbell v. Superior Court, 7 Wash. 306, 34 Pac. 1103; State ex rel. Rucker v. Stallcup, 11 Wash. 713, 40 Pac. 341; State ex rel. Stockman v. Superior Court, 15 Wash. 366, 46 Pac. 395; State ex rel. Baldwin v. Superior Court, 11 Wash. 111, 39 Pac. 818; State ex rel. Nolte v. Superior Court, 15 Wash. 500, 46 Pac. 1031; State ex rel. Alladio v. Superior Court, 17 Wash. 54, 48 Pac. 733; State ex rel. Townsend Gas etc. Co. v. Superior Court, 20 Wash. 502, 55 Pac. 933; State ex rel. Reed v. Jones, 2 Wash. 662, 27

Pac. 452, 26 Am. St. Rep. 897; State ex rel. Vincent v. Benson, 21 Wash. 571, 58 Pac. 1066; State ex rel. Hibbard & Co. v. Superior Court, 21 Wash. 631, 59 Pac. 505; State ex rel. Lewis v. Hogg, 22 Wash. 646, 62 Pac. 143; State ex rel. Cann v. Moore, 23 Wash. 115, 62 Pac. 441; State ex rel. Carrau v. Superior Court, 30 Wash. 709, 71 Pac. 648; State ex rel. Port Orchard Irr. Co. v. Superior Court, 31 Wash. 410, 71 Pac. 1, 100; State ex rel. Zent v. Neal, 30 Wash. 702, 71 Pac. 648; State ex rel. Post v. Superior Court, 31 Wash. 53, 71 Pac. 740; State ex rel. Stetson & Post Mill Co. v. Superior Court, 32 Wash. 498, 73 Pac. 479; State ex rel. Twigg v. Superior Court, 34 Wash. 643, 76 Pac. 282; State ex rel. West Seattle v. Superior Court, 36 Wash. 566, 79 Pac. 29; State ex rel. Miller v. Superior Court, 40 Wash. 555, 82 Pac. 877, 111 Am. St. Rep. 925, 2 L. R. A. (N. S.) 395; State ex rel. Grant Realty Co. v. Superior Court, 76 Wash. 376, 136 Pac. 144; State ex rel. Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650; State ex rel. Prentice v. Superior Court, 86 Wash. 90, 149 Pac. 321; State ex rel. Calhoun v. Superior Court, 86 Wash. 492, 150 Pac. 1168; State ex rel. Hopman v. Superior Court, 88 Wash. 612, 153 Pac. 315.

See, also, State ex rel. McGlothorn v. Superior Court, 112 Wash. 501, 192 Pac. 937.

§ 21. Jurisdiction of the Subject Matter, in General: North Yakima v. Superior Court, 4 Wash. 655, 30 Pac. 1053; State ex rel. Peterson v. Superior Court, 5 Wash. 639, 32 Pac. 553; State ex rel. Peterson v. Superior Court, 6 Wash. 417, 34 Pac. 151; State ex rel. Prentice v. Superior Court, 86 Wash. 90, 149 Pac. 321.

§ 22. Contempt Proceedings: State ex rel. Rochford v. Superior Court, 4 Wash. 30, 29 Pac. 764; State ex rel. Jensen v. Bell, 34 Wash. 185, 75 Pac. 641; State ex rel. Peterson v. Superior Court, 67 Wash. 370, 121 Pac. 836; State ex rel. Board of Commissioners v. Superior Court, 73 Wash. 296, 131 Pac. 816; State ex rel. Surry v. Superior Court, 74 Wash. 689, 134 Pac. 178; Surry v. Surry, 84 Wash. 269, 146 Pac. 613.

§ 23. Issuance of Particular Writs: State ex rel. Hartman v. Superior Court, 21 Wash. 469, 58 Pac. 572.

§ 25. Interference With Jurisdiction or Proceedings of Other Courts: State ex rel. Warren v. Ayer, 17 Wash. 127, 49 Pac. 226; State ex rel. Belt v. Kennan, 25 Wash. 621, 66 Pac. 62; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, L. R. A. 1915C, 257.

§ 26. Proceedings in Trial Court After Appeal Taken: State ex rel. Nooksack

River Boom Co. v. Superior Court, 2 Wash. 9, 25 Pac. 1007; State ex rel. Schloss v. Superior Court, 3 Wash. 696, 29 Pac. 202; State ex rel. McDonald v. Superior Court, 6 Wash. 112, 32 Pac. 1072; State ex rel. Tilton v. Superior Court, 7 Wash. 74, 34 Pac. 431; State ex rel. Wolferman v. Superior Court, 8 Wash. 591, 36 Pac. 449; State ex rel. Dooly v. Superior Court, 10 Wash. 168, 38 Pac. 998; State ex rel. German-Amer. Sav. etc. Bank v. Superior Court, 12 Wash. 677, 42 Pac. 123; State ex rel. Schwabacher Bros. Co. v. Superior Court, 13 Wash. 638, 43 Pac. 877; Parker v. Superior Court, 25 Wash. 544, 66 Pac. 154; State ex rel. Quandt v. Superior Court, 30 Wash. 197, 70 Pac. 233; State ex rel. Post v. Superior Court, 31 Wash. 53, 71 Pac. 740; Sullivan's Estate, In re, 36 Wash. 217, 78 Pac. 945; State ex rel. Hamilton v. Superior Court, 56 Wash. 91, 105 Pac. 171; State ex rel. Merrill v. Superior Court, 80 Wash. 109, 141 Pac. 317; Geissler's Estate, In re, 99 Wash. 452, 169 Pac. 822.

Defenses and Grounds of Opposition: See Remington's Digest, Prohib., § 27; State ex rel. Hunter v. Langhorne, 8 Wash. 447, 36 Pac. 438.

Prohibition Ineffectual or not Beneficial: See Remington's Digest, Prohib., § 28; Clifford v. Parker, 13 Wash. 518, 43 Pac. 717; State ex rel. Nooksack River Boom Co. v. Superior Court, 2 Wash. 9, 25 Pac. 1007; State ex rel. Gunderson v. Superior Court, 13 Wash. 226, 43 Pac. 43; State ex rel. Hart Lum. Co. v. Superior Court, 16 Wash. 347, 47 Pac. 754; State ex rel. Gordon v. Superior Court, 3 Wash. 702, 29 Pac. 204; State ex rel. Cleek v. Tallman, 38 Wash. 132, 80 Pac. 272.

Persons Entitled to Relief: See Remington's Digest, Prohib., § 29; Board of Harbor Line Commrs. v. State, 2 Wash. 530, 27 Pac. 550; Henschel v. Western Assur. Co., 4 Wash. 816, 30 Pac. 736; State ex rel. Rochford v. Superior Court, 4 Wash. 30, 29 Pac. 764; State ex rel. Dodge v. Langhorne, 12 Wash. 588, 41 Pac. 917; State ex rel. Hanna v. Main, 62 Wash. 242, 113 Pac. 632, 34 L. R. A. (N. S.) 255.

JURISDICTION: See Remington's Digest, Prohib., §§ 30—32. **Of Supreme Court:** State ex rel. Reed v. Jones, 2 Wash. 662, 27 Pac. 452, 26 Am. St. Rep. 897; State ex rel. Nooksack River Boom Co. v. Superior Court, 2 Wash. 9, 25 Pac. 1007; State ex rel. Rochford v. Superior Court, 4 Wash. 30, 29 Pac. 764; State ex rel. Campbell v. Superior Court, 7 Wash. 306, 34 Pac. 1103; State ex rel. Allen v. Superior Court, 9 Wash. 668, 38 Pac. 206; State ex rel. Meeker v. Superior Court, 13 Wash. 607, 43 Pac. 887, 46 Pac. 342; State ex rel. Amsterdamsch

Trustees Kantoor v. Superior Court, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111; **State ex rel. White v. Board of State Land Commrs.**, 23 Wash. 700, 63 Pac. 532; **Winsor v. Bridges**, 24 Wash. 540, 64 Pac. 780; **State ex rel. Pelton v. Ross**, 39 Wash. 399, 81 Pac. 865; **State ex rel. Bennett v. Taylor**, 54 Wash. 150, 102 Pac. 1029; **State ex rel. Murphy v. Taylor**, 101 Wash. 148, 172 Pac. 217.

— **Of Superior Courts:** **Winsor v. Bridges**, 24 Wash. 540, 64 Pac. 780.

— **Jurisdiction Dependent on Amount or Value in Controversy:** **State ex rel. Bagley v. Superior Court**, 3 Wash. 705, 29 Pac. 213; **State ex rel. McLeod v. Superior Court**, 24 Wash. 725, 64 Pac. 1119; **State ex rel. Foster v. Superior Court**, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690; **State ex rel. Fuller v. Superior Court**, 31 Wash. 96, 71 Pac. 722.

See, also, **State ex rel. Home Tel. & Tel. Co. v. Hurn**, 106 Wash. 362, 180 Pac. 400.

PROCEEDINGS: See Remington's Digest, Prohib., §§ 33—41.

Presentation of Objections in Original Proceeding: **State ex rel. Nooksack River Boom Co. v. Superior Court**, 2 Wash. 9, 25 Pac. 1007; **Harris v. Brooker**, 8 Wash. 138, 35 Pac. 599.

Parties: **State ex rel. Rochford v. Superior Court**, 4 Wash. 30, 29 Pac. 764.

Petition, or Other Application: **Harris v. Brooker**, 8 Wash. 138, 35 Pac. 599; **State ex rel. West Seattle v. Superior Court**, 36 Wash. 566, 79 Pac. 29.

Affidavits on Application: **State ex rel. Alladio v. Superior Court**, 17 Wash. 54, 48 Pac. 733.

Return or Answer and Subsequent Pleadings: **State ex rel. Schloss v. Superior Court**, 3 Wash. 696, 29 Pac. 202; **Geissler's Estate, In re**, 99 Wash. 452, 169 Pac. 822.

Evidence: **Board of Harbor Line Commrs. v. State ex rel. Yesler**, 2 Wash. 530, 27 Pac. 550; **State ex rel. Townsend Gas etc. Co. v. Superior Court**, 20 Wash. 502, 55 Pac. 933; **Clifford v. Parker**, 13 Wash. 518, 43 Pac. 717; **State ex rel. State Ins. Co. v. Superior Court**, 14 Wash. 203, 44 Pac. 131.

See, also, **State ex rel. Brown v. Superior Court**, 109 Wash. 287, 186 Pac. 891.

Scope of Inquiry and Powers of Court: **State ex rel. Amsterdamsch Trustees**

Kantoor v. Superior Court, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111.

See, also, **State ex rel. Eureka Cedar Lbr. & Shingle Co. v. Superior Court**, 107 Wash. 620, 182 Pac. 607.

Hearing and Determination: **State ex rel. State Ins. Co. v. Superior Court**, 14 Wash. 203, 44 Pac. 131.

Costs: **State ex rel. Cummings v. Superior Court**, 5 Wash. 518, 32 Pac. 457, 771; **State ex rel. Nolte v. Superior Court**, 15 Wash. 500, 46 Pac. 1031.

Prohibition to restrain one court of concurrent jurisdiction from interfering with or entertaining suit where another court has assumed cognizance. 14 **Ann. Cas.** 206.

Writ of prohibition to arrest proceedings of probate court. **Ann. Cas.** 1914A, 138.

Courts-martial proceedings as reviewable by writ of prohibition. 17 **Ann. Cas.** 447, 448.

Prohibition against court proceeding with a case in which it erroneously denied a change of venue. 2 **L. R. A. (N. S.)** 395; **L. R. A.** 1917F, 911.

Prohibition to prevent prejudiced judge proceeding with case. 8 **A. L. R.** 1238.

When prohibition lies against council or executive officer of municipal corporation. 20 **Ann. Cas.** 962.

Public service commission's acts as subject to control by prohibition. **Ann. Cas.** 1914D, 795.

Prohibition to prevent receiver taking property from possession of stranger. 47 **L. R. A. (N. S.)** 757.

Right of attorney to writ of prohibition in disbarment proceedings. 10 **Ann. Cas.** 546.

Determination of constitutional question in prohibition proceedings. 6 **Ann. Cas.** 986; 1 **L. R. A. (N. S.)** 843.

Issuance of writ of prohibition in criminal case on application of defendant on ground of lack of jurisdiction in trial court. 18 **Ann. Cas.** 263.

Ministerial acts as subject to prohibition. 3 **Ann. Cas.** 357.

Validity of statute as reviewable in prohibition proceedings. **Ann. Cas.** 1913D, 596.

§ 1029. Writ may be Alternative or Peremptory.

The writ must be either alternative or peremptory. The alternative writ must state generally the allegations against the party to whom it is directed, and command such party to desist or refrain from further pro-

ceedings in the action or matter specified therein until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted and a return day inserted. [L. '95, p. 119, § 31.]

§ 1030. Provisions Relating to Mandate Applicable.

The provisions of sections 1013 to 1026, relating to writ of mandate, apply to this proceeding. [L. '95, p. 120, § 32.]

§ 1031. Writs of Review, Mandate and Prohibition Made Returnable, When.

Writs of review, mandate, and prohibition issued by the supreme court, or by a superior court, may, in the discretion of the court issuing the writ, be made returnable, and a hearing thereon be had at any time. [L. '95, p. 120, § 33.]

§ 1032. Rules of Practice and Proceedings.

Except as otherwise provided in this chapter, the provisions of the Code of Procedure concerning civil actions are applicable to and constitute the rules of practice in the proceedings in this chapter. [L. '95, p. 120, § 34.]

Cited in 15 Wash. 93; 21 Wash. 454; 25 Wash. 618; 30 Wash. 599.

§ 1033. Appeals.

From a final judgment in the superior court, in any such proceeding an appeal shall lie to the supreme court. [L. '95, p. 120, § 35.]

Cited in 86 Wash. 50; 109 Wash. 637.

An order in mandamus proceedings by a citizen and taxpayer compelling the prosecuting attorney to institute quo warranto proceedings against a corporation is a final order in the proceeding against the prosecuting attorney, and hence is appealable by him under this section: *State ex rel. Prosecuting Attor-*

ney v. Union Savings Bank, 86 Wash. 48, 149 Pac. 327.

A writ of prohibition is a special proceeding and from a final judgment an appeal may be taken to the supreme court under this section: *State ex rel. Spokane & Eastern Trust Co. v. Superior Court*, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

CHAPTER II.

INFORMATION IN THE NATURE OF QUO WARRANTO.

§ 1034. Against Whom Filed.

An information may be filed against any person or corporation in the following cases:—

1. When any person shall usurp, intrude upon [into], or unlawfully hold or exercise any public office or franchise within the state, or any office in any corporation created by the authority of the state;

2. When any public officer shall have done or suffered any act, which, by the provisions of law, shall work a forfeiture of his office;

3. When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons in order to try their respective rights to the office or franchise;

4. When any association or number of persons shall act within this state as a corporation, without being legally incorporated;

5. Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or where they exercise powers not conferred by law. [Cf. L. '54, p. 216, §§ 468, 477; L. '77, p. 143, § 706; Cd. '81, § 702; 2 H. C., § 679.]

Cited in 2 Wash. 569, 571; 8 Wash. 400, 558; 10 Wash. 350; 14 Wash. 263; 16 Wash. 162; 20 Wash. 632; 28 Wash. 492, 507; 31 Wash. 103; 34 Wash. 164; 48 Wash. 198; 52 Wash. 640; 56 Wash. 658; 67 Wash. 384; 69 Wash. 558, 560; 92 Wash. 494.

JURISDICTION, PROCEEDINGS AND RELIEF—Jurisdiction: See Remington's Digest, Quo. W., § 9; State ex rel. Blake v. Morris, 14 Wash. 262, 44 Pac. 266.

Parties Defendant or Respondents—See Remington's Digest, Quo. W., §§ 12-1, 13.

In General: State ex rel. Powell v. Fassett, 69 Wash. 555, 125 Pac. 963; **Waiver of Defects:** State ex rel. Atty. Gen. v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

NATURE AND GROUNDS: See Remington's Digest, Quo. W., §§ 1—8. Mills v. State ex rel. Smith, 2 Wash. 566, 27 Pac. 560; State ex rel. Attorney Gen. v. Seattle Gas etc., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

Discretion of Court as to Remedy: Mills v. State ex rel. Smith, 2 Wash. 566, 27 Pac. 560; State ex rel. Attorney Gen. v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; State ex rel. Gilbert v. Prosecuting Attorney, 92 Wash. 484, 159 Pac. 761.

Exercise of Franchise or Privilege in General: State ex rel. Attorney Gen. v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

Exercise of Powers by Municipality: State ex rel. Pros. Atty. v. South Park, 34 Wash. 162, 75 Pac. 636, 101 Am. St. Rep. 998.

Exercise of Public Office—In General: State ex rel. Hyland v. Peter, 21 Wash. 243, 57 Pac. 814.

— Trial of Title to Office: State ex rel. Heilbron v. Van Brocklin, 8 Wash. 557, 36 Pac. 495; Kimball v. Olmstead,

20 Wash. 629, 56 Pac. 377; Standard Gold Min. Co. v. Byers, 31 Wash. 100, 71 Pac. 767; State ex rel. Niggle v. Kirkwood, 15 Wash. 298, 46 Pac. 331.

Exercise of Corporate Office: State ex rel. Mitchell v. Horan, 22 Wash. 197, 60 Pac. 135.

Defenses and Grounds of Opposition: State ex rel. Niggle v. Kirkwood, 15 Wash. 298, 46 Pac. 331.

For text treatment of "Quo Warranto," see 22 R. C. L. 654.

Governor as subject to writ to try title to office. 3 Ann. Cas. 393; 11 Ann. Cas. 620; Ann. Cas. 1913B, 789.

Drainage district organization or assessments as subject to test by quo warranto. Ann. Cas. 1915C, 29, 34; 60 L. R. A. 243.

Validity of commission of military officer as determinable in quo warranto proceedings. 17 Ann. Cas. 448.

Remedy of quo warranto as extending to usurpation of office in private corporation. Ann. Cas. 1915A, 1145; 51 L. R. A. (N. S.) 1126.

Quo warranto against corporations for making illegal charges in the course of authorized business. 63 L. R. A. 761.

Necessity of leave of court to prosecution of quo warranto proceeding. 6 Ann. Cas. 912; Ann. Cas. 1915C, 392.

Proper parties defendant in proceeding in quo warranto against corporation. Ann. Cas. 1913A, 570; Ann. Cas. 1918D, 228.

Joinder of parties in quo warranto proceedings. Ann. Cas. 1918D, 214.

§ 1035. By Whom Filed.

The information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information. [L. '54, p. 216, § 469; Cd. '81, § 703; 2 H. C., § 680.]

Cited in 2 Wash. 572; 22 Wash. 198; 28 Wash. 494, 503; 42 Wash. 412; 52 Wash. 640; 91 Wash. 84; 92 Wash. 490; 105 Wash. 95.

Parties Plaintiff or Petitioners: See Remington's Digest, Quo. W., §§ 10—12. In General: State ex rel. Mitchell v. Horan, 22 Wash. 197, 60 Pac. 135.

— **Public Officers:** Mills v. State ex rel. Smith, 2 Wash. 566, 27 Pac. 560; State ex rel. Atty. Gen. v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; State ex rel. Powell v. Fassett, 69 Wash. 555, 125 Pac. 933.

— **Private Persons:** Mills v. State ex rel. Smith, 2 Wash. 566, 27 Pac. 560; State ex rel. White v. Point Roberts etc. Co., 42 Wash. 409, 85 Pac. 22; State ex rel. Gilbert v. Prosecuting Atty., 92 Wash. 484, 159 Pac. 761.

Ultimate discretion is vested in the court to order the prosecuting attorney to institute quo warranto proceedings, by this section; "may" being used not in the permissive, but in the alternative sense, and the statute being remedial and to be liberally construed: State ex rel. Gilbert v. Prosecuting Atty., 92 Wash. 484, 159 Pac. 761.

Under this section the attorney general has no authority, even under the common-law powers, if any, inhering in his office, to institute the action: State ex rel. Atty. Gen. v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

An order overruling the prosecuting attorney's demurrer to a petition to require him to file an action in quo warranto, and directing him to make an investigation and exercise his discretionary power in the matter of commencing quo warranto, is not a final order in the proceeding, and is therefore not appealable: State ex rel. Cummings v. Blackwell, 91 Wash. 81, 157 Pac. 223.

Quo warranto as matter of right by attorney general or district attorney. 1 L. R. A. (N. S.) 826.

Scope of discretion of public prosecutor with respect to institution of proceedings in nature of quo warranto. 15 L. R. A. (N. S.) 603.

Who may maintain quo warranto to test validity of organization of municipal corporation or political subdivision of state. 21 L. R. A. (N. S.) 685.

Private person's right to file information in quo warranto to try title to office. 6 Ann. Cas. 463; 13 Ann. Cas. 1063; Ann. Cas. 1915D, 1154.

Right of corporation to maintain action of quo warranto. 1 A. L. R. 197.

§ 1036. Information, Contents of.

The information shall consist of a plain statement of the facts which constitute the grounds of the proceedings, addressed to the court. [L. '54, p. 216, § 470; Cd. '81, § 704; 2 H. C., § 681.]

Cited in 8 Wash. 558.

Pleading—Information or Petition: See Remington's Digest, Quo. W., § 14; State ex rel. Heilbron v. Van Brocklin, 8 Wash. 557, 36 Pac. 495; State ex rel. Atty. Gen. v. Seattle Gas etc. Co., 28

Wash. 488, 68 Pac. 946, 70 Pac. 114; State ex rel. Whitney v. Friars, 10 Wash. 348, 39 Pac. 104; State ex rel. Tremblay v. McQuade, 12 Wash. 554, 41 Pac. 897; State ex rel. Gilbert v. Prosecuting Atty., 92 Wash. 484, 159 Pac. 761.

§ 1037. Information for Usurping Office—Contents—Damages Claimed.

Whenever an information shall be filed against a person for usurping an office by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person, he shall show his interest in the matter, and he may claim the damages he has sustained. [L. '54, p. 216, § 471; Cd. '81, § 705; 2 H. C., § 682.]

Cited in 2 Wash. 572; 52 Wash. 640.

Necessity in information of quo warranto of alleging legal existence

of office in question. 5 Ann. Cas. 691.

§ 1038. Summons—Pleadings—Proceedings.

Whenever an information is filed, a notice signed by the relator shall be served and returned, as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceeding be had as in other cases. [L. '54, p. 217, § 472; Cd. '81, § 706; 2 H. C., § 683.]

Cited in 2 Wash. 571; 52 Wash. 640.
Answer or Demurrer: See Remington's Digest, Quo. W., §§ 15, 15-1; State ex rel.

Heilbron v. Van Brocklin, 3 Wash. 557, 36 Pac. 495; State ex rel. Port Angeles v. Morse, 56 Wash. 654, 106 Pac. 147.

§ 1039. Judgment and Damages.

In every case wherein the right to an office is contested, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, at the time of the judgment. [L. '54, p. 217, § 473; Cd. '81, § 707; 2 H. C., § 684.]

Cited in 2 Wash. 573; 43 Wash. 606; 52 Wash. 640.

Trial or Hearing: See Remington's Digest, Quo. W., § 16; State ex rel. Mullin v. Doherty, 16 Wash. 382, 47 Pac. 958, 58 Am. St. Rep. 39; State ex rel. Orr v. Fawcett, 17 Wash. 188, 49 Pac. 346.

Judgment and Relief: See Remington's Digest, Quo. W., §§ 17—19; State ex rel. Heilbron v. Van Brocklin, 8 Wash. 557, 36 Pac. 495; Fawcett v. Superior Court, 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894.

Judgment of ouster in quo warranto proceedings is not suspended by an appeal: Fawcett v. Superior Court, 15

Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894; State ex rel. Mullen v. Superior Court, 15 Wash. 376, 46 Pac. 402.

A de jure officer who has recovered judgment against a de facto officer for the salary paid to him, under sections 1039 and 1042, has elected his remedy and cannot recover the same from the town on failure to collect the judgment: Samuels v. Harrington, 43 Wash. 603, 86 Pac. 1071, 117 Am. St. Rep. 1075.

Whether fine or judgment for damages may be imposed on quo warranto proceedings. **Ann. Cas.** 1913D, 942.

§ 1040. Judgment for Relator.

If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office, after he has been qualified as required by law, and the court shall order the defendant to deliver over all books and papers in his custody or within his power, belonging to the office from which he has been ousted. [L. '54, p. 217, § 474; Cd. '81, § 708; 2 H. C., § 685.]

Cited in 2 Wash. 573; 15 Wash. 346; 22 Wash. 199; 52 Wash. 640.

§ 1041. Order, How Enforced.

If the defendant shall refuse or neglect to deliver over the books and papers pursuant to the order, the court, or judge thereof, shall enforce the order by attachment and imprisonment. [L. '54, p. 217, § 475; Cd. '81, § 709; 2 H. C., § 686.]

Cited in 52 Wash. 640.

§ 1042. Action for Damages—Limitation.

When judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the information, have his action for the damages at any time within one year after the judgment. [L. '54, p. 217, § 476; Cd. '81, § 710; 2 H. C., § 687.]

Cited in 2 Wash. 573; 43 Wash. 606; 52 Wash. 640.

§ 1043. Judgment of Ouster or Forfeiture.

Whenever any defendant shall be found guilty of any usurpation of or intrusion into or unlawfully exercising any office or franchise within this state, or any office in any corporation created by the authority of this state, or when any public officer thus charged shall be found guilty of having done or suffered any act which by the provisions of the law

shall work a forfeiture of his office, or when any association or number of persons shall be found guilty of having acted as a corporation without having been legally incorporated, the court shall give judgment of ouster against the defendant or defendants, and exclude him or them from the office, franchise, or corporate rights, and in case of corporations, that the same shall be dissolved, and the court shall adjudge costs in favor of the plaintiff. [L. '54, p. 217, § 478; Cd. '81, § 711; 2 H. C., § 688.]

Cited in 15 Wash. 676; 16 Wash. 162; 48 Wash. 198; 49 Wash. 242; 52 Wash. 640.

DISSOLUTION OF CORPORATION, WHEN AUTHORIZED: State ex rel. Conlan v. Oudin & Bergman Fire Clay Min. & Mfg. Co., 48 Wash. 196, 93 Pac. 219; State ex rel. Mitchell v. Horan, 22 Wash. 197, 60 Pac. 135.

Where the sole object of a proceeding is to dissolve an alleged corporation and deprive it of corporate rights and franchises, no judgment can be rendered except that prescribed by this section: State ex rel. Amsterdamsch Trustees K. v. Superior Court, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111.

§ 1044. Judgment Against Corporation.

If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by executions against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account and make a distribution thereof, among the creditors. The prosecuting attorney shall immediately institute proceedings for that purpose. [L. '54, p. 217, § 479; Cd. '81, § 712; 2 H. C., § 689.]

Cited in 15 Wash. 675; 48 Wash. 198; 49 Wash. 242.

The last sentence of this section is only directory, and does not preclude the institution of proceedings by any interested party: Conlan v. Oudin, 49 Wash. 240, 94 Pac. 1074.

The superior court has no power until after judgment to appoint a receiver for a corporation, upon the institution by the state of quo warranto proceedings seeking to oust it from the exercise of corporate powers: State ex rel. Amsterdamsch Trustees K. v. Superior Court, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111.

Refusal to appoint a receiver, when

not an abuse of discretion: Ridpath v. Sans Poil etc. Transportation Co., 26 Wash. 427, 67 Pac. 229.

Under this section a receiver may be appointed upon the involuntary dissolution of a corporation without a showing as to any necessity therefor: Conlan v. Oudin, 49 Wash. 240, 94 Pac. 1074.

When a temporary receiver should be appointed for a corporation, though solvent and prosperous, on account of dissensions; and the receivership will be made permanent in case the differences cannot be adjusted within a time limited: Boothe v. Summit Coal Min. Co., 55 Wash. 167, 104 Pac. 207, 19 Ann. Cas. 1255.

§ 1045. Action to Recover Escheated or Forfeited Property.

Whenever any property shall [escheat or] be forfeited to the state for its use, the legal title shall be deemed to be in the state from the time of the [escheat or] forfeiture, and an information may be filed by the prosecuting attorney in the superior court for the recovery of the property, alleging the ground on which the recovery is claimed, and like proceedings and judgment shall be had as in civil action for the recovery of the property. [L. '54, p. 218, § 480; Cd. '81, § 713; 2 H. C., § 690.]

§ 1046. Costs.

When an information is filed by the prosecuting attorney, he shall not be liable for the costs, but when it is filed upon the relation of a private

person such person shall be liable for costs unless the same are adjudged against the defendant. [L. '54, p. 218, § 481; Cd. '81, § 714; 2 H. C., § 691.]

§ 1047. Information to Annul Patent, etc.

An information may be prosecuted for the purpose of annulling or vacating any letters patent, certificate, or deed granted by the proper authorities of this state, when there is reason to believe that the same were obtained by fraud, or through mistake or ignorance of a material fact, or when the patentee or those claiming under him have done or omitted an act in violation of the terms on which the letters, deeds, or certificates were granted, or have by any other means forfeited the interests acquired under the same. [L. '54, p. 218, § 482; Cd. '81, § 715; 2 H. C., § 692.]

§ 1048. Proceedings to Annul.

In such cases, the information may be filed by the prosecuting attorney upon his relation, or by any private person upon his relation, showing his interest in the subject matter; and the subsequent proceedings, judgment of the court, and awarding of costs shall conform to the above provisions, and such letters patent, deed, or certificate shall be annulled or sustained, according to the right of the case. [L. '54, p. 218, § 483; Cd. '81, § 716; 2 H. C., § 693.]

CHAPTER III.

CONTEMPTS AND THEIR PUNISHMENT.

§ 1049. Contempts, Defined.

The following acts or omissions, in respect to a court of justice or proceedings therein, are deemed to be contempts of court:—

1. Disorderly, contemptuous, or insolent behavior toward the judge while holding the court, tending to impair its authority, or to interrupt the due course of a trial or other judicial proceedings;

2. A breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding;

3. Misbehavior in office, or other willful neglect or violation of duty by an attorney, clerk, sheriff, or other person appointed or selected to perform a judicial or ministerial service;

4. Deceit, abuse of the process, or proceedings of the court by a party to an action, suit, or special proceeding;

5. Disobedience of any lawful judgment, decree, order, or process of the court;

6. Assuming to be an attorney or other officer of the court, and acting as such without authority in a particular instance;

7. Rescuing any person or property in the lawful custody of an officer, held by such officer under an order or process of such court;

8. Unlawfully detaining a witness or party to an action, suit, or proceeding while going to, remaining at, or returning from the court where the same is for trial;

9. Any other unlawful interference with the process or proceedings of a court;

10. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness;

11. When summoned as a juror in a court, improperly conversing with a party to an action, suit, or proceeding to be tried at such court, or with any other person in relation to the merits of such action, suit or proceeding, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court;

12. Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, decree, order, or process of a superior court, or proceeding in an action, suit, or proceeding contrary to law, after such action, suit, or proceeding shall have been removed from the jurisdiction of such inferior tribunal, magistrate, or officer. [L. '69, p. 167, § 667; Cd. '81, § 725; 2 H. C., § 778.]

See supra, § 630, contempt in proceedings supplemental to execution.

See supra, § 696, contempt for failure of garnishee to deliver property to sheriff.

See supra, §§ 732-734, contempt for violating injunction.

See supra, § 746, contempt for failure to deposit money, etc.

See supra, § 1026, penalty for disobeying writ of mandate.

See infra, § 1220, contempt for failure to obey subpoena.

See infra, § 1891 et seq., contempt and punishment in justice court.

See infra, § 2040, contempt by grand jurors or other officers in disclosing facts.

Cited in 19 Wash. 242; 25 Wash. 528; 29 Wash. 577; 40 Wash. 220; 71 Wash. 496; 79 Wash. 555, 556; 94 Wash. 184; 104 Wash. 684.

ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT: See Remington's Digest, Contempt, §§ 1-10.

Nature and Elements of Contempt: State v. Tugwell, 19 Wash. 238, 38 Pac. 864, 43 L. R. A. 717; State v. Denham, 30 Wash. 643, 71 Pac. 196; State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 67 Wash. 317, 121 Pac. 467, Ann. Cas. 1913D, 456; Wright v. Suydam, 79 Wash. 550, 140 Pac. 578.

Misconduct in Presence of Court: Lambuth, In re, 18 Wash. 478, 51 Pac. 1071; State v. Budress, 63 Wash. 26, 114 Pac. 879; Willis, In re, 94 Wash. 180, 162 Pac. 38.

Publications Relating to Court in Pending Proceedings: State v. Tugwell, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717; State ex rel. Dorrien v. Hazeltine, 82 Wash. 81, 143 Pac. 436; State v. Sefrit, 84 Wash. 345, 146 Pac. 864.

Misconduct of Juror: Hedican v. Pennsylvania Fire Ins. Co., 21 Wash. 488, 58 Pac. 574.

Interference With Persons in Custody of the Law: Grant, In re, 26 Wash. 412, 67 Pac. 73.

Disobedience of Mandate or Order, in General: State ex rel. Timm v. Trounce, 5 Wash. 804, 32 Pac. 750; State ex rel. Stevens v. Catlin, 21 Wash. 423, 58 Pac. 296; State ex rel. Brown v. McFaul, 27 Wash. 286, 67 Pac. 564; State ex rel. Union Machinery & Supply Co. v. Thompson, 99 Wash. 478, 169 Pac. 980; State ex rel. Berger v. Haiman, 100 Wash. 632, 171 Pac. 529; State ex rel. Curtiss v. Erickson, 66 Wash. 639, 120

Pac. 104; State ex rel. Olding v. Stampfly, 69 Wash. 368, 125 Pac. 148.

— Validity of Mandate, Order or Judgment: State ex rel. Pub. Co. v. Muligan, 3 Wash. 144, 28 Pac. 369; Barnett v. Ashmore, 5 Wash. 163, 31 Pac. 466; State ex rel. Dodge v. Langhorne, 12 Wash. 588, 41 Pac. 917; State ex rel. Evans v. Winder, 14 Wash. 114, 44 Pac. 125; Larsen v. Winder, 14 Wash. 109, 44 Pac. 123; Savage v. Sternberg, 19 Wash. 679, 54 Pac. 611, 67 Am. St. Rep. 751; Groen, In re, 22 Wash. 53, 60 Pac. 123; State ex rel. Brown v. McFaul, 27 Wash. 286, 67 Pac. 564; State v. Denham, 30 Wash. 643, 71 Pac. 196; Metler v. Metler, 32 Wash. 494, 73 Pac. 535; Simon Piano Co. v. Fairfield, 103 Wash. 206, 174 Pac. 457.

Stay or Review of Proceedings: State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

— Service on or Knowledge of Party or Other Person: State ex rel. Boardman v. Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866.

— Ability to Obey: State ex rel. Smith v. Smith, 17 Wash. 430, 50 Pac. 52; State ex rel. Olsen v. Allen, 14 Wash. 684, 45 Pac. 644; Anderson, In re, 97 Wash. 683, 167 Pac. 70.

In civil contempt to enforce payment of overdue monthly installments of alimony, lack of present ability to pay is a complete defense, notwithstanding unjustifiable past delinquencies; and judgment of contempt is unwarranted where the only evidence on the subject is defendant's direct and positive testimony of present inability: Snook v. Snook, 110 Wash. 310, 188 Pac. 502.

— Demand and Refusal of Payment of Money as Adjudged: State ex rel. Dit-

mar v. Ditmar, 19 Wash. 324, 53 Pac. 350.

Acts or Defaults Affecting Only Rights or Remedies of Parties to Proceedings: State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

Defenses: State ex rel. Sander v. Jones, 20 Wash. 576, 56 Pac. 369; State ex rel. Stevens v. Catlin, 21 Wash. 423, 58 Pac. 206.

Persons Liable: State ex rel. Cougill v. Sachs, 3 Wash. 496, 30 Pac. 503; State ex rel. Martin v. Pendergast, 39 Wash. 132, 81 Pac. 324.

For text treatment of "Contempt," see 6 R. C. L. 486.

What courts or officers have power to punish for contempt. 8 A. L. R. 1543.

Nature of contempt proceeding as civil or criminal action. 21 Ann. Cas. 907; Ann. Cas. 1916B, 959; 13 L. R. A. (N. S.) 591; 34 L. R. A. (N. S.) 874; 42 L. R. A. (N. S.) 793.

Disclosure by grand juror of proceedings as contempt. 15 Ann. Cas. 257; 17 L. R. A. (N. S.) 1049.

Refusal to be sworn or to affirm as contempt of court. 51 L. R. A. (N. S.) 1155.

Disobedience of rule excluding witnesses from courtroom as contempt. 9 Ann. Cas. 371.

Fighting in court as contempt. Ann. Cas. 1912A, 581.

Drunkenness in presence of court as contempt. Ann. Cas. 1913B, 282; 33 L. R. A. (N. S.) 138.

Attorney's statement in court concerning decisions as contempt. 5 L. R. A. (N. S.) 916.

Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court. 7 A. L. R. 345.

Release of, or interference with custody of prisoner, as contempt. L. R. A. 1917D, 355.

Judgment for specific performance of contract to sell realty as enforceable by process of contempt. Ann. Cas. 1912C, 780.

Perjury or false swearing as contempt. 11 A. L. R. 342.

Inability to comply with order or decree as defense to charge of contempt. 15 Ann. Cas. 943.

Present inability to pay as defense to contempt proceedings to enforce payment of past installments of alimony, nonpayment of which was inexcusable. 9 A. L. R. 265.

Civil liability of judicial officer ordering arrest for contempt. 13 A. L. R. 1364; 4 Ann. Cas. 330; Ann. Cas. 1914C, 1167.

§ 1050. Punishment for Contempt.

Every court of justice and every judicial officer has power to punish contempt by fine or imprisonment, or both. But such fine shall not exceed three hundred dollars, nor the imprisonment six months; and when the contempt is not [one] of those mentioned in subdivisions one and two of the last section, it must appear that the right or remedy of a party to an action, suit, or proceeding was defeated or prejudiced thereby, before the contempt can be punished otherwise than by a fine not exceeding one hundred dollars. [L. '69, p. 168, § 688; Cd. '81, § 726; 2 H. C., § 779.]

Cited in 40 Wash. 220; 66 Wash. 642; 79 Wash. 556.

POWER TO PUNISH: See Remington's Digest, Contempt, §§ 13—17.

§ 13. Nature and Grounds of Power: State ex rel. Smith v. Smith, 17 Wash. 430, 50 Pac. 52; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; Coulter, In re, 25 Wash. 526, 65 Pac. 759; State ex rel. Victor Boom Co. v. Peterson, 29 Wash. 571, 70 Pac. 71; State ex rel. Curtis v. Erickson, 66 Wash. 639, 120 Pac. 104; State ex rel. Dorrien v. Hazeltine, 82 Wash. 81, 143 Pac. 436.

§ 14. Constitutional and Statutory Provisions: State ex rel. Timm v. Trounce, 5 Wash. 804, 32 Pac. 750; State v. Tug-

well, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717; State ex rel. Henry v. McDonald, 25 Wash. 122, 64 Pac. 912; State ex rel. Victor Boom Co. v. Peterson, 29 Wash. 571, 70 Pac. 71.

§ 15. Existence of Other Remedy: State ex rel. Ditmar v. Ditmar, 19 Wash. 324, 53 Pac. 350; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736; Drasdo v. Beck, 37 Wash. 363, 79 Pac. 948; Wright v. Suydam, 79 Wash. 550, 140 Pac. 578.

§ 16. Parties: State ex rel. Boardman v. Ball, 5 Wash. 387, 31 Pac. 975, 34 Am. St. Rep. 866; State ex rel. Martin v. Pendergast, 39 Wash. 132, 81 Pac. 324; State ex rel. Dye v. Reilly, 40

Wash. 217, 82 Pac. 287; *State v. Nicholl*, 40 Wash. 517, 82 Pac. 895.

PUNISHMENT: See Remington's Digest, Contempt, §§ 28, 29.

§ 28. Nature and Grounds in General: *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056, 43 L. R. A. 717.

§ 29. Punishment of Contempt: *State ex rel. Dye v. Reilly*, 40 Wash. 217, 82 Pac. 287; *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104; *Wright v. Suydam*, 79 Wash. 550, 140 Pac. 573.

Purging Contempt After Adjudication: See Remington's Digest, Contempt, § 31; *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350; *State ex rel. Rohde v. Sachs*, 21 Wash. 373, 26 Pac. 865; *State ex rel. Martin v. Pendergast*, 39 Wash. 132, 81 Pac. 324; *State ex rel. O'Neil v. Wallace*, 96 Wash. 107, 164 Pac. 741.

Excessive Punishment: See Remington's Digest, Contempt, § 32; *Willis, In re*, 94 Wash. 180, 162 Pac. 38.

Power of justice of peace or magistrate to punish for contempt. 9 Ann. Cas. 316; 1 L. R. A. (N. S.) 1135.

Power of juvenile court to punish contempt. Ann. Cas. 1916E, 1014.

Power of legislature or legislative committee to punish for contempt. 7 Ann. Cas. 877; Ann. Cas. 1916B, 1118; Ann. Cas. 1918B, 378; L. R. A. 1917F, 288.

Power of board of public officials to punish for contempt. Ann. Cas. 1912B, 1265.

Right to impose fine for failure to pay alimony. 14 A. L. R. 717.

§ 1051. Contempts in Presence of Court, How Punished.

When a contempt is committed in the immediate view and presence of the court or officer, it may be punished summarily, for which an order must be made reciting the facts as occurring in such immediate view and presence, determining that the person proceeded against is thereby guilty of contempt, and that he be punished as therein prescribed. [L. '69, p. 168, § 669; Cd. '81, § 727; 2 H. C., § 780.]

Cited in 25 Wash. 528; 26 Wash. 70; 39 Wash. 136; 40 Wash. 524, 526; 63 Wash. 28, 29; 94 Wash. 185.

Summary Proceedings—Contempts in Presence of Court: See Remington's Di-

gest, Contempt, § 19; *State ex rel. Martin v. Pendergast*, 39 Wash. 138, 81 Pac. 324; *State v. Buddress*, 63 Wash. 26, 114 Pac. 879; *Willis, In re*, 94 Wash. 180, 162 Pac. 38.

§ 1052. Procedure in Other Cases.

In cases other than those mentioned in the preceding section, before any proceedings can be taken therein, the facts constituting the contempt must be shown by an affidavit presented to the court or judicial officer, and thereupon such court or officer may either make an order upon the person charged to show cause why he should not be arrested to answer, or issue a warrant of arrest to bring such person to answer in the first instance. [L. '69, p. 169, § 670; Cd. '81, § 728; 2 H. C., § 781.]

Cited in 25 Wash. 528; 26 Wash. 70; 29 Wash. 577; 40 Wash. 524, 526; 82 Wash. 86.

Preliminary Affidavit or Information: See Remington's Digest, Contempt, § 18; *State ex rel. Olson v. Allen*, 14 Wash. 684, 45 Pac. 644; *State ex rel. Sander v. Jones*, 20 Wash. 576, 56 Pac. 369; *Coulter, In re*, 25 Wash. 526, 65 Pac. 759; *State v. Canutt*, 26 Wash. 68, 66 Pac. 130; *State ex rel. Dye v. Reilly*, 40 Wash. 217, 82 Pac. 287; *State ex rel. Victor Boom Co. v. Peterson*, 29 Wash. 571, 70 Pac. 71; *State ex rel. Dorrien v. Hazeltine*, 82 Wash. 81, 143 Pac. 436.

Trial: See Remington's Digest, Contempt, §§ 20—24.

§ 20. — Contempts not in Presence of the Court: *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291.

§ 21. Attachment or Notice: *State ex rel. Ditmar v. Ditmar*, 19 Wash. 324, 53 Pac. 350.

§ 22. Evidence: *State ex rel. Olson v. Allen*, 14 Wash. 684, 45 Pac. 644; *Lewis, In re*, 24 Wash. 723, 64 Pac. 1118; *State ex rel. Curtiss v. Erickson*, 66 Wash. 639, 120 Pac. 104; *State v. Wright*, 77 Wash. 551, 137 Pac. 1198.

§ 23. **Hearing:** State ex rel. Dye v. Reilly, 40 Wash. 217, 82 Pac. 287.

§ 24. **Quashing or Vacating Proceedings:** State ex rel. Smith v. Smith, 17 Wash. 430, 50 Pac. 52.

Necessity of affidavit or sworn statement as foundation for constructive contempt. 2 A. L. R. 225.

Reflection on judge as ministerial officer as contempt. 15 L. R. A. (N. S.) 621; 15 Ann. Cas. 658. ,

Pendency of cause as essential element of contempt by newspaper publication. 3 Ann. Cas. 763; 18 Ann. Cas. 664.

Publication of evidence taken in suit heard in camera as contempt. Ann. Cas. 1912B, 542.

Remarrying in foreign jurisdiction contrary to decree of divorce as contempt. Ann. Cas. 1914A, 1175; 40 L. R. A. (N. S.) 765.

§ 1053. Defendant may be Produced if in Custody.

If the party charged be in custody of an officer by virtue of a legal order or process, civil or criminal, except upon a sentence for a felony, an order may be made for the production of such person by the officer having him in custody that he may answer, and he shall thereupon be produced and held until an order be made for his disposal. [L. '69, p. 169, § 671; Cd. '81, § 729; 2 H. C., § 782.]

Cited in 67 Wash. 318.

§ 1054. How Prosecuted.

In the proceeding for a contempt, the state is the plaintiff. In all cases of public interest, the proceeding may be prosecuted by the prosecuting attorney on behalf of the state, and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a coplaintiff with the state. [L. '69, p. 169, § 672; Cd. '81, § 730; 2 H. C., § 783.]

Cited in 15 Wash. 349; 39 Wash. 134; 63 Wash. 599; 67 Wash. 303; 79 Wash. 553.

ceeding to punish for contempt: Fawcett v. Superior Court, 15 Wash. 342, 46 Pac. 389, 55 Am. St. Rep. 894.

State is plaintiff in an independent pro-

§ 1055. Warrant, How Executed.

Whenever a warrant of arrest is issued pursuant to this chapter, the court or judicial officer shall direct therein whether the person charged may be let to bail for his appearance upon the warrant, or detained in custody without bail, and if he may be bailed, the amount in which he may be let to bail. Upon executing the warrant of arrest, the sheriff must keep the person in actual custody, bring him before the court or judicial officer, and detain him until an order be made in the premises, unless the person arrested execute and deliver to the sheriff, at any time before the return day of the warrant, a bond, with two sufficient sureties, to the effect that he will appear on such return day and abide the order or judgment of the court or officer thereupon. [L. '69, p. 169, § 673; Cd. '81, § 731; 2 H. C., § 784.]

§ 1056. Return of Warrant—Investigation.

The sheriff shall return the warrant of arrest and the bond, if any, given him by the defendant, by the return day therein specified. When the defendant has been brought up or appeared, the court or judicial officer shall proceed to investigate the charge by examining such defendant and

witnesses for or against him, for which an adjournment may be had from time to time, if necessary. [L. '69, p. 169, § 674; Cd. '81, § 732; 2 H. C., § 785.]

Cited in 40 Wash. 220; 67 Wash. 318.

Necessity that hearing be allowed
before imposition of punishment

for contempt. *Ann. Cas.* 1916A, 727.

§ 1057. Judgment and Sentence.

Upon the evidence so taken, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged; and if it be determined that he is so guilty, shall sentence him to be punished as provided in this chapter. [L. '69, p. 170, § 675; Cd. '81, § 733; 2 H. C., § 786.]

§ 1058. Indemnity to Injured Party.

If any loss or injury to a party in an action, suit, or proceeding, prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements, which judgment, and the acceptance of the amount thereof, is a bar to any action, suit, or proceeding by the aggrieved party for such loss or injury. [L. '69, p. 170, § 676; Cd. '81, § 734; 2 H. C., § 787.]

Cited in 55 Wash. 8, 11, 12, 15.

This section being remedial in its nature, will be construed to mean "shall," where the aggrieved party asks for and is willing to take the same in such proceeding in lieu of an ordinary action:

State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426.

Restitution as purging contempt in violation of injunction. 2 *A. L. R.* 169.

§ 1059. Imprisonment Until Performance.

When the contempt consists in the omission or refusal to perform an act which is yet in the power of the defendant to perform, he may be imprisoned until he shall have performed it, and in such case the act must be specified in the warrant of commitment. [L. '69, p. 170, § 677; Cd. '81, § 735; 2 H. C., § 788.]

Cited in 21 Wash. 200; 26 Wash. 216; 71 Wash. 191, 497.

Imprisonment to Compel Payment of Money: See *Remington's Digest*, Contempt, § 30; *Van Alstine*, In re, 21 Wash. 194, 57 Pac. 348; *Anderson*, In re, 97 Wash. 683, 167 Pac. 70.

Term of imprisonment for civil contempt. 6 *Ann. Cas.* 535.

Imprisonment for failure to pay alimony as violation of constitutional prohibition against imprisonment for debt. 17 *L. R. A. (N. S.)* 1140.

§ 1060. Offender Liable to Indictment.

Persons proceeded against according to the provisions of this chapter are also liable to indictment [or information] for the same misconduct, if it be an indictable offense, but the court before which a conviction is had on the indictment [or information] in passing sentence shall take into consideration the punishment before inflicted. [L. '69, p. 170, § 678; Cd. '81, § 736; 2 H. C., § 789.]

Cited in 19 Wash. 243.

§ 1061. **Alias Warrant—Prosecution of Bond.**

When the warrant of arrest has been returned served, if the defendant do not appear on the return day, the court or judicial officer may issue another warrant of arrest, or may order the bond to be prosecuted, or both. If the bond be prosecuted and the aggrieved party join in the action; and the sum specified therein be recovered, so much thereof as will compensate such party for the loss or injury sustained by reason of the misconduct for which the warrant was issued shall be deemed to be recovered for such party exclusively. [L. '69, p. 170, § 679; Cd. '81, § 737; 2 H. C., § 790.]

§ 1062. **Appeal.**

Either party to a judgment in a proceeding for a contempt may appeal therefrom in like manner and with like effect as from judgment in an action, but such appeal shall not have the effect to stay the proceedings in any other action, suit, or proceeding, or upon any judgment, decree, or order therein, concerning which or wherein such contempt was committed. Contempts of justices' courts are punishable in the manner specially provided for in the chapter relating to justices of the peace and to their practice and jurisdiction. [L. '69, p. 171, § 680; Cd. '81, § 738; 2 H. C., 791.]

Cited in 14 Wash. 685; 20 Wash. 182; 28 Wash. 591; 53 Wash. 70; 55 Wash. 5; 73 Wash. 297.

Appeal or Error: See Remington's Digest, Contempt, § 25; State ex rel. Olson v. Allen, 14 Wash. 684, 45 Pac. 644; State ex rel. Geiger v. Geiger, 20 Wash. 181, 54 Pac. 1129; State ex rel. Sander v. Jones, 20 Wash. 576, 56 Pac. 369; State ex rel. Denham v. Superior Court, 28 Wash. 590, 68 Pac. 1051; State ex rel. Victor Boom Co. v. Peterson, 29 Wash. 571, 70 Pac. 71; State v. Nicholl, 40 Wash. 517, 82 Pac. 895; Drainage Dist.

No. 1 v. Costello, 53 Wash. 67, 101 Pac. 497; State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co., 55 Wash. 1, 103 Pac. 426; State v. Buddress, 63 Wash. 26, 114 Pac. 879; Willis, In re, 94 Wash. 180, 162 Pac. 38.

Appealability of contempt judgments under appeal statutes. 3 Ann. Cas. 759, 1050; 17 Ann. Cas. 321.

Judgment in contempt proceeding rendered after final decree as reviewable on appeal from such decree. Ann. Cas. 1915B, 1069.

CHAPTER IV.

HABEAS CORPUS.

§ 1063. **Who may Prosecute Writ.**

Every person restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal. [L. '54, p. 212, § 434; Cd. '81, § 666; 2 H. C., § 711.]

Cited in 98 Wash. 440.

Existence of Remedy by Appeal or Other Remedy: See Remington's Digest, Hab. Corp., §§ 2, 2-1; Nolan, In re, 21 Wash. 395, 58 Pac. 222; Casey, In re, 27 Wash. 686, 68 Pac. 185; State ex rel. Zenner v. Graham, 34 Wash. 81, 74 Pac. 1058; Hamilton, In re, 56 Wash. 405, 105 Pac. 1046.

Nature of Restraint or Detention: See Remington's Digest, Hab. Corp., § 3; Ex

parte Jones, 2 Wash. 551, 27 Pac. 172; Pellissier v. Reed, 75 Wash. 201, 134 Pac. 813.

Proceedings Reviewable: See Remington's Digest, Hab. Corp., §§ 4—6.

In General: Ex parte Williams, 1 W. T. 240; Rafferty, In re, 1 Wash. 382, 25 Pac. 465.

§ 5. — **Commitment for Contempt:** Van Alstine, In re, 21 Wash. 194, 57 Pac. 348; Coulter, In re, 25 Wash. 526,

65 Pac. 757; Cave, In re, 26 Wash. 213, 66 Pac. 425, 90 Am. St. Rep. 736.

§ 6. — **Final Judgment, Sentence and Commitment:** Rafferty, In re, 1 Wash. 382, 25 Pac. 465.

JURISDICTION, PROCEEDINGS AND RELIEF—Jurisdiction in General—Courts of Appellate Jurisdiction: See Remington's Digest, Hab. Corp., § 11; Rafferty, In re, 1 Wash. 382, 25 Pac. 465; Graham, In re, 7 Wash. 237, 34 Pac. 931; State ex rel. Syverzon v. Foster, 84 Wash. 58, 146 Pac. 169, L. R. A. 1915E, 340.

Determination of Particular Issues or Questions: See Remington's Digest, Hab. Corp., §§ 19—22. **Custody of Infants:** Kentzler v. Kentzler, 3 Wash. 166, 28 Pac. 370, 28 Am. St. Rep. 21; Mason, In re, 3 Wash. 609, 28 Pac. 1025; Lovell v. House of Good Shepherd, 14 Wash. 211, 44 Pac. 253; Clifford, In re, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. Rep. 819; State ex rel. Stitt v. Reynolds, 60 Wash. 12, 110 Pac. 633; State ex rel. De Bit v. Mackintosh, 98 Wash. 438, 167 Pac. 1090; Beers v. Walker, 101 Wash. 683, 172 Pac. 861.

§ 20. — **Extradition:** Foye, In re, 21 Wash. 250, 57 Pac. 825; Baker, In re, 21 Wash. 259, 57 Pac. 827; Sylvester, In re, 21 Wash. 263, 57 Pac. 829; Armstrong v. Van de Vanter, 21 Wash. 682, 59 Pac. 510; Poor v. Cudihee, 37 Wash. 609, 79 Pac. 1105; Gillis, In re, 38 Wash. 156, 80 Pac. 300; Rudebeck, In re, 95 Wash. 433, 163 Pac. 930.

§ 21. — **Final Judgment, Sentence, and Commitment:** Russell, In re, 40 Wash. 244, 82 Pac. 290, 111 Am. St. Rep. 910.

§ 22. — **Commitment for Contempt:** Coulter, In re, 25 Wash. 526, 65 Pac. 759; Van Alstine, In re, 21 Wash. 194, 57 Pac. 348.

See, also, Parent, In re, 112 Wash. 620, 192 Pac. 947.

Appeal and Error: See Remington's Digest, Hab. Corp., §§ 25, 26.

In General: Foye, In re, 21 Wash. 250, 57 Pac. 825; Baker, In re, 21 Wash. 259, 57 Pac. 827; Sylvester, In re, 21 Wash. 263, 57 Pac. 829; St. Clair v. Williams, 23 Wash. 552, 63 Pac. 206; Garfinkle, In re, 37 Wash. 650, 80 Pac. 188.

— **Stay of Proceedings:** State v. Humason, 4 Wash. 413, 30 Pac. 718; State v. Fenton, 30 Wash. 325, 70 Pac. 741; State ex rel. Roberts v. Superior Court, 32 Wash. 143, 72 Pac. 1040.

For text treatment of "Habeas Corpus," see 12 **R. C. L.** 1101.

Right of prisoner who has received excessive sentence to be discharged on habeas corpus. 7 **Ann. Cas.** 144; **Ann. Cas.** 1916D, 368.

Habeas corpus because of defective verdict. **L. R. A.** 1916F, 967.

Remedy by habeas corpus of accused not brought to trial within constitutional or statutory period. **Ann. Cas.** 1912D, 1273.

Right of person wrongfully brought into jurisdiction to be released on habeas corpus. 12 **L. R. A. (N. S.)** 225.

Right of one at large on bail to writ of habeas corpus. 14 **A. L. R.** 344; 5 **Ann. Cas.** 552; **Ann. Cas.** 1912C, 551.

Right of one detained pursuant to quarantine to habeas corpus. 2 **A. L. R.** 1542.

Right of person in custody under judgment to be discharged on habeas corpus when judgment ceases to be operative. **Ann. Cas.** 1913B, 878.

Habeas corpus as remedy for recovery by one parent of custody of child from other parent. **Ann. Cas.** 1912C, 868.

Right of one restrained as insane person to discharge upon ground of irregularity or invalidity of commitment. 44 **L. R. A. (N. S.)** 389.

§ 1064. Parents, etc., may have Writ.

Writs of habeas corpus shall be granted in favor of parents, guardians, masters, and husbands, and to enforce the rights and for the protection of infants and insane persons; and the proceedings shall in all cases conform to the provisions of this chapter. [L. '54, p. 214, § 456; Cd. '81, § 688; 2 H. C., § 733.]

§ 1065. Application for, How Made.

Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify,—

1. By whom the petitioner is restrained of his liberty, and the place where (naming the parties if they are known, or describing them if they are not known);

2. The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant;

3. If the restraint be alleged to be illegal, in what the illegality consists. [L. '54, p. 212, § 422; Cd. '81, § 667; 2 H. C., § 712.]

§ 1066. By Whom Granted.

Writs of habeas corpus may be granted by the supreme court or superior court, or by any judge of either court, and upon application the writ shall be granted without delay. [L. '54, p. 212, § 436; Cd. '81, § 668; 2 H. C., § 713.]

Cited in 37 Wash. 260.

§ 1067. To Whom Directed—Contents of.

The writ shall be directed to the officer or party having the person under restraint, commanding him to have such person before the court or judge at such time and place as the court or judge shall direct to do and receive what shall be ordered concerning him, and have then and there the writ. [L. '54, p. 212, § 437; Cd. '81, § 669; 2 H. C., § 714.]

§ 1068. Delivery of Writ to Sheriff—Service.

If the writ be directed to the sheriff, it shall be delivered by the clerk to him without delay. [L. '54, p. 212, § 438; Cd. '81, § 670; 2 H. C., § 715.]

§ 1069. Service of Writ Directed to Person Other Than Sheriff.

If the writ be directed to any other person, it shall be delivered to the sheriff, and shall be by him served by delivering the same to such person without delay. [L. '54, p. 212, § 439; Cd. '81, § 671; 2 H. C., § 716.]

§ 1070. Service When Person not Found.

If the person to whom such writ is directed cannot be found or shall refuse admittance to the sheriff, the same may be served by leaving it at the residence of the person to whom it is directed, or by posting the same on [in] some conspicuous place, either on his dwelling-house or where the party is confined or under restraint. [L. '54, p. 212, § 440; Cd. '81, § 672; 2 H. C., § 717.]

§ 1071. Return—Attachment for Refusal.

The sheriff or other person to whom the writ is directed shall make immediate return thereof, and if he refuse after due service to make return, the court shall enforce obedience by attachment. [L. '54, p. 213, § 441; Cd. '81, § 673; 2 H. C., § 718.]

§ 1072. Substance and Form of Return.

The return must be signed and verified by the person making it, who shall state,—

1. The authority or cause of the restraint of the party in his custody;
2. If the authority shall be in writing, he shall return a copy and produce the original on the hearing;

3. If he has had the party in his custody, or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of the transfer. He shall produce the party at the hearing, unless prevented by sickness or infirmity, which must be shown in the return. [L. '54, p. 213, § 442; Cd. '81, § 674; 2 H. C., § 719.]

§ 1073. Proceedings—Pleadings.

The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced, or for other good cause. The plaintiff may except to the sufficiency of or controvert the return, or any part thereof, or allege any new matter in evidence. The new matter shall be verified, except in cases of commitment on a criminal charge. The return and pleadings may be amended without causing a [any] delay. [L. '54, p. 213, § 443; Cd. '81, § 675; 2 H. C., § 720.]

In a habeas corpus to release a prisoner, a demurrer to the officer's return admits all the allegations thereof: *Thorp v. Metzger*, 77 Wash. 62, 137 Pac. 330.

§ 1074. Hearing and Determination.

The court or judge shall thereupon proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuation thereof, shall discharge the party. [L. '54, p. 213, § 444; Cd. '81, § 676; 2 H. C., § 721.]

Hearing on Petition—Grant or Refusal: See Remington's Digest, Hab. Corp., § 12; Milecke, *In re*, 52 Wash. 312, 100 Pac. 743, 132 Am. St. Rep. 168, 21 L. R. A. (N. S.) 259.

If a prisoner, rearrested after a release on a conditional pardon, is entitled to trial in habeas corpus proceedings to determine whether he has violated the conditions of the pardon, he cannot com-

plain if he is awarded a trial before the court and the burden of proof is placed on the state: *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963.

Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition. 11 A. L. R. 1410.

§ 1075. Restrictions upon Inquiry.

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:—

1. Upon any process issued on any final judgment of a court of competent jurisdiction;

2. For any contempt of any court, officer or body having authority in the premises to commit; but an order of commitment, as for a contempt upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications;

3. Upon a warrant issued from the superior court upon an indictment or information. [L. '54, p. 213, § 445; Cd. '81, § 677; L. '91, p. 82, § 1; 2 H. C., § 722.]

Cited in 6 Wash. 158; 19 Wash. 308; 21 Wash. 198, 398; 25 Wash. 530; 33 Wash. 35; 40 Wash. 246, 247, 249; 56 Wash. 396; 58 Wash. 689; 84 Wash. 62; 112 Wash. 622, 623, 624, 626.

This section does not transgress the constitutional provision securing the right

to the writ of habeas corpus: *Lybarger*, *In re*, 2 Wash. 131, 25 Pac. 1075.

Grounds for Relief: See Remington's Digest, Hab. Corp., §§ 7—10-1.

Want of Jurisdiction: *Permstick*, *In re*, 3 Wash. 672, 29 Pac. 350, 28 Am. St. Rep. 80; *Newcomb*, *In re*, 56 Wash. 395, 105

Pac. 1042; Herman, In re, 79 Wash. 149, 139 Pac. 1083.

§ 8. Invalidity of Proceedings: Way v. Woolery, 6 Wash. 157, 32 Pac. 1082.

§ 8-1. Errors and Irregularities: Newcomb, In re, 56 Wash. 395, 105 Pac. 1042; Blystone, In re, 75 Wash. 286, 134 Pac. 827.

See, also, Parent, In re, 112 Wash. 620, 192 Pac. 947.

§ 8-2. Invalidity of Statute or Ordinance: Newcomb, In re, 56 Wash. 395, 105 Pac. 1042; Hamilton, In re, 56 Wash. 405, 105 Pac. 1046; Putnam, In re, 58 Wash. 687, 109 Pac. 111.

§ 9. Former Jeopardy: Steiner v. Nerton, 6 Wash. 23, 32 Pac. 1063.

§ 10. Admission to or Reduction of Bail: Packenham v. Reed, 37 Wash. 258, 79 Pac. 786.

§ 10-1. Defenses: State ex rel. McBride v. Superior Court, 103 Wash. 409, 174 Pac. 973.

It is a good defense to habeas corpus proceedings to obtain a discharge from an asylum upon restoration to sanity that the relator was lawfully committed to the asylum for the insane and had made no application to the superintendent for a discharge and was not in fact re-

stored to sanity so as to be safe to be at large: State ex rel. Thomson v. Clifford, 106 Wash. 16, 179 Pac. 90.

Scope of Inquiry, and Powers of Court: See Remington's Digest, Hab. Corp., §§ 15—18.

In General: Lybarger, In re, 2 Wash. 131, 25 Pac. 1075; Barbee, In re, 19 Wash. 306, 53 Pac. 155.

§ 16. — Jurisdictional Questions: Smith v. Sullivan, 33 Wash. 30, 73 Pac. 793.

§ 17. — Validity of Proceedings: Nolan, In re, 21 Wash. 395, 58 Pac. 222; Rudebeck, In re, 95 Wash. 433, 163 Pac. 930.

§ 18. — Errors and Irregularities: Barbee, In re, 19 Wash. 306, 53 Pac. 155; State ex rel. De Bit v. Mackintosh, 98 Wash. 438, 167 Pac. 1090.

Inquiry into legal existence of court in habeas corpus proceedings. 16 **Ann. Cas.** 341.

Determination, in habeas corpus, of constitutionality of statute or ordinance under which petitioner is held. 3 **Ann. Cas.** 581.

Power of inferior court to consider, in habeas corpus proceedings, question decided by highest court of jurisdiction. 14 **Ann. Cas.** 755.

§ 1076. Admission to Bail Instead of Discharge.

No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail, or in cases not bailable on account of any defect in the charge or process, or for alleged want of probable cause; but in all cases the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, admit to bail, or recommit the prisoner, as may be just and legal, and recognize witnesses when proper. [L. '54, p. 213, § 446; Cd. '81, § 678; 2 H. C., § 723.]

Cited in 1 Wash. 384; 43 Wash. 20.

Disposition of Person: See Remington's Digest, Hab. Corp., §§ 23, 24.

Admission to Bail: Foye, In re, 21 Wash. 250, 57 Pac. 825.

There is no authority to admit to bail a person held on an extradition warrant, pending an appeal from a judgment in habeas corpus proceedings, and the lower court will not be required to fix

the amount of a supersedeas bond in aid of such an appeal: State ex rel. Rheinstrom v. Ronald, 106 Wash. 189, 179 Pac. 843.

— Discharge: State v. Brodie, 7 Wash. 442, 35 Pac. 137; Murphy, In re, 7 Wash. 257, 34 Pac. 834; Maney, In re, 20 Wash. 509, 55 Pac. 930, 72 Am. St. Rep. 130; Baker, In re, 21 Wash. 259, 57 Pac. 827; Davis v. Catron, 22 Wash. 183, 60 Pac. 131.

§ 1077. Writ for Purpose of Bail.

The writ may be had for the purpose of admitting a prisoner to bail in civil and criminal actions. When any person has an interest in the detention, [and] the prisoner shall not be discharged until the person having such interest is notified. [L. '54, p. 214, § 447; Cd. '81, § 679; 2 H. C., § 724.]

Cited in 37 Wash. 260; 84 Wash. 63.

§ 1078. Compelling Attendance of Witnesses.

The court or judge shall have power to require and compel the attendance of witnesses, and to do all other acts necessary to determine the case. [L. '54, p. 214, § 448; Cd. '81, § 680; 2 H. C., § 725.]

§ 1079. Officer not Liable, When.

No sheriff or other officer shall be liable to a civil action for obeying any writ of habeas corpus, or order of discharge made thereon. [L. '54, p. 214, § 449; Cd. '81, § 681; 2 H. C., § 726.]

§ 1080. Warrant to Prevent Removal.

Whenever it shall appear by affidavit that anyone is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued reciting the facts, and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge, to be dealt with according to the law. [L. '54, p. 214, § 450; Cd. '81, § 682; 2 H. C., § 727.]

§ 1081. What Warrant may Include.

The court or judge may also, if the same be deemed necessary, insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint. [L. '54, p. 214, § 451; Cd. '81, § 683; 2 H. C., § 728.]

§ 1082. Warrant, How Executed.

The officer shall execute the writ by bringing the person therein named before the court or judge, and the like return of proceedings shall be required and had as in case of writs of habeas corpus. [L. '54, p. 214, § 452; Cd. '81, § 684; 2 H. C., § 729.]

§ 1083. Temporary Orders.

The court or judge may make any temporary orders in the cause or disposition of the party during the progress of the proceedings that justice may require. The custody of any party restrained may be changed from one person to another, by order of the court or judge. [L. '54, p. 214, § 453; Cd. '81, § 685; 2 H. C., § 730.]

Cited in 98 Wash. 440, 442.

§ 1084. Writ Issued on Sunday, When.

Any writ or process authorized by this chapter may be issued and served, in cases of emergency, on Sunday. [L. '54, p. 214, § 454; Cd. '81, § 686; 2 H. C., § 731.]

§ 1085. Writs—Issuance, Service and Return—Amendments.

All writs and other process authorized by this chapter shall be issued by the clerk of the court, and sealed with the seal of such court, and shall

be served and returned forthwith, unless the court or judge shall specify a particular time for such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed and temporary commitments, when necessary. [L. '54, p. 214, § 455; Cd. '81, § 687; 2 H. C., § 732.]

Cited in 1 Wash. 385.

Allowance and Issuance of Writ—Necessity and Duty in General: See

Remington's Digest, Hab. Corp., § 13; Rafferty, In re, 1 Wash. 382, 25 Pac. 465.

CHAPTER V.

ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

§ 1086. Must be General—Effect of.

No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims; and after the payment of the costs and disbursements thereof, including the attorney fees allowed by law in case of judgment, out of the estate of the insolvent, such claim or claims shall be deemed as presented, and shall share pro rata with other claims as hereinafter provided. [Cf. L. '90, p. 83, § 1; 1 H. C., § 2741; L. '93, p. 247, § 1.]

Cited in 4 Wash. 259, 784; 5 Wash. 340, 345, 668, 669, 670, 672; 6 Wash. 42; 9 Wash. 64, 455; 24 Wash. 97; 44 Wash. 46, 516.

This act being in derogation of the common law, is to be strictly construed, and does not apply to corporations: *Nyman v. Berry*, 3 Wash. 734, 29 Pac. 557.

It is not a mere regulation of common law assignments, but an insolvent law, as it contains a provision whereby a debtor may be absolutely discharged of all his debts: *Hyman v. Barmon*, 6 Wash. 516, 33 Pac. 1076.

The title to this act embraces but one subject, which is sufficiently expressed in the title: *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161, 76 Pac. 934.

The lien of an attachment is not discharged by the subsequent filing of an assignment by the attachment debtor for the benefit of his creditors: *Bierer v. Blurock*, 9 Wash. 63, 36 Pac. 975.

A statutory assignment for the benefit of creditors, which had the effect of dissolving prior attachments in this state, cannot be set up as a dissolution of an attachment in the courts of a foreign state: *Neufelder v. North British & Merc. Ins. Co.*, 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793.

REQUISITES AND VALIDITY.—The state insolvency act is not suspended or superseded by the federal bankruptcy law when no bankruptcy proceedings are instituted: *Jensen-King-Byrd Co. v. Williams*, 35 Wash. 161, 76 Pac. 934.

Sales Creating Trust: See Remington's Digest, Assign. for B. C., § 2; *Chapin v. Bokee*, 4 Wash. 1, 29 Pac. 936; *Puget Sound Warehouse Co. v. La Hue*, 86 Wash. 395, 150 Pac. 630.

The Assignment and Requisites: See Remington's Digest, Assign. for B. C., §§ 3—8.

Right to Make Assignment: *Nyman v. Berry*, 3 Wash. 734, 29 Pac. 557; *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919; *Oleson v. Bank of Tacoma*, 15 Wash. 148, 45 Pac. 734; *Cerf, Schloss & Co. v. Wallace*, 14 Wash. 249, 44 Pac. 264.

§ 4. Property to be Included: *Degging v. Seattle Brewing & Malting Co.*, 41 Wash. 385, 83 Pac. 898, 4 L. R. A. (N. S.) 626.

§ 5. Parties to Instrument: *Thygesen v. Neufelder*, 9 Wash. 455, 37 Pac. 672.

§ 6. Provisions as to Execution of Trust: *Smith v. Cullen*, 18 Wash. 398, 51 Pac. 1040.

§ 7. Acknowledgment: *Smith v. Cullen*, 18 Wash. 398, 51 Pac. 1040.

§ 8. Delivery to Assignee: *Day's Assignment*, In re, 15 Wash. 525, 46 Pac. 1048.

Preferences and Fraud: See Remington's Digest, Assign. for B. C., §§ 9—11.

Right of Debtor to Prefer Creditor: *Hyman v. Barmon*, 6 Wash. 516, 33 Pac. 1076; *Benham v. Ham*, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851; *Samuel*

v. Kittenger, 6 Wash. 261, 33 Pac. 509; First Nat. Bank v. Carter, 6 Wash. 494, 33 Pac. 824; Roberts v. Sabin, 14 Wash. 35, 44 Pac. 108; Furth v. Snell, 6 Wash. 542, 33 Pac. 830; Victor v. Glover, 17 Wash. 37, 48 Pac. 788, 40 L. R. A. 297.

§ 10. — Confession of Judgment: Puget Sound Nat. Bank v. Levy, 10 Wash. 499, 39 Pac. 142, 45 Am. St. Rep. 803; Hyman v. Barmon, 6 Wash. 516, 33 Pac. 1076.

§ 11. — Giving Mortgage: Benham v. Ham, 5 Wash. 128, 31 Pac. 459, 34 Am. St. Rep. 851; Turner v. Iowa Nat. Bank, 2 Wash. 192, 26 Pac. 256; Ephraim v. Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604; Furth v. Snell, 6 Wash. 542, 33 Pac. 830; Mansfield v. First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999.

CONSTRUCTION AND OPERATION: See Remington's Digest, Assign. for B. C., §§ 12—16.

Property Conveyed—In General: Traders' Bank of Tacoma v. Van Wagenen, 2 Wash. 172, 26 Pac. 253; Mansfield v. First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999; Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94; Slauson v. Schwabacher, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; Gilbert v. Morgan Lumber Co., 87 Wash. 293, 151 Pac. 785.

§ 13. — Assignor's Title or Possession: Gilbert Hunt Mfg. Co. v. Wheeler, 15 Wash. 594, 47 Pac. 26; Pennsylvania Mut. Life Ins. Co. v. Fife, 15 Wash. 605, 47 Pac. 27; Sanders v. Main, 9

Wash. 46, 36 Pac. 1049; Bierer v. Blurock, 9 Wash. 63, 36 Pac. 975; State ex rel. Baum v. Superior Court, 14 Wash. 324, 44 Pac. 542.

§ 14. Effect on Pending Actions: Jensen-King-Byrd Co. v. Williams, 35 Wash. 161, 76 Pac. 934.

§ 15. Proceedings Against Assignor in Disregard of Assignment: Cosh-Murray Co. v. Bothell, 10 Wash. 314, 38 Pac. 1118; Sabin v. Adams, 5 Wash. 768, 32 Pac. 793; Traders' Bank of Tacoma v. Van Wagenen, 2 Wash. 172, 26 Pac. 253; Gilbert v. Morgan Lumber Co., 87 Wash. 293, 151 Pac. 785.

§ 16. Foreign Assignments and Extra-territorial Effect of Assignments: Neufelder v. North British etc. Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793; Whitman v. Mast, Buford & Burwell Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874; Bloomingdale v. Weil, 29 Wash. 611, 70 Pac. 94; Happy v. Prickett, 24 Wash. 290, 64 Pac. 528.

For text treatment of "Assignments for Benefit of Creditors," see 2 **R. C. L.** 641.

Reservation of balance or surplus under assignment for payment of debts as rendering transaction void. **Ann. Cas.** 1912D, 500.

Power of one partner to assign partnership real estate for benefit of creditors. 28 **L. R. A.** 97.

Effect of provision for release on assignment for creditors. 50 **L. R. A. (N. S.)** 715.

§ 1087. Assent Presumed.

In case of an assignment for the benefit of all the creditors of the assignor, the assent of the creditors shall be presumed. [L. '90, p. 83, § 2; 1 H. C., § 2742.]

Statutory presumption of assent of creditors to assignment. 24 **L. R. A.** 373.

Nonassent of some or all of creditors as affecting validity of assignment. **Ann. Cas.** 1913A, 818.

§ 1088. How Made, Procedure Thereafter.

The debtor shall annex to such assignment an inventory, under oath, of all his estate, real and personal, according to the best of his knowledge, and also a list of his creditors, with their postoffice address [es], and a list of the amount of their respective demands, but such inventory shall not be conclusive as to the amount of the debtor's estate. Every assignment shall be in writing, and duly acknowledged, in the same manner as conveyances of real estate, and recorded in the record of deeds of the county where the person making the same resides, or where the business in respect to which the same is made has been carried on. Upon the application of two or more creditors of said debtors therefor, by petition to the judge of the superior court of the county in which such assignment is or should be recorded, at any time, within thirty days from the making

or recording of such assignment, it shall be the duty of said superior judge to direct the clerk of said superior court to order a meeting of the creditors of said debtor to choose an assignee of the estate of said debtor in lieu of the assignee named by the debtor in his assignment; and thereupon the clerk of said court shall forthwith give notice to all the creditors of said debtor to meet at his office at a time stated, not to exceed fifteen days from the date of such notice, to select one or more assignees in the place of the assignee named by the debtor in his assignment. Such creditors may appear in person or by proxy, and a majority in number and value of said creditors attending such meeting shall select one or more assignees; and in the event that no one shall receive a majority vote of said creditors, who represent at least one-half in amount of all claims represented at such meeting, then, and in that event, said clerk shall certify that fact to the judge of the superior court aforesaid, and thereupon said superior judge shall select and appoint an assignee. When such assignee shall have been selected by such creditors, or appointed by the superior judge, as herein provided, then the assignee named in the debtor's assignment shall forthwith make to the assignee elected by the creditors, or appointed by the superior judge, an assignment and conveyance of all the estate, real and personal that has been assigned or conveyed to him by said debtor; and such assignee so elected by the creditors or appointed by the superior judge, upon giving the bond required of an assignee by this chapter, shall possess all the powers and be subject to all the duties imposed by this chapter, as fully, to all intents and purposes, as though named in the debtor's assignment. From the time of the pending of an application to elect an assignee by the creditors, and until the time shall be terminated by an election or appointment as herein provided, no property of the debtor, except perishable property, shall be sold or disposed of by any assignee; but the same shall be safely and securely kept until the election or appointment of an assignee, as herein provided. No creditor shall be entitled to vote at any such meeting called for the purpose of electing an assignee, until he shall have presented to the clerk of the superior court, who shall preside at such meeting, a verified statement of his claim against the debtor. [L. '90, p. 83, § 3; 1 H. C., § 2743.]

Appointment and Removal: See Remington's Digest, Assign. for B. C., §§ 19—21.

Selection in General: Ewing v. Van Wagenen, 6 Wash. 39, 32 Pac. 1009; Henze, In re, 13 Wash. 614, 43 Pac. 888.

Removal: State ex rel. Votaw v. Parker, 6 Wash. 411, 34 Pac. 149; Whitman v. Mast, Buford & Burwell Co., 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874.

Appointment of Successor or Receiver:

Lammon v. Giles, 3 W. T. 117, 13 Pac. 417.

Policy of life insurance as passing to assignee for benefit of creditors. 20 Ann. Cas. 1186; Ann. Cas. 1915B, 1289; 50 L. R. A. 33; 46 L. R. A. (N. S.) 148; 16 L. R. A. (N. S.) 318.

Effect of failure to file inventory on right to attach property in hands of assignee for creditors. 26 L. R. A. 594.

§ 1089. Inventory and Valuation—Bond.

The assignee shall also forthwith file with the clerk of the superior court of the county where such assignment will be recorded a true and full inventory and valuation of said estate, under oath, as far as the same has come to his knowledge, and shall then and there enter into bonds to

the state of Washington, for the use of the creditors, in double the amount of the inventory and valuation, with two or more sufficient sureties, to be approved by said clerk, for the faithful performance of said trust; and the assignee may thereupon proceed to perform any duties necessary to carry into effect the intention of said assignment. [L. '90, p. 85, § 4; 1 H. C., § 2744.]

§ 1090. Notice of Assignment.

The assignee shall forthwith give notice of such assignment, by publication in some newspaper in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks; and shall forthwith send a notice by mail to each creditor of whom he shall be informed, directed to their usual place of residence, and notifying the creditors to present their claims, under oath, to him within three months thereafter. [L. '90, p. 85, § 5; 1 H. C., § 2745.]

Cited in 10 Wash. 315.

Jurisdiction is acquired by the assignment and statutory notice: Cosh-Murray

Co. v. Bothell, 10 Wash. 314, 38 Pac. 1118; Boston Nat. Bank v. Hammond, 21 Wash. 158, 57 Pac. 365.

§ 1091. List of Creditors.

At the expiration of three months from the time of first publishing notice, the assignee shall report and file with the clerk of the court a true and full list, under oath, of all such creditors of the assignor as shall have claims to be such, with a statement of their claims, and also an affidavit of publication of notice, and a list of the creditors, with their places of residence, to whom notice has been sent by mail, and the date of mailing, duly verified. [L. '90, p. 85, § 6; 1 H. C., § 2746.]

§ 1092. Exceptions to Claims.

Any person interested may appear within three months after filing such report, and file with said clerk any exceptions to the claim or demand of any creditor, and the clerk shall forthwith cause notice thereof to be given to the creditor, which shall be served [and returned] as in case of summons; and the court shall proceed to hear the proof and allegation of the parties in the premises, and shall render such judgment therein as shall be just, and may allow a trial by jury thereon. [L. '90, p. 85, § 7; 1 H. C., § 2747.]

Section altered to conform to present organization of courts.

Cited in 5 Wash. 338; 10 Wash. 315.

§ 1093. Dividends, Accounts, Compensation.

If no exception be made to the claim of any creditor, or if the same has been adjudicated, the court shall order the assignee to make from time to time fair and equal dividends among the creditors of the assets in his hands, in proportion to their claims, and as soon as may be to render a final account of said trust to said court, which may allow such commissions to said assignee in the final settlement as may be considered right and just, not exceeding, however, the fees and compensation allowed by law to administrators and executors. [Cf. L. '90, p. 86, § 8; 1 H. C., § 2748; L. '93, p. 39, § 1.]

Cited in 5 Wash. 338, 348.

ACCOUNTING, SETTLEMENT AND DISCHARGE OF ASSIGNEE: See Remington's Digest, Assign. for B. C., §§ 36—38. **Property to be included:** Anderson v. Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337.

§ 37. **Charges—Expenses and Costs:** Lammon v. Giles, 3 W. T. 117, 13 Pac. 417; Slater v. Stevens County Bank, 12 Wash. 488, 41 Pac. 168; Thompson v. Sines, 18 Wash. 359, 51 Pac. 474.

See, also, Kriegler v. Spokane Merchants' Assoc., 111 Wash. 179, 189 Pac. 1004.

§ 38. **Actions for Accounting:** Rochford v. Doty, 37 Wash. 232, 79 Pac. 782.

See, also, Kriegler v. Spokane Merchants' Assoc., 111 Wash. 179, 189 Pac. 1004.

ADMINISTRATION OF ASSIGNED ESTATE: See Remington's Digest, Assign. for B. C., §§ 17, 18.

Representation of Debtor by Assignee: Hamilton Brown Shoe Co. v. Adams, 5 Wash. 333, 32 Pac. 92; Sabin v. Adams, 5 Wash. 768, 32 Pac. 793; Thompson v. Sines, 18 Wash. 359, 51 Pac. 474. **Jurisdiction of courts:** Cosh-Murray Co. v. Bothell, 10 Wash. 314, 38 Pac. 1118; Boston Nat. Bank v. Hammond, 21 Wash. 158, 57 Pac. 365.

RIGHTS AND REMEDIES OF CREDITORS: See Remington's Digest, Assign. for B. C., §§ 28—33.

§ 28. **Rights as to Property in General:** Traders' Bank of Tacoma v. Van Wagenen, 2 Wash. 172, 26 Pac. 253; Sabin v. Adams, 5 Wash. 768, 32 Pac. 793; Cosh-Murray Co. v. Bothell, 10

Wash. 314, 38 Pac. 1118; Thompson v. Sines, 18 Wash. 359, 51 Pac. 474; Hamilton Brown Shoe Co. v. Adams, 5 Wash. 333, 32 Pac. 92; Mansfield v. First Nat. Bank, 5 Wash. 665, 32 Pac. 789, 999; Kasper v. Spokane Merchants' Assn., 87 Wash. 47, 151 Pac. 800.

§ 29. **Effect of Presenting Claims:** Neufelder v. North British etc. Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793.

§ 30. **Secured Claims:** Frasch, In re, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771; Neufelder v. North British etc. Ins. Co., 10 Wash. 393, 39 Pac. 110, 45 Am. St. Rep. 793.

See, also, Pickering v. Roeder, 104 Wash. 539, 177 Pac. 321.

§ 31. **Mortgages and Pledges:** Gilbert Hunt Mfg. Co. v. Wheeler, 15 Wash. 594, 47 Pac. 26; Thompson v. Sines, 18 Wash. 359, 51 Pac. 474; Keyes v. Sabin, 101 Wash. 618, 172 Pac. 835.

§ 32. **Right to have Assignment Set Aside:** Oleson v. Bank of Tacoma, 15 Wash. 148, 45 Pac. 734; Traders' Bank of Tacoma v. Van Wagenen, 2 Wash. 172, 26 Pac. 253; Meakim v. Ludwig, 99 Wash. 180, 169 Pac. 24.

§ 33. **Estoppel to Attack Assignment:** Boston Nat. Bank v. Hammond, 21 Wash. 158, 57 Pac. 365; Cerf, Schloss & Co. v. Wallace, 14 Wash. 249, 44 Pac. 264; Anderson v. Risdon-Cahn Co., 13 Wash. 494, 43 Pac. 337.

Right of secured creditors to dividends. 2 Ann. Cas. 274; 13 Ann. Cas. 1089.

Treatment of collateral held by creditor. L. R. A. 1918B, 1024.

§ 1094. Assignee Subject to Control of Court.

The assignee shall at all times be subject to the order of the court or judge and the said court or judge may, by citation and attachment, compel the assignee, from time to time, to file reports of his proceedings, and of the situation and condition of the trust, and to proceed in the faithful execution of the duties required by this chapter. [L. '90, p. 86, § 9; 1 H. C., § 2749.]

Cited in 5 Wash. 339.

§ 1095. Not Void, When—Citation to Debtor.

No assignment shall be declared fraudulent or void for want of any list or inventory as provided in this chapter. The court or judge may, upon application of the assignee, or any creditor, compel the appearance in person of the debtor before such court or judge forthwith, to answer under oath such matters as may then and there be inquired of him; and such debtor may then and there be fully examined under oath as to the amount and situation of his estate, and the names of the creditors, and amounts due to each, with their places of residence, and the court

may compel the delivery to the assignee of any property or estate embraced in the assignment. [L. '90, p. 86, § 10; 1 H. C., § 2750.]

Cited in 5 Wash. 671; 39 Wash. 341.

An assignment is not vitiated by a provision which authorizes sales on credit: *Smith v. Cullen*, 18 Wash. 398, 51 Pac. 1040.

Estoppel to attack assignment: See *Boston Nat. Bank v. Hammond*, 21 Wash. 158, 57 Pac. 365.

§ 1096. Additional Inventory.

The assignee shall, from time to time, file with the clerk of the court an inventory and valuation of any additional property which may come into his hands, under such assignment, after the filing of the first inventory, and the clerk may thereupon require him to give additional security. [L. '90, p. 86, § 11; 1 H. C., § 2751.]

Cited in 5 Wash. 341.

§ 1097. Claims not Due, Limitation.

Any creditor may claim debts to become due, as well as debts due, but on debts not due, a reasonable abatement shall be made when the same are not drawing interest; and all creditors who shall not exhibit their claims within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after payment in full of all claims presented within said term and allowed by the court. [L. '90, p. 86, § 12; 1 H. C., § 2752.]

Effect on assignment for benefit of creditors on accrual of right of

action for goods sold on credit. 7 Ann. Cas. 545.

§ 1098. Authority of Assignee—Sales.

Any assignee as aforesaid shall have as full power and authority to dispose of all estate, real and personal, assigned, as the debtor had at the time of the assignment, and to sue for and recover, in the name of such assignee, everything belonging or appertaining to said estate, and generally to do whatever the debtor might have done in the premises; but no sale of real estate belonging to said trust shall be made without notice published, as in case of sale of real estate on execution, unless the court shall order and direct otherwise. [L. '90, p. 87, § 13; 1 H. C., § 2753.]

Cited in 4 Wash. 786; 5 Wash. 670, 672, 673.

Actions: See *Remington's Digest*, Assign. for B. C., §§ 24—27.

By Assignees in General: *Traders' Bank of Tacoma v. Van Wagenen*, 2 Wash. 172, 26 Pac. 253; *Moore v. Terry*, 17 Wash. 185, 49 Pac. 234; *Mansfield v. First Nat. Bank*, 5 Wash. 665, 32 Pac. 789, 999; *Slauzon v. Schwabacher*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. Rep. 948; *Whitman v. Mast, Buford & Burwell Co.*, 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874; *Bloomington v. Weil*, 29 Wash. 611, 70 Pac. 94; *McKay v. Elwood*, 12 Wash. 579, 41 Pac. 919.

§ 25. — **Leave of Court to Sue Assignees:** *Quinby v. Slipper*, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899; *Pennsylvania Mutual Life Ins. Co. v. Fife*, 15 Wash. 605, 47 Pac. 27.

§ 26. — **Joinder or Intervention in Actions by Assignor or Others:** *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528.

§ 27. — **Judgment and Enforcement Thereof:** *Anderson v. Risdon-Cahn Co.*, 13 Wash. 494, 43 Pac. 337; *Mansfield v. First Nat. Bank*, 6 Wash. 603, 34 Pac. 143.

Sale or Other Disposition of Assets—Rights of Purchasers: See *Remington's Digest*, Assign. for B. C., § 22; *Box's Assignment*, In re, 11 Wash. 90, 39 Pac. 240.

Right of debtor of insolvent creditor to setoff against assignee liability as indorser of insolvent's note. Ann. Cas. 1914D, 747.

Right of assignor to complain of sale made by assignee for creditors. 19 L. R. A. (N. S.) 682.

§ 1099. Proceedings upon Death or Failure of Assignee to Act.

In case any assignee shall die before closing of his trust, or in case any assignee shall fail or neglect, for the period of thirty days after the making of any assignment, to file an inventory and valuation and give bonds as required by this chapter, the superior court or judge thereof of the county where such assignment may be recorded, on the application of any person interested, shall appoint some person to execute the trust embraced in such assignment; and such person, on giving the bond with sureties, as required of the assignee, shall possess all the power conferred on such assignee, and shall be subject to all the duties hereby imposed as fully as though named in the assignment; and in case any surety shall be discovered insufficient, or, on complaint before the court or judge, it should be made to appear that any assignee is guilty of wasting or misapplying the trust estate, said court or judge may direct and require additional security, and may remove such assignee, and may appoint others instead; and such person so appointed, on giving bond, shall have full power to execute such duties, and to demand and sue for all estate in the hands of the person removed, and to demand and recover the amount and value of all moneys and property or estate so wasted and misapplied which he may neglect or refuse to make satisfaction for from such person and his sureties. [L. '90, p. 87, § 14; 1 H. C., § 2754.]

Cited in 13 Wash. 614; 54 Wash. 526.

§ 1100. Discharge of Assignor, When.

Whenever it shall appear to the satisfaction of the court or judge thereof when the assignment is pending upon the final reports of the assignee chosen by the creditors or otherwise that the assignor has been guilty of no fraud in making an assignment or concealment or diversion of the property or any part thereof, in order to keep the same beyond the reach of creditors, and has acted justly and fairly in all respects; that the estate has been made to realize the fullest amount possible and that the expenses of the assignment have been paid. The judge of the court having jurisdiction of the matter shall, upon the allowance of the final account of the assignee, make an order discharging the assignor or assignors as the case may be from any further liability on account of any indebtedness existing prior to the making of such assignment, and thereafter such assignor shall be freed from any liability on account of any unsatisfied portion of the indebtedness existing prior to the making of the assignment. [Cf. L. '90, p. 88, § 15; 1 H. C., § 2755; L. '95, p. 378, § 1.]

Cited in 5 Wash. 340; 24 Wash. 97; 35 Wash. 166.

RIGHTS AND REMEDIES OF ASSIGNOR: See Remington's Digest, Assign. for B. C., §§ 34, 35.

Interest in Property Assigned in General: *Traders' Bank of Tacoma v. Van Wagenen*, 2 Wash. 172, 26 Pac. 253; *Davidson v. Chilberg*, 99 Wash. 519, 169 Pac. 981.

Discharge: *Leisure v. Kneeland*, 2 Wash. 537, 27 Pac. 176, 26 Am. St. Rep.

888; *Weber v. Yancey*, 7 Wash. 84, 34 Pac. 473; *Boston Nat. Bank v. Hammond*, 21 Wash. 158, 57 Pac. 365; *Blodgett v. Inglis*, 63 Wash. 513, 115 Pac. 1043, Ann. Cas. 1912D, 622; *Davidson v. Chilberg*, 99 Wash. 519, 169 Pac. 981.

See, also, *Western Hdw. & Metal Co. v. Nordeen*, 110 Wash. 150, 188 Pac. 1.

Operation and Effect of Discharge—Debts and Liabilities Discharged: See Remington's Digest, Insol., §§ 19—22. Effect of foreign discharge: *Weber v.*

Yancy, 7 Wash. 84, 34 Pac. 473. Col- Mach. Co. v. Sires, 21 Wash. 322, 53
lateral attack: Rosenthal v. Schneider, Pac. 209.
2 W. T. 144, 3 Pac. 837; Case Threshing

§ 1101. Sheriff not to be Receiver or Assignee.

It shall be unlawful for the judge of any court of record or the creditors of an insolvent debtor to appoint the sheriff of the county receiver or assignee in any case of insolvency or assignment. [L. '93, p. 462, § 1.]

Cited in 7 Wash. 77.

§ 1102. Right of Exemption.

Hereafter any person making a general assignment for the benefit of creditors, under any statute of this state, shall have the right to claim, and have set aside to him, as exempt from the operation of such assignment, all real and personal property which is, at the time of such assignment, exempt from levy by execution or attachment, under the laws of this state. [L. '97, p. 6, § 1.]

Cited in 45 Wash. 618.

§ 1103. How Claimed—Objections.

Such assignor shall, if he desires to claim the benefit of the last preceding section, state in such assignment, or in the inventory annexed thereto, what property he claims as exempt, giving a description thereof sufficient for identification. Any creditor of such assignor who believes any of the property so claimed as exempt is not so in fact shall have the right to make objection to such exemption claim at any time prior to the expiration of the time for presentment of claims against such assignor to his assignee. Such objection shall be made by delivering to the assignor and the assignee, and filing with the clerk of the court having jurisdiction of the assignment, a notice in writing, clearly pointing out the part or parts of such exemption claim objected to, and the ground of such objection. When the time above provided for the service and filing of objections has expired, the assignor, upon application to said court, shall have a right to the summary hearing of the said objections, and at such hearing the court shall determine and adjudge to the assignor his lawful exemptions. If any part of the exemptions claimed by the assignor shall be denied, the court shall direct the assignee to pay, out of the funds in his hands, the costs of the hearing, if any, as a part of the expenses of the assignment proceedings. The court may, at its discretion, if it find any claim made for exemption to be fraudulent and made in bad faith, deny such exemption. If no objection to the said exemption claim is served and filed prior to the expiration of the time for presentment of claims to the assignee, the assignor shall be entitled as of course to an order setting aside to him the exemptions claimed by him as aforesaid, and it shall be the duty of the assignee forthwith to deliver the same to him. [L. '97, p. 6, § 2.]

LIENS AND THEIR ENFORCEMENT.

TITLE VIII.

LIENS AND THEIR ENFORCEMENT.

CHAPTER I.—THE FORECLOSURE OF CHATTEL MORTGAGES.

- | | |
|--|---|
| 1104. Chattel mortgage—How foreclosed. | 1112. Mortgagee may take possession—Sale. |
| 1105. Notice, contents of. | 1113. Foreclosure of chattel mortgages—Application of chapter II. |
| 1106. Service of notice, how made. | 1114. Remedies of mortgagee—Decree—Sale—Deficiency. |
| 1107. Publication—Sale, how conducted. | 1115. Sale of mortgagor's interest under process—Notice. |
| 1108. Purchaser's title. | |
| 1109. Officer's bill of sale, effect of. | |
| 1110. Foreclosure contested—Injunction. | |
| 1111. Action before maturity of debt. | |

CHAPTER II.—FORECLOSURE OF MORTGAGES ON REAL ESTATE.

- | | |
|---|--|
| 1116. Foreclosure—Venue. | 1123. Levy upon and sale of other property. |
| 1117. Remedy confined to mortgaged property. | 1124. Publication of notice. |
| 1118. Judgment—Order of sale—Satisfaction of. | 1125. Concurrent actions not maintainable. |
| 1119. Judgment for deficiency. | 1126. Installments not due—Proceedings. |
| 1120. Judgments for deficiency, form of. | 1127. Sale in parcels—Order. |
| 1121. Execution to enforce decree. | 1128. Sale of whole—Application of proceeds. |

CHAPTER III.—LIENS OF MECHANICS AND MATERIALMEN.

- | | |
|---|---|
| 1129. Who may have lien. | 1138. Limitations of actions. |
| 1130. Land, subject to. | 1139. Extent of contractor's liability—Rights of owner. |
| 1131. Improvements at request of owner. | 1140. Foreclosure—Parties. |
| 1131-1. Liens on orchards—Right to lien. | 1141. Rank of liens—Attorney's fees. |
| 1131-2. Notice of orchard lien—Requisites. | 1142. Personal action. |
| 1131-3. Limitation of action—Costs and attorney's fees. | 1143. Lien not discharged by taking note. |
| 1132. Priority over subsequent encumbrances. | 1144. Material exempt from attachment, etc., when. |
| 1133. Prerequisites — Duplicate statements to be furnished. | 1145. Community interest, how subjected. |
| 1134. Requisites of claim, form, time of filing. | 1146. When land not subject to lien—Power of court. |
| 1135. Recording claim. | 1147. Liberal construction. |
| 1136. Assignment of lien. | 1148. Existing rights preserved. |
| 1137. Segregation of claims. | |

CHAPTER IV.—LIENS OF EMPLOYEES.

- | | |
|--|--|
| 1149. Laborer's lien on property, franchises, etc. | 1152. Foreclosure of lien. |
| 1150. Notice of lien. | 1153. How claims are to be paid by receiver or assignee. |
| 1151. Service of notice. | |

CHAPTER V.—LIENS ON CHATTELS.

- | | |
|--|--|
| 1154. Lien on chattels for labor and material. | 1157a. Priority of labor over material liens — Personal judgment — Deficiency. |
| 1155. Notice of lien on chattel. | 1158. Filing of notice. |
| 1156. Ownership—Priority of lien. | |
| 1157. Enforcement of lien. | |

LIENS AND THEIR ENFORCEMENT.

CHAPTER VI.—SECURITY FOR LABOR, ETC., ON PUBLIC WORKS.

- | | |
|---|--|
| 1159. Contractor's bond—Filing. | 1161. Conditions of bond—Action on. |
| 1159-1. Notice to contractor—Condition precedent to action. | 1161-1. Retroactive effect given sections 1159 and 1161. |
| 1160. Liability for failure to take bond. | |

CHAPTER VII.—LIENS UPON LOGS AND OTHER TIMBER.

- | | |
|---|--|
| 1162. Who may have liens. | 1173. Sheriff as receiver. |
| 1163. Lien on lumber—Lumber, defined. | 1174. Answer of defendant—Hearing. |
| 1164. Lien for stumpage. | 1175. Enforcement of lien against whole or part. |
| 1165. Preferred liens. | 1176. Errors not to invalidate lien, when. |
| 1166. Limitation of filing lien for labor. | 1177. Innocent third party, who is. |
| 1167. Limitation of filing lien for stumpage. | 1178. Joinder—Costs. |
| 1168. Filing of claim for labor, etc. | 1179. Judgment, enforcement of. |
| 1169. Filing of claim for stumpage. | 1180. Sale as personalty. |
| 1170. Recording claim. | 1181. Damages for eloigning or removing marks, etc.—Recoverable, when. |
| 1171. Limitation of actions. | |
| 1172. Jurisdiction—Procedure. | |

CHAPTER VIII.—LIENS ON STEAMERS, BOATS, ETC.

- | | |
|---|-------------------------------------|
| 1182. Vessels, etc., liable for liens. | 1185. Priority. |
| 1183. Enforcement of liens. | 1186. Suits in rem. |
| 1184. Liens for services of stevedores. | 1187. Liens for towage and dunnage. |

CHAPTER IX.—LIENS ON FARM PRODUCTS.

- | | |
|--|--|
| 1188. Farm laborers' and landlords' liens. | 1190a. Provisions extended to farm laborers. |
| 1189. Priority of liens. | |
| 1190. Time for filing—Lien for rents—How enforced. | |

CHAPTER X.—LIENS FOR STORAGE AND ADVANCE CHARGES.

- | | |
|---|--|
| 1191. When lien exists. | 1194. Application of proceeds of sale. |
| 1192. Sale of livestock, etc., for charges. | 1195. Special contract not affected. |
| 1193. Sale of other property. | 1196. Notices, how given. |

CHAPTER XI.—LIENS FOR KEEPING LIVESTOCK.

- | | |
|--|--|
| 1197. Creation of lien. | 1200. No waiver by delivery—Action to enforce. |
| 1198. Enforcement. | |
| 1199. Possession to secure lien—Sale—Notice. | |

CHAPTER XII.—LIENS OF INNKEEPERS AND THEIR LIABILITY.

- | | |
|------------------------------------|-------------------------------|
| 1201. Lien upon baggage, etc. | 1203. Responsibility limited. |
| 1202. Sale to satisfy lien—Notice. | |

CHAPTER XIII.—LIENS FOR RENT.

- | | |
|--|----------------------|
| 1203-1. Lien for rent—Property subject—Extent of lien. | 1203-2. Enforcement. |
|--|----------------------|

CHAPTER XIV.—PREFERENCE RIGHTS OF EMPLOYEES.

- | | |
|---|--|
| 1204. Priority of wages, etc., in insolvency. | 1205. Preference on death of employer |
| | 1206. Notice and presentment of claims |

CHAPTER XV.—THE CONSTRUCTION OF STATUTES RELATING TO LIENS.

- | | |
|---------------------------------|---------------------------|
| 1208. Construction of lien law. | 1209. Extent of lien law. |
|---------------------------------|---------------------------|

CHAPTER I.

THE FORECLOSURE OF CHATTEL MORTGAGES.

§ 1104. Chattel Mortgage—How Foreclosed.

Any mortgage of personal property, when the debt to secure which the mortgage was given is due, may be foreclosed by notice and sale as herein provided; or it may be foreclosed by action in the superior court having jurisdiction in the county in which the property is situated. [Cf. L. '75, p. 46, § 18; L. '79, p. 105, § 6; Cd. '81, § 1991; 1 H. C., § 1650.]

Cited in 16 Wash. 109; 27 Wash. 286; 33 Wash. 640; 48 Wash. 562; 50 Wash. 122; 78 Wash. 137; 87 Wash. 271; 88 Wash. 110; 99 Wash. 582, 589; 100 Wash. 420; 102 Wash. 52; 106 Wash. 168.

Actions to Foreclose: See Remington's Digest, Chat. Mtg., §§ 67—72.

Nature and Form: Moody v. Noyes, 15 Wash. 128, 45 Pac. 732.

The right to foreclose is not lost by the delay of a mortgagee in possession if the statute of limitations has not run: Brockway v. Abbott, 37 Wash. 263, 79 Pac. 924.

§ 68. — Grounds and Conditions Precedent: Gilbert Hunt Mfg. Co. v. Wheeler, 15 Wash. 594, 47 Pac. 26; Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819; Slyfield v. Willard, 43 Wash. 179, 86 Pac. 392; Hopkins v. Crane, 50 Wash. 636, 97 Pac. 772.

§ 69. — Defenses: Weir v. Rathbun, 12 Wash. 84, 40 Pac. 625; Snively v. Matheson, 12 Wash. 88, 40 Pac. 628, 50 Am. St. Rep. 877; Hinchman v. Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867; Washington Bank of Walla Walla v. Fidelity Abstract etc. Co., 15 Wash. 487, 46 Pac. 1036, 55 Am. St. Rep. 902, 37 L. R. A. 115; Mahoney v. Crockett, 37 Wash. 252, 79 Pac. 933.

§ 70. — Parties: Ephraim v. Kelleher,

4 Wash. 243, 29 Pac. 895, 18 L. R. A. 604; Weir v. Rathbun, 12 Wash. 84, 40 Pac. 625; German-American State Bank v. Seattle Grain Co., 89 Wash. 376, 154 Pac. 443; Bollen v. Wilson Creek Union Grain & Trading Co., 90 Wash. 400, 156 Pac. 404.

§ 71. — Pleading: Smith v. Ellis, 3 W. T. 328, 21 Pac. 385; Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819.

§ 72. — Evidence: Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012; Slyfield v. Willard, 43 Wash. 179, 86 Pac. 392.

See, also, Simpson v. Combes, 107 Wash. 575, 182 Pac. 566.

Claims to Property by Third Persons: See Remington's Digest, Chat. Mtg., § 76; Ephraim v. Kelleher, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604.

For text treatment of "Chattel Mortgages," see 5 **R. C. L.** 580.

Enforcement of chattel mortgage in foreign state to which goods have been removed by mortgagor. 3 **Ann. Cas.** 109; **Ann. Cas.** 1914B. 1252; 39 **L. R. A. (N. S.)** 627.

Right of mortgagee to purchase property on foreclosure sale under chattel mortgage. **Ann. Cas.** 1913D, 412.

§ 1105. Notice, Contents of.

The notice must contain a full description of the property mortgaged, together with time and place of sale, also a statement of the amount due, and must be signed by the mortgagee or his attorney. [L. '75, p. 46, § 19; L. '79, p. 106, § 7; Cd. '81, § 1992; 1 H. C., § 1651.]

Cited in 21 Wash. 475; 26 Wash. 179; 50 Wash. 120, 122; 87 Wash. 271; 89 Wash. 504.

Notice or Preliminary Proceedings: See Remington's Digest, Chat. Mtg., § 64-1; Harker v. Woolery, 10 Wash.

484, 39 Pac. 100; Rawson v. Ellsworth, 13 Wash. 667, 43 Pac. 934; Mack v. Doak, 50 Wash. 119, 96 Pac. 825; Allen v. Morris, 87 Wash. 268, 151 Pac. 827; White v. Powers, 89 Wash. 502, 154 Pac. 820.

§ 1106. Service of Notice, How Made.

Such notice shall be placed in the hands of the sheriff or other proper officer, and shall be personally served in the same manner as is provided by law for the service of a summons: Provided, that if the mortgagor

cannot be found in the county where the mortgage is being foreclosed, it shall not be necessary to advertise the notice or affidavit in a newspaper; but the general publication directed in the next section shall be sufficient service upon all the parties interested, and such notice shall be sufficient authority for the officer to take such property into his immediate possession. [Cf. L. '75, p. 47, §§ 20, 21; L. '79, p. 106, § 8; Cd. '81, § 1993; 1 H. C., § 1652.]

Cited in 21 Wash. 475; 23 Wash. 179; 50 Wash. 122; 87 Wash. 272, 273; 88 Wash. 110; 89 Wash. 504, 505.

Taking Custody of Property: See Remington's Digest, Chat. Mtg., § 65; Meacham Arms Co. v. Strong, 3 W. T. 61, 13 Pac. 245; Nettleton v. Evans, 67 Wash. 227, 121 Pac. 54; Allen v. Morris, 87 Wash. 268, 151 Pac. 827; Kato v. Union Oil Co. of California, 92 Wash. 473, 159 Pac. 692.

A constable has no authority to foreclose a chattel mortgage by notice and

sale, under this section: Pickle v. Smalley, 21 Wash. 473, 58 Pac. 581; Jacobson v. Aberdeen Packing Co., 26 Wash. 175, 66 Pac. 419.

"Such notice" refers to the mortgagee's original notice or warrant to the sheriff to foreclose the mortgage, and not to the notice to be served on the mortgagor, in view of sections 1106, 1107, providing for notice to the mortgagor to follow seizure: Allen v. Morris, 87 Wash. 268, 151 Pac. 827.

§ 1107. Publication—Sale, How Conducted.

After notice has been served upon the mortgagor, it must be published in the same manner and for the same length of time as required in cases of the sale of like property on execution, and the sale shall be conducted in the same manner. [Cf. L. '75, p. 47, § 22; L. '79, p. 106, § 9; Cd. '81, § 1994; 1 H. C., § 1653.]

Cited in 87 Wash. 273; 89 Wash. 504, 506; 97 Wash. 487.

§ 1108. Purchaser's Title.

The purchaser shall take all interest which the mortgagor had in the said mortgaged property upon which the said mortgage operated. [Cf. L. '75, p. 47, § 23; L. '79, p. 106, § 10; Cd. '81, § 1995; 1 H. C., § 1654.]

Cited in 97 Wash. 487.

Title and Rights of Purchaser: See Remington's Digest, Chat. Mtg., § 78; First Nat. Bank of Seattle v. Woolery, 6 Wash. 215, 33 Pac. 357; Lawrence v. Times Printing Co., 22 Wash. 482, 61 Pac. 166; Larson v. Anderson, 97 Wash. 484, 166 Pac. 774.

Without deciding whether a chattel mortgage of abstract books covers photo-

graphic reproductions unlawfully taken by the mortgagor and sold to a third person, a decree of foreclosure and sheriff's sale particularly describing the books only, does not pass title to the copies, or authorize a possessory action to recover the copies: Wintler Abstract & Loan Co. v. Sears, 108 Wash. 461, 184 Pac. 309, 7 A. L. R. 152.

§ 1109. Officer's Bill of Sale, Effect of.

The officer conducting the sale shall execute to the purchaser a bill of sale of the property, which bill of sale shall be effectual to carry the whole title and interest purchased, and if any balance of the purchase price remain, it shall be disposed of in the same manner as surplus proceeds of sales are on execution. [Cf. L. '75, p. 47, § 24; L. '79, p. 106, § 11; Cd. '81, § 1996; 1 H. C., § 1655.]

Cited in 78 Wash. 137; 87 Wash. 271; 97 Wash. 487.

Proceeds and Surplus: See Remington's Digest, Chat. Mtg., § 79; First Nat. Bank of Seattle v. Woolery, 6

Wash. 215, 33 Pac. 357; Hamilton v. Carter, 12 Wash. 510, 41 Pac. 911; Hinchman v. Point Defiance R. Co., 14 Wash. 349, 44 Pac. 867; Dubuque v. Stich, 16 Wash. 641, 48 Pac. 344.

Fees and Costs: See Remington's Digest, Chat. Mtg., § 80; Howard v. Gemming, 10 Wash. 1, 38 Pac. 748; Jacobson v. Aberdeen Packing Co., 26 Wash. 175; 66 Pac. 419.

Operation and Effect: See Remington's Digest, Chat. Mort., § 81; Dubuque v. Stich, 16 Wash. 641, 48 Pac. 344.

§ 1110. Foreclosure Contested—Injunction.

The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any person interested in so doing, and the proceedings may be transferred to the superior court, for which purpose an injunction may issue if necessary. [Cf. L. '75, p. 47, § 28; L. '79, p. 106, § 12; Cd. '81, § 1997; 1 H. C., § 1656.]

Cited in 4 Wash. 259; 13 Wash. 257; 33 Wash. 640, 643; 50 Wash. 121, 122; 78 Wash. 137; 87 Wash. 271; 90 Wash. 14; 106 Wash. 168.

Restraining Foreclosure: See Remington's Digest, Chat. Mtg., § 63; Meacham

Arms Co. v. Swartz, 2 W. T. 412, 7 Pac. 859; West Coast Grocery Co. v. Stinson, 13 Wash. 255, 43 Pac. 35; Kidder v. Beavers, 33 Wash. 635, 74 Pac. 819.

§ 1111. Action Before Maturity of Debt.

Where the debt is not due for which the mortgage is given, and the mortgagee has reasonable cause to believe that the mortgage property will be destroyed, lost, or removed, he shall have the right to an immediate action in the superior court of the county having jurisdiction where the property is situated, for the recovery of his debt, and the court may make any order it may deem fit, in order to secure said property so as to make the same available for the satisfaction of said debt. [L. '79, p. 106, § 13; Cd. '81, § 1998; 1 H. C., § 1657.]

Cited in 47 Wash. 184, 186; 69 Wash. 153; 83 Wash. 356; 100 Wash. 213; 108 Wash. 465; 110 Wash. 76.

Option and Election to Foreclose: See Remington's Digest, Chat. Mtg., § 61; Frank v. Pickle, 2 W. T. 55, 3 Pac. 584; Fitch v. Goetjen, 83 Wash. 355, 145 Pac. 447; Case Threshing Machine Co. v. Shroll, 100 Wash. 212, 170 Pac. 564.

See, also, Skookum Lbr. Co. v. Sacajawea Lbr. & Shingle Co., 107 Wash. 356, 181 Pac. 914, 187 Pac. 410.

A chattel mortgage that is made due by the election of the mortgagee may be foreclosed by statutory notice, without proceeding by action under sections 1104 and 1109: Allen v. Morris, 87 Wash. 268, 151 Pac. 827.

Injunction and Receiver: See Remington's Digest, Chat. Mtg., § 74; Schoonover v. Condon, 12 Wash. 475, 41 Pac. 195; Euphrat v. Morrison, 39 Wash. 311, 81 Pac. 695; Libert v. Unfried, 47 Wash. 182, 91 Pac. 774.

§ 1112. Mortgagee may Take Possession—Sale.

A mortgage[e] of personal property, where a debt for the security of which the mortgage has been given has become due, or if the debt is not yet due, and the mortgagee has reasonable ground to believe that his debt is insecure, and that by allowing the property longer to remain in the hands of the mortgagor he would be in danger of losing his debt or security, may have the property taken from the possession of the mortgagor, and sold in the manner provided in this chapter. [L. '79, p. 105, § 4; Cd. '81, § 1989; 1 H. C., § 1658.]

Cited in 47 Wash. 184, 186; 69 Wash. 153; 87 Wash. 271; 100 Wash. 213.

Taking Possession: See Remington's Digest, Chat. Mtg., § 73; McClellan v. Gaston, 18 Wash. 472, 51 Pac. 1062; Bancroft-Whitney Co. v. Gowan, 24 Wash. 66, 63 Pac. 1111.

A proceeding by a chattel mortgagee to preserve his security, under this section, does not have the effect of an election to declare the whole debt due or accelerate the maturity of the debt, where he did not allege such an election, the notes did not provide for an accelera-

tion of the maturity of the debt in such case: *Haggard v. Sanglin*, 69 Wash. 151, 124 Pac. 373.

Exercise of Power of Sale: See *Remington's Digest*, Chat. Mtg., § 64; *Sheehan v. Levy*, 1 Wash. 149, 23 Pac. 802; *Richter v. Buchanan*, 48 Wash. 32, 92 Pac. 782; *Woodward v. Lutsch*, 69 Wash. 59, 129 Pac. 393.

Where property covered by a chattel mortgage was left in the possession of the mortgagors and one of them delivered it to a third party, no title passed. While the mortgage was not foreclosed, the mortgagors could have recovered the possession; or if the possession of such third party endangered the security of the mortgagee, they could have the property taken into possession, and held for disposal, as prescribed by the above section: *Silsby v. Aldridge*, 1 Wash. 117, 23 Pac. 836; *Kerron v. Northern Pac. Lbr. & Mfg. Co.*, 1 Wash. 241, 24 Pac. 445.

If a mortgagee of chattels has taken possession thereof for alleged breach of the condition providing for payment, he is entitled to retain possession as against a subsequent assignment by mortgagor

for the benefit of creditors, until it is determined by legal proceedings that the assignee has the superior right thereto: *Sanders v. Main*, 9 Wash. 46, 36 Pac. 1049; following *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578; *State ex rel. Arthur Mach. Co. v. Superior Court*, 7 Wash. 77, 34 Pac. 430; *State ex rel. Hunt v. Superior Court*, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354.

If a chattel mortgage on a stock of goods provides for payment out of sales of the goods and the mortgagee takes possession, his lien will apply to goods after acquired mingled with the stock, although not in terms covered by the mortgage: *Armstrong v. Ford*, 10 Wash. 64, 38 Pac. 866.

Where the possession of goods is taken under a chattel mortgage the fact that it contains no affidavit of good faith will not affect the mortgagee's right: *Reed v. Bank of Commerce*, 8 Wash. 539, 36 Pac. 484. See *Sligh v. Shelton etc. R. Co.*, 20 Wash. 16, 54 Pac. 763.

Right of chattel mortgagee to take possession under insecurity clause. *Ann. Cas.* 1914B, 1097.

§ 1113. Foreclosure of Chattel Mortgages—Application of Chapter II.

The provisions contained in chapter II of this title, so far as the same shall be applicable, shall govern in actions for the foreclosure of chattel mortgages or bills of sale creating liens on personal property. [Cf. L. '69, p. 147, § 572; Cd. '81, § 618; 2 H. C., § 636.]

Cited in 1 Wash. 546; 4 Wash. 249; 47 Wash. 163.

§ 1114. Remedies of Mortgagee—Decree—Sale—Deficiency.

The mortgagee or holder of the lien may proceed upon his mortgage or lien, [or] if there be a separate obligation in writing to pay the same, secured by said mortgage or lien, he may bring suit upon such separate promise. When he proceeds on the mortgage, if there be a specific agreement therein contained for the payment of a certain sum, or there is a separate obligation for the said sum, in addition to a decree of sale of mortgaged property, judgment shall be rendered for the amount due upon said mortgage or other instrument, the payment of which is thereby secured. The decree shall direct the sale of the mortgaged property, and if the proceeds of said sale be insufficient under the execution, the sheriff is authorized to levy upon and sell other property of the mortgage debtor, not exempt from execution, for the sum remaining unsatisfied. [Cf. L. '69, p. 147, § 572; Cd. '81, § 619; 2 H. C., § 637.]

Cited in 1 Wash. 546; 12 Wash. 87; 54 Wash. 230, 235.

This section and that immediately preceding it provide for the foreclosure of chattel mortgages, and assimilate such foreclosure to that of mortgages on real property: *Byrd v. Forbes*, 3 W. T. 318, 13 Pac. 715.

ELECTION OF REMEDY—RESIDUE. The payee may, at his option, recover either a money judgment or proceed to foreclose upon a written instrument constituting not only a mortgage, but also a note and mortgage: *Frank v. Pickle*, 2 W. T. 55, 3 Pac. 584. When judgment is not satisfied by a sale of mortgaged

premises under a decree of foreclosure, it is the duty of the sheriff to proceed at once to make the residue by levy upon and sale of other property: *Hays v. Miller*, 1 W. T. 143.

A first mortgage lien is not in any way affected by a sale of the mortgaged property under a second mortgage: *Binnian v. Baker*, 6 Wash. 50, 32 Pac. 1008.

Judgment: See *Remington's Digest*, Chat. Mtg., § 75; *Sheehan v. Levy*, 1 Wash. 149, 23 Pac. 802; *Weir v. Rathbun*, 12 Wash. 84, 40 Pac. 625; *Hopkins v. Crane*, 50 Wash. 636, 97 Pac. 772; *Dungeness Logging Co. v. Oregon & Washington R. Co.*, 65 Wash. 631, 118 Pac. 825; *Spokane Merchants' Assn. v. First National Bank of Colville*, 86 Wash. 367, 150 Pac. 434, L. R. A. 1918A, 323; *German-American State Bank v. Seattle Grain Co.*, 89 Wash. 376, 154 Pac. 443; *Boeringa v. Perry*, 96 Wash. 57, 164 Pac. 773.

The withholding of an order of sale upon a decree of foreclosure of a chattel mortgage for five months does not constitute laches: *Hamilton v. Carter*, 12 Wash. 510, 41 Pac. 911.

In an action to foreclose a mortgage securing a contract, against a party to the contract and one claiming an interest

in the property, a joint personal judgment cannot be entered against both defendants: *Hopkins v. Crane*, 50 Wash. 636, 97 Pac. 772.

A decree of foreclosure cannot be collaterally attacked on the ground that property was not a proper subject of chattel mortgage, and of foreclosure sale: *Dubuque v. Stich*, 16 Wash. 641, 48 Pac. 344.

In an action to foreclose a mortgage given to secure the plaintiff against loss by breach of a contract, it is not necessary that damages from the breach be ascertained before suit brought, jurisdiction to foreclose necessarily including the determination of the amount for which foreclosure be awarded: *Hopkins v. Crane*, 50 Wash. 636, 97 Pac. 722.

Deficiency and Personal Liability: See *Remington's Digest*, Chat. Mtg., §§ 66, 75-1; *Mitchell, Lewis & Staver Co. v. O'Neil*, 16 Wash. 108, 47 Pac. 235; *Bradley Eng. & Mach. Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37, 18 Ann. Cas. 1072; *Lee v. Pasco Theatre Co.*, 93 Wash. 204, 160 Pac. 435.

Right to deficiency judgment in action to foreclose chattel mortgage. 18 Ann. Cas. 1075.

§ 1115. Sale of Mortgagor's Interest Under Process—Notice.

The interest of the mortgagor, subject, however, to the lien of the mortgagee, may be sold under any process of law issuing out of any superior or justice of the peace court in this state: Provided, however, that if the party who has said mortgage reside in this state, or has an agent herein, and the same is known to the officer executing such process, he shall serve upon him or his agent personally, or by mailing to him or to his agent, if their postoffice is known, a notification of the intended sale, at the time such mortgaged property is seized under said process, or within five days thereafter. Said property shall not be sold within less than thirty days after its seizure, and the officer executing such process must post in three public places, near the place where the said property is to be sold, a notice of the time and place of such sale, at the time he seizes said property under said process. [L. '79, p. 105, § 5; Cd. '81, § 1990; 1 H. C., § 1659.]

Cited in 1 Wash. 547; 12 Wash. 515; 13 Wash. 257.

Manner and Conduct of Sale: See *Remington's Digest*, Chat. Mtg., § 77; *Hamilton v. Carter*, 12 Wash. 510, 41 Pac. 911.

SALE OF MORTGAGOR'S INTEREST UNDER PROCESS OF LAW.—A mortgagor's interest in goods may be taken in execution, and the provisions of the above section are inconsistent with the idea that after levy by the sheriff, the mortgagee can demand and take possession: *Byrd v. Forbes*, 3 W. T. 318, 13

Pac. 715. Mortgaged property in the hands of the mortgagor can be taken possession of by process of attachment, and the property can be taken into actual custody of the sheriff: *Marsh v. Wade*, 1 Wash. 538, 20 Pac. 578. Any interest that the mortgagor may have in the mortgaged property in the hands of the mortgagee can also be reached by process of garnishment; that is to say, the mortgagee can be garnished for any interest that may exist after his mortgage is satisfied, but the possession of the honest mortgagee cannot be disturbed: *Marsh v. Wade*, 1 Wash. 538, 20

Pac. 578. An unexpired mortgage is a mortgage still, regardless of where the possession lies: *Id.*

NOTICE TO MORTGAGEE.—The provisions of the above section concerning the sheriff's notice to the mortgagee are mandatory, but do not affect the validity of the sale: *Byrd v. Forbes*, 3 W. T. 318, 13 Pac. 715. A sheriff is not liable for

noncompliance with the above section, where it did not appear that, being well informed of the mortgagee's address, he failed to notify him of a levy upon mortgaged chattels, and where it did not appear that the mortgagee lost his security or suffered damage from the sheriff's acts: *Byrd v. Forbes*, 3 W. T. 318, 13 Pac. 715.

CHAPTER II.

FORECLOSURE OF MORTGAGES ON REAL ESTATE.

§ 1116. Foreclosure—Venue.

When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns may proceed in the superior court of the county where the land, or some part thereof, lies, to foreclose the equity of redemption contained in the mortgage. [L. '54, p. 207, § 408; Cd. '81, § 609; 2 H. C., § 625.]

RIGHT TO FORECLOSE: See Remington's Digest, Mtg., §§ 131—138.

§ 131. Maturity of Debt Secured: *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396; *Easton v. Littooy*, 91 Wash. 648, 158 Pac. 531; *Holland Co. v. Aitken*, 98 Wash. 107, 167 Pac. 109.

§ 132. Effect of Extension of Time for Payment: *White v. Krutz*, 37 Wash. 34, 79 Pac. 495.

§ 133. Default in Payment—Interest: *Ames v. Bigelow*, 15 Wash. 532, 46 Pac. 1046; *Bank v. Doherty*, 29 Wash. 233, 69 Pac. 732, 92 Am. St. Rep. 903.

§ 134. — Taxes or Assessments: *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345.

§ 135. Stipulations for Maturity of Debt on Default: *Cloud v. Rivord*, 6 Wash. 555, 34 Pac. 136; *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 Pac. 900, 126 Am. St. Rep. 856, 15 L. R. A. (N. S.) 590; *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. Rep. 1058; *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633; *Castor v. Muramoto*, 69 Wash. 145, 125 Pac. 153, 42 L. R. A. (N. S.) 108; *Musselman v. Knottingham*, 77 Wash. 435, 137 Pac. 1012; *Harbican v. Skinner*, 83 Wash. 596, 145 Pac. 582.

§ 136. Breach of Condition Other Than for Payment of Debt: *Board of Election Fund v. First Presbyterian Church*, 19 Wash. 455, 53 Pac. 671.

§ 137. Stipulations Against Forfeiture or Foreclosure: *Mentzer v. Abbott*, 20 Wash. 708, 54 Pac. 762.

§ 138. Waiver of Default or of Right to Foreclose: *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495; *Wein-*

berg v. Naher, 51 Wash. 591, 99 Pac. 736, 22 L. R. A. (N. S.) 956; *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002; *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232.

See, also, *Tibbetts v. Bush & Lane Piano Co.*, 111 Wash. 165, 189 Pac. 996.

Successive Foreclosures: See Remington's Digest, Mtg., § 140; *Damon v. Leque*, 14 Wash. 253, 44 Pac. 261; *Dano v. Daniel*, 28 Wash. 155, 68 Pac. 446; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Wakefield v. Fish*, 62 Wash. 564, 114 Pac. 180.

Conditions Precedent: See Remington's Digest, Mtg., §§ 141, 142; *Scammon v. Ward*, 1 Wash. 179, 23 Wash. 439; *Reed v. Miller*, 1 Wash. 426, 25 Pac. 334; *Allen v. Swerdfinger*, 14 Wash. 461, 44 Pac. 894. **Election to Declare Entire Debt Due:** *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543, 45 Pac. 141; *United States Sav. & Loan Co. v. Cade*, 15 Wash. 38, 45 Pac. 656; *Ames v. Bigelow*, 15 Wash. 532, 46 Pac. 1046; *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345.

Defenses: See Remington's Digest, Mtg., §§ 143—151. **In general:** *Kenworthy v. Merritt*, 2 W. T. 155, 7 Pac. 62; *Brown v. Elwell*, 17 Wash. 442, 49 Pac. 1068; *Frye v. Meyer*, 22 Wash. 277, 60 Pac. 655; *Washington Loan & Trust Co. v. Ritz*, 37 Wash. 642, 80 Pac. 174.

See, also, *Haggerty v. Building Inv. Co.*, 111 Wash. 638, 191 Pac. 760.

§ 144. — Validity and Want of Consideration: *Ault v. Blackman*, 8 Wash. 624, 36 Pac. 694; *Nance v. Woods*, 79 Wash. 188, 140 Pac. 323; *Shedden v. Sylvester*, 88 Wash. 348, 153 Pac. 1.

See, also, *American Sav. Bank & Trust Co. v. Peterson*, 112 Wash. 101, 191 Pac. 837.

§ 145. — **Invalidity of Assignment:** *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325; *Security Sav. Soc. v. Cohalan*, 31 Wash. 266, 71 Pac. 1020.

§ 146. — **Payment and Release:** *Western Security Co. v. Douglass*, 14 Wash. 215, 44 Pac. 257; *Interstate Sav. & L. Assn. v. Cairns*, 16 Wash. 215, 47 Pac. 509; *Eastham v. Landon*, 17 Wash. 48, 48 Pac. 738; *Hanna v. Reeves*, 22 Wash. 6, 60 Pac. 62.

§ 147. — **Persons to Whom Defense is Available:** *Hanna v. Reeves*, 22 Wash. 6, 60 Pac. 62; *Perkins v. Bailey*, 38 Wash. 46, 80 Pac. 177, 107 Am. St. Rep. 831; *Schweiter v. Hooker*, 94 Wash. 642, 162 Pac. 981.

§ 148. — **In Action by Assignee:** *Howard v. Shaw*, 10 Wash. 151, 38 Pac. 746; *Gordon v. Decker*, 19 Wash. 188, 52 Pac. 856.

§ 149. — **Purchase Price Mortgage:** *Kenworthy v. Merritt*, 2 W. T. 155, 7 Pac. 62; *Friday v. Parkhurst*, 13 Wash. 439, 43 Pac. 362.

§ 150. — **Defects in Title:** *Kley v. Geiger*, 4 Wash. 484, 30 Pac. 727; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349, 44 Pac. 867; *Gordon v. Decker*, 19 Wash. 188, 52 Pac. 856.

§ 151. — **Setoff or Counterclaim:** *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *Peterson v. Johnson*, 20 Wash. 497, 55 Pac. 932; *First Nat. Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828.

VENUE—In General: See *Remington's Digest*, Mtg., § 155; *Wood v. Mastick*, 2 W. T. 64, 3 Pac. 612; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536, 48 Pac. 267; *Empire State Surety Co. v. Ballou*, 66 Wash. 76, 118 Pac. 923; *Citizens' Nat. Bank v. Abbott*, 72 Wash. 73, 129 Pac. 1085.

LIMITATIONS AND LACHES: See *Remington's Digest*, Mtg., §§ 156, 157. **Time to Foreclose:** *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533; *Fuhrman v. Power*, 43 Wash. 533, 86 Pac. 960; *Mann v. Provident Life & T. Co.*, 42 Wash. 581, 85 Pac. 56. **Limitations:** *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733; *Krutz v. Gardner*, 25 Wash. 396, 35 Pac. 771; *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533; *Frew v. Clark*, 34 Wash. 561, 76 Pac. 85; *Boyer v. Price*, 45 Wash. 667, 88 Pac. 1106; *Childs v. Smith*, 51 Wash. 457, 99 Pac. 304, 130 Am. St. Rep. 1107.

PARTIES: See *Remington's Digest*, Mtg., §§ 153, 154, 158—171.

§ 153. **Persons Entitled to Foreclose:** *Fidelity Ins. etc. Co. v. Nelson*, 30 Wash. 340, 70 Pac. 961; *Spokane Merchants'*

Assn. v. Parry, 60 Wash. 204, 110 Pac. 991.

§ 154. **Persons as to Whom Mortgage may be Foreclosed:** *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345; *Coolidge v. Schering*, 32 Wash. 557, 73 Pac. 682; *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533.

§ 158. **Plaintiffs—Trustees in Trust Deeds:** *Thompson v. Huron Lumber Co.*, 4 Wash. 600, 30 Pac. 741, 31 Pac. 25.

§ 159. — **Assignees and Holders of Obligations Secured:** *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543, 45 Pac. 141; *State Finance Co. v. Moore*, 103 Wash. 298, 174 Pac. 22.

§ 160. — **Joinder:** *Clay v. Selah Valley Irr. Co.*, 14 Wash. 543, 45 Pac. 141.

§ 161. **Necessary Defendants—In General:** *Bacon v. O'Keefe*, 13 Wash. 655, 43 Pac. 886; *State ex rel. Hartman v. Superior Court*, 21 Wash. 469, 58 Pac. 572; *Denny v. Cole*, 22 Wash. 372, 61 Pac. 38, 79 Am. St. Rep. 940; *Thompson v. Price*, 37 Wash. 394, 79 Pac. 951; *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633; *Bird v. Steele*, 74 Wash. 68, 132 Pac. 724; *Nance v. Woods*, 79 Wash. 188, 140 Pac. 323.

§ 162. — **Persons Claiming Adverse or Paramount Title:** *California Safe Deposit etc. Co. v. Cheney Elec. etc. Co.*, 12 Wash. 138, 40 Pac. 732; *Murdoch v. Leonard*, 15 Wash. 142, 45 Pac. 751; *Pennsylvania Mtg. Inv. Co. v. Gilbert*, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43; *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345; *Seattle Trust Co. v. Cameron*, 100 Wash. 92, 170 Pac. 379.

§ 163. — **Mortgage After Sale of Premises:** *Harrington v. Miller*, 4 Wash. 808, 31 Pac. 325.

§ 164. — **Wife of Mortgagor:** *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446.

§ 165. — **Heirs and Representatives of Deceased Mortgagor:** *Hill v. Lowman*, 15 Wash. 503, 46 Pac. 1042; *Anrud v. Scandinavian-Amer. Bank*, 27 Wash. 16, 67 Pac. 364; *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524, 84 Pac. 8; *Schlarb v. Castaing*, 50 Wash. 331, 97 Pac. 289.

§ 166. — **Wives of Subsequent Purchasers:** *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949.

§ 167. — **Prior Encumbrancers:** *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345.

§ 168. — **Subsequent Encumbrancers:** *Krutz v. Gardner*, 25 Wash. 396, 35 Pac. 771.

§ 169. Proper Parties Defendant: California Safe Deposit & T. Co. v. Cheney Elec. Light & P. Co., 12 Wash. 138, 40 Pac. 732; Murdock v. Leonard, 15 Wash. 142, 45 Pac. 751; Bisbee v. Carey, 17 Wash. 224, 40 Pac. 220; Burrows v. McCalley, 17 Wash. 269, 49 Pac. 508; Oates v. Shuey, 25 Wash. 597, 66 Pac. 58.

§ 171. Intervention: Thompson v. Huron Lumber Co., 4 Wash. 600, 30 Pac. 741, 31 Pac. 25; Stewart v. Eaton, 20 Wash. 378, 55 Pac. 314; Hindman v. Colvin, 47 Wash. 382, 92 Pac. 139; Murray v. O'Brien, 56 Wash. 361, 105 Pac. 840, 28 L. R. A. (N. S.) 998.

Process in General: See Remington's Digest, Mtg., § 172; De Corvet v. Dolan, 7 Wash. 365, 35 Pac. 1072; Munch v. McLaren, 9 Wash. 676, 38 Pac. 205; Tilton v. O'Shea, 31 Wash. 513, 72 Pac. 106; Gravelle v. Canadian etc. Mtg. & T. Co., 42 Wash. 457, 85 Pac. 36; Fuhrman v. Power, 43 Wash. 533, 86 Pac. 960.

Notice of Pendency of Action: See Remington's Digest, Mtg., § 173; Payson v. Jacobs, 38 Wash. 203, 80 Pac. 429; Hyde v. Heaton, 43 Wash. 433, 86 Pac. 664.

PLEADING: See Remington's Digest, Mtg., §§ 174—181. **Complaint—Form and requisites in general:** Cook v. Blalock, 1 W. T. 560; Bethel v. Robinson, 4 Wash. 446, 30 Pac. 737; Murdock v. Leonard, 15 Wash. 142, 45 Pac. 751.

§ 175. — Mortgage and Indebtedness: Seattle Trust Co. v. Kerry, 19 Wash. 389, 53 Pac. 665.

§ 176. — Title or Right of Plaintiff to Mortgage: Brown v. Elwell, 17 Wash. 442, 49 Pac. 1068.

§ 177. — Interests of Defendants: Dexter Horton & Co. v. Long, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867; Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064.

§ 178. — Prayer for Relief: Damon v. Leque, 14 Wash. 253, 44 Pac. 261; Bank of California v. Dyer, 14 Wash. 279, 44 Pac. 534; Rogers v. Turner, 19 Wash. 399, 53 Pac. 663; Citizens' Nat. Bank v. Abbott, 72 Wash. 73, 129 Pac. 1085.

§ 179. Answer: Bethel v. Robinson, 4 Wash. 446, 30 Pac. 734; Interstate Sav. & L. Assn. v. Knapp, 20 Wash. 225, 55 Pac. 48, 931; Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533; Schaad v. Robinson, 50 Wash. 283, 97 Pac. 104.

§ 180. Replication or Reply: Wilson v. Hubbard, 39 Wash. 671, 82 Pac. 154.

See, also, Green v. Harris, 113 Wash. 259, 193 Pac. 690.

§ 181. Amended and Supplemental Pleadings: Biddle Pur. Co. v. Port Townsend Steel etc. Co., 16 Wash. 681, 48 Pac. 407.

Evidence: See Remington's Digest, Mtg., §§ 182—185. Issues, proof and variance: Butler v. Carvin, 33 Wash. 621, 74 Pac. 813; Naden v. Christopher, 62 Wash. 413, 113 Pac. 1116; Sappington v. Owens, 92 Wash. 632, 159 Pac. 785.

§ 183. Admissibility of Evidence: Book v. Willey, 8 Wash. 267, 35 Pac. 1098; Peters v. Gay, 9 Wash. 383, 37 Pac. 325; Allen v. Swerdfiger, 14 Wash. 461, 44 Pac. 894; Goon Gan v. Richardson, 16 Wash. 373, 47 Pac. 762; Van Dusen v. Kelleher, 25 Wash. 315, 65 Pac. 552.

§ 184. Weight and Sufficiency of Evidence—In General: Allen v. Swerdfiger, 14 Wash. 461, 44 Pac. 894; Corbet v. Waller, 27 Wash. 242, 67 Pac. 567; Gunby v. Ingram, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232.

§ 185. — Production of Bond, Note or Other Obligation Secured: Allen v. Swerdfiger, 14 Wash. 461, 44 Pac. 894; Goon Gan v. Richardson, 16 Wash. 373, 47 Pac. 762.

Upon an issue as to the priority of senior mortgages, a prima facie case is made by the showing that they were given for money loaned, by introducing the notes and mortgages, and proof of nonpayment and the recording; and shows they were given for a valuable consideration: Watson v. Barnard, 105 Wash. 536, 178 Pac. 477.

TRIAL OR HEARING: See Remington's Digest, Mtg., §§ 191—193.

§ 191. Scope of Inquiry and Powers of Court—Reformation and Foreclosure: Commercial Nat. Bank of Seattle v. Johnson, 16 Wash. 536, 48 Pac. 267; Jenkins v. Jenkins University, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785; Land Mortg. Bank v. Nicholson, 24 Wash. 258, 64 Pac. 156.

§ 192. — Trial of Adverse Titles: Pennsylvania Mtg. Inv. Co. v. Gilbert, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43; Johnson v. Irwin, 16 Wash. 652, 48 Pac. 345; Kizer v. Caufield, 17 Wash. 417, 49 Pac. 1064; Oates v. Shuey, 25 Wash. 597, 66 Pac. 58; Coolidge v. Schering, 32 Wash. 557, 73 Pac. 682; Graham v. Smart, 42 Wash. 205, 84 Pac. 824.

§ 193. New Trial: Stubblefield v. McAuliff, 20 Wash. 442, 55 Pac. 637.

REVIEW: See Remington's Digest, Mtg., §§ 236—241.

§ 236. Decisions Reviewable: Pennsylvania Mtg. Inv. Co. v. Gilbert, 13 Wash. 684, 43 Pac. 941; State ex rel. Twigg v. Superior Court, 34 Wash. 643, 76 Pac. 282.

§ 237. Presentation and Reservation in Lower Court of Grounds of Review: Bank v. Doherty, 42 Wash. 317, 84 Pac. 872, 114 Am. St. Rep. 123, 4 L. R. A. (N. S.) 1191.

§ 238. **Parties:** *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43; *Hinchman v. Point Defiance R. Co.*, 14 Wash. 171, 44 Pac. 152.

§ 239. **Taking and Perfecting Appeal of Other Proceeding:** *State ex rel. Commercial Nat. Bank v. Superior Court*, 14 Wash. 365, 44 Pac. 859.

§ 240. **Effect of Appeal or Other Proceeding:** *State ex rel. Manhattan Trust Co. v. Superior Court*, 17 Wash. 380, 49 Pac. 507.

§ 241. **Determination and Disposition of Cause:** *Wortman v. Vorhies*, 14 Wash. 152, 49 Pac. 129; *Reed v. Parker*, 33 Wash. 107, 74 Pac. 61; *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Deeg v. Ettleson*, 38 Wash. 241, 80 Pac. 437.

FEES AND COSTS: See *Remington's Digest*, Mtg., §§ 242—246.

§ 242. **Attorneys' Fees — In General:** *Reed v. Miller*, 1 Wash. 426, 25 Pac. 334; *Clement's Estate, In re*, 8 Wash. 323, 35 Pac. 1073; *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 Pac. 900, 126 Am. St. Rep. 856, 15 L. R. A. (N. S.) 590; *Scandinavian-American Bank v. Washington Hotel & Imp. Co.*, 70 Wash. 223, 126 Pac. 438, 128 Pac. 222.

§ 243. — **Stipulations and Amount:** *Reed v. Miller*, 1 Wash. 426, 25 Pac. 334; *Cloud v. Rivord*, 6 Wash. 555, 34 Pac. 136; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *Exchange Nat. Bank v. Wolverton*, 11 Wash. 108, 39 Pac. 248; *Haywood v. Miller*, 14 Wash. 660, 45 Pac. 307; *Commercial Nat. Bank of Seattle v. Johnson*, 16 Wash. 536, 48 Pac. 267; *Scholey v. De Mattos*, 18 Wash. 504, 52 Pac. 242; *Dennis v. Moses*, 18 Wash. 537, 52 Pac. 333, 40 L. R. A. 302; *Gordon v. Decker*, 19 Wash. 188, 52 Pac. 856; *Vermont Loan & Trust Co. v. Greer*, 19 Wash. 611, 53 Pac. 1103; *Fidelity & Deposit Co. v. Oliver*, 57 Wash. 31, 106 Pac. 483; *Thayer v. Harbican*, 70 Wash. 278, 126 Pac. 625; *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633; *Strandell v. Strand*, 82 Wash. 59, 143 Pac. 442; *Matson v. Frank*, 86 Wash. 669, 151 Pac. 89; *Amalgamated Gold Mines Co. v. Ridgely*, 100 Wash. 99, 170 Pac. 355.

See, also, *Watson v. Barnard*, 105 Wash. 536, 178 Pac. 477; *Kienbaum v. Rathfon Reduction Works*, 107 Wash. 115, 181 Pac. 10.

A mortgage note containing a promise to pay a reasonable attorney's fee, in case suit is instituted to collect the note, entitled attorneys in a foreclosure action to a reasonable fee upon a settlement and discontinuance of the foreclosure: *Owens v. Bauzman*, 105 Wash. 412, 177 Pac. 792.

§ 244. — **Necessity for Action or Judgment:** *Hoyt & Bros. Co. v. Smith*,

4 Wash. 640, 30 Pac. 664; *Lammon v. Austin*, 6 Wash. 199, 33 Pac. 355; *Easton v. Littooy*, 91 Wash. 648, 158 Pac. 531.

§ 245. — **Liens for Fees:** *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43.

§ 246. **Proceedings to Determine:** *Dexter, Horton & Co. v. Long*, 2 Wash. 435, 27 Pac. 271, 26 Am. St. Rep. 867; *Ames v. Bigelow*, 15 Wash. 532, 46 Pac. 1046; *Scholey v. De Mattos*, 18 Wash. 504, 52 Pac. 242.

OPERATION AND EFFECT: See *Remington's Digest*, Mtg., §§ 247—251.

§ 247. **Satisfaction of Debt:** *Howard v. McNaught*, 9 Wash. 355, 37 Pac. 455, 43 Am. St. Rep. 837; *Hyde v. Heaton*, 43 Wash. 433, 86 Pac. 664.

Upon recovering judgment for money loaned and foreclosing a contract given as security, the bidding in of the property at execution sale for the full amount fully satisfies the judgment and debt for the loan: *Magnoni v. Bono*, 106 Wash. 600, 180 Pac. 888.

§ 248. **Bar of Subsequent Foreclosure:** *Bank of California v. Dyer*, 14 Wash. 279, 44 Pac. 534; *Dooly v. Eastman*, 28 Wash. 564, 68 Pac. 1039.

Where a mortgage upon California land for \$21,500 was further secured to the extent of \$3,000 by a mortgage for that sum on Washington land, the foreclosure of the California mortgage leaving a deficiency does not merge the debt or extinguish the Washington mortgage for the balance, to the extent of that security: *Widmann v. Hammack*, 110 Wash. 77, 187 Pac. 1091.

§ 249. **Persons Concluded in General:** *Connolly v. Cunningham*, 2 W. T. 242, 5 Pac. 473; *Pacific Mfg. Co. v. Brown*, 8 Wash. 347, 36 Pac. 273.

§ 250. **Rights and Remedies of Prior Encumbrancers:** *Hayz v. Miller*, 1 W. T. 143.

§ 251. **Rights and Remedies of Junior Encumbrancers:** *Pacific Mfg. Co. v. Brown*, 8 Wash. 347, 36 Pac. 273; *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795.

For text treatment of "Mortgages," see 19 **B. C. L.** 225.

Who is real party in interest by whom foreclosure action must be brought. 64 **L. R. A.** 618.

Mortgagor who has conveyed interest in premises as necessary or proper party to foreclosure action. **Ann. Cas.** 1913A, 83.

Right of bondholders to sue for enforcement of trust deed. 20 **L. R. A.** 535.

Right of pledgee of mortgage as collateral security to foreclose. 16 **Ann. Cas.** 125.

Right to foreclose indemnity mortgage prior to suffering damage by reason of indemnity. 3 *Ann. Cas.* 482; *Ann. Cas.* 1913D, 1152.

Running of limitation statute against action to foreclose mortgage as suspended by absence of mortgagor from state. 8 *Ann. Cas.* 1173.

Effect of acceleration clause in mortgage to start statute of limitations running. 2 *Ann. Cas.* 854; 12 *L. R. A. (N. S.)* 1190; 22 *L. R. A.*

(*N. S.*) 1110; 51 *L. R. A. (N. S.)* 151.

Right of contract creditors to intervene in foreclosure suit. 3 *Ann. Cas.* 1091.

Effect of foreclosure of mortgage as terminating lease. 14 *A. L. R.* 664.

Foreclosure sale as affecting debtor's share in crop grown by tenant. 13 *A. L. R.* 1425.

§ 1117. Remedy Confined to Mortgaged Property.

When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged. [L. '54, p. 207, § 409; Cd. '81, § 610; 2 H. C., § 626.]

Cited in 14 Wash. 283; 109 Wash. 101.

A mortgage may be given to secure a lien upon real estate without any ac-

companying debt or personal obligation to pay in view of this section: *Weikel v. Davis*, 109 Wash. 97; 186 Pac. 323.

§ 1118. Judgment—Order of Sale—Satisfaction of.

In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. [L. '54, p. 207, § 410; Cd. '81, § 611; 2 H. C., § 627.]

Cited in 11 Wash. 616, 687; 94 Wash. 36.

JUDGMENT OR DECREE: See *Remington's Digest, Mtg.*, §§ 194—197.

§ 194. **Nature and Essentials of Judgment in General:** *Hays v. Miller*, 1 W. T. 143; *Shumway v. Orchard*, 12 Wash. 104, 40 Pac. 634; *Fuller & Co. v. Hull*, 19 Wash. 400, 53 Pac. 666.

§ 195. **Scope and Extent of Relief—In General:** *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862; *Seattle, In re*, 26 Wash. 602, 67 Pac. 250; *Carstens & Earles v. Seattle*, 88 Wash. 632, 153 Pac. 1080, *Ann. Cas.* 1917A, 1078; *Seattle Trust Co. v. Cameron*, 100 Wash. 92, 170 Pac. 379.

§ 196. — **Strict Foreclosure:** *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268.

§ 197. — **Amount of Indebtedness:** *Cloud v. Rivord*, 6 Wash. 555, 34 Pac. 136; *State Finance Co. v. Moore*, 103 Wash. 298, 174 Pac. 22.

Notice of Pendency of Action—Necessity in General: *Frank v. Jenkins*, 11 Wash. 611, 40 Pac. 220.

Opening or Vacating Judgment or Decree: See *Remington's Digest, Mtg.*, §§ 198, 199. **Grounds:** *State ex rel. Wolf-erman v. Superior Court*, 8 Wash. 591, 36 Pac. 443; *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. Rep. 922; *Hill v. Lowman*, 15 Wash. 503, 46

Pac. 1042; *Land Mortg. Bank v. Nicholson*, 24 Wash. 258, 64 Pac. 156; *Terry v. Furth*, 40 Wash. 493, 82 Pac. 882. **Application and Determination:** *Smithson Land Co. v. Brautigam*, 16 Wash. 174, 47 Pac. 434; *Anrud v. Scandinavian-Amer. Bank*, 27 Wash. 16, 67 Pac. 364; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446.

Conclusiveness, Operation, and Effect of Judgment or Decree: See *Remington's Digest, Mtg.*, §§ 200, 201. **Collateral Attack:** *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748; *Twigg v. James*, 37 Wash. 434, 79 Pac. 959. **Persons and matters concluded:** *Manhattan Trust Co. v. Seattle Coal etc. Co.*, 19 Wash. 493, 53 Pac. 951; *McGee v. Winholt*, 23 Wash. 199, 69 Pac. 748; *Twigg v. James*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 858.

— **Lien:** See *Remington's Digest, Mtg.*, § 202; *Hays v. Miller*, 1 W. T. 143; *Shumway v. Orchard*, 12 Wash. 104, 40 Pac. 634; *Fuller & Co. v. Hull*, 19 Wash. 400, 53 Pac. 666; *Young v. Davis*, 50 Wash. 504, 97 Pac. 506, 126 Am. St. Rep. 910; *Pioneer National Bank v. Gaskill*, 87 Wash. 245, 151 Pac. 492.

Foreclosure sale as passing title of all parties. *Ann. Cas.* 1914D, 283, Order of sales under foreclosure of parcels of land conveyed succes-

sively by mortgagor as affected by assumption of mortgage debt. *Ann. Cas.* 1914A, 715.

Validity of notice of foreclosure sale appointing Sunday as day of sale. *Ann. Cas.* 1916B, 16.

Rights of purchaser at foreclosure sale with respect to fixtures. 7 *L. R. A.* 278.

Subrogation of purchaser at invalid sale to rights of mortgagee or other claimant. *Ann. Cas.* 1917D, 576.

Right of purchaser at foreclosure sale to maintain bill in equity to correct description of land contained in mortgage. *Ann. Cas.* 1913D, 1006; 39 *L. R. A. (N. S.)* 90.

§ 1119. Judgment for Deficiency.

When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure [or order of sale] that the balance due on the mortgage, and costs, which remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor. [*L. '54*, p. 208, § 211; *Cd. '81*, § 612; 2 *H. C.*, § 628.]

Cited in 11 *Wash.* 110, 616; 12 *Wash.* 106; 54 *Wash.* 230, 234; 63 *Wash.* 290; 92 *Wash.* 533, 633.

DEFICIENCY AND PERSONAL LIABILITY: See *Remington's Digest*, Mtg., §§ 226—232.

This section was not repealed by Laws 1899, page 85, section 2, since that section was void as not included in the title of the act: *Bradley Eng. & Mach. Co. v. Muzzy*, 54 *Wash.* 227, 103 *Pac.* 37, 18 *Ann. Cas.* 1072.

Laws 1897, page 98, section 1 (*Bal. Code*, § 5888a), limiting the mortgagee to the mortgaged property, was held void in *Dennis v. Moses*, 18 *Wash.* 537, 52 *Pac.* 333, 40 *L. R. A.* 302.

§ 226. **Personal Judgment for Deficiency—Against Mortgagor:** *Howard v. McNaught*, 9 *Wash.* 355, 37 *Pac.* 455, 43 *Am. St. Rep.* 837; *Exchange Nat. Bank v. Wolverton*, 11 *Wash.* 108, 39 *Pac.* 248; *Bank of California v. Dyer*, 14 *Wash.* 279, 44 *Pac.* 534.

§ 227. — **Against Grantee of Mortgagor Assuming Mortgage Debt:** *Solicitors' Loan & T. Co. v. Robins*, 14 *Wash.* 507, 45 *Pac.* 39; *Conrads v. Green*, 92 *Wash.* 269, 159 *Pac.* 102.

§ 228. — **Jurisdiction, Form, Proceedings:** *Munch v. McLaren*, 9 *Wash.* 676, 38 *Pac.* 205; *Fuller & Co. v. Hull*, 19 *Wash.* 400, 53 *Pac.* 666; *Harding v.*

Atlantic Trust Co., 26 *Wash.* 536, 67 *Pac.* 222; *Twigg v. James*, 37 *Wash.* 434, 79 *Pac.* 959.

§ 229. — **Sufficiency of Pleadings to Sustain Judgment:** *Bank of California v. Dyer*, 14 *Wash.* 279, 44 *Pac.* 534; *Rogers v. Turner*, 19 *Wash.* 399, 53 *Pac.* 663; *State ex rel. Twigg v. Superior Court*, 34 *Wash.* 643, 76 *Pac.* 282.

§ 230. — **Time for Rendition and Lien:** *Hayz v. Miller*, 1 *W. T.* 143; *Shumway v. Orchard*, 12 *Wash.* 104, 40 *Pac.* 634; *Fuller & Co. v. Hull*, 19 *Wash.* 400, 53 *Pac.* 666; *Codd v. Von Der Ahe*, 92 *Wash.* 529, 159 *Pac.* 686.

§ 231. **Actions for Deficiency:** *Howard v. McNaught*, 9 *Wash.* 355, 37 *Pac.* 455, 43 *Am. St. Rep.* 837; *Clark v. Eltinge*, 29 *Wash.* 215, 69 *Pac.* 736.

§ 232. — **Evidence and Defenses:** *Leisure v. Kneeland*, 2 *Wash.* 537, 27 *Pac.* 176, 26 *Am. St. Rep.* 888; *Howard v. McNaught*, 9 *Wash.* 355, 37 *Pac.* 455, 43 *Am. St. Rep.* 837; *Sappington v. Owens*, 92 *Wash.* 632, 159 *Pac.* 785.

Personal liability for deficiency of person procuring mortgage to be given or assumed in the name of another. *Ann. Cas.* 1917A, 687.

Validity and construction of statutory provision against deficiency judgment in case of purchase-money mortgage. 6 *A. L. R.* 1425.

§ 1120. Judgments for Deficiency, Form of.

Judgments over for any deficiency remaining unsatisfied after application of the proceeds of sale of mortgaged property, either real or personal, shall be similar in all respects to other judgments for the recovery of money, and may be made a lien upon the property of a judgment debtor, as other judgments, and the collections thereof enforced in the same manner. [*Cf. L. '54*, p. 208, § 411; *L. '69*, p. 148, § 575; *Cd. '81*, § 622; 2 *H. C.*, § 629.]

Cited in 11 *Wash.* 616; 92 *Wash.* 533.

§ 1121. Execution to Enforce Decree.

A decree of foreclosure of mortgage or other lien may be enforced by execution as an ordinary judgment or decree for the payment of money. The execution shall contain a description of the property described in the decree. The sheriff shall indorse upon the execution the time when he receives it, and he shall thereupon forthwith proceed to sell such property, or so much thereof as may be necessary to satisfy the judgment, interest and costs upon giving the notice prescribed in section 582. [L. '99, p. 85, § 1; L. '54, p. 208, § 412; L. '69, p. 146, § 567; Cd. '81, § 613; 2 H. C., § 630.]

Section 2 of this act, (Rem. & Bal. Code § 1122) was held void in *Bradley Eng. & Mach. Co. v. Muzzy*, 54 Wash. 227, 103 Pac. 37.

Cited in 11 Wash. 688; 12 Wash. 106; 17 Wash. 622, 643; 18 Wash. 560; 46 Wash. 40; 63 Wash. 290, 102 Wash. 627.

The sale of real property under execution has been governed, since its enactment, by this section, whether the execution was issued under a judgment rendered prior or subsequent thereto: *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046.

§ 1123. Levy upon and Sale of Other Property.

In all actions of foreclosure where there is a decree for the sale of the mortgaged premises or property, and a judgment over for any deficiency remaining unsatisfied after applying the proceeds of the sale of mortgaged property, further levy and sales upon other property of the judgment debtor may be made under the same execution. [Cf. L. '69, p. 148, § 573; L. '73, p. 151, § 571; L. '77, p. 129, § 623; Cd. '81, § 620 in part, last part in following section.]

Cited in 63 Wash. 290, 92 Wash. 633.

§ 1124. Publication of Notice.

When sales of other property not embraced in the mortgage or decree of sale are made under the execution to satisfy any deficiency remaining due upon judgment, two weeks' publication of notice of such sale shall be sufficient. Such notice shall be published in a newspaper printed in the county where the property is situated, and if there be no newspaper published therein, then in the most convenient newspaper having a circulation in said county. [Cf. L. '69, p. 148, § 574; Cd. '81, § 621; 2 H. C., § 631.]

This section seems to be superseded by § 582, *supra*, relating to notice of sales on execution, which is made applicable by sections 1120 and 1121, *supra*.

§ 1125. Concurrent Actions not Maintainable.

The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure. [L. '54, p. 208, § 413; Cd. '81, § 614; 2 H. C., § 632.]

Cited in 29 Wash. 203; 32 Wash. 205; 47 Wash. 163—165; 78 Wash. 487.

Existence of or Resort to Other Remedy: See *Remington's Digest*, Mtg., § 139;

Dewing v. Crueger, 7 Wash. 590, 35 Pac. 393; *Hersner v. Martin*, 8 Wash. 698, 36 Pac. 1096; *Nason v. Northwestern Mill & Power Co.*, 17 Wash. 142, 49 Pac.

235; *Hanna v. Kason*, 26 Wash. 568, 67 Pac. 271; *Hinchman v. Anderson*, 32 Wash. 198, 72 Pac. 1018; *Citizens' Nat. Bank v. Abbott*, 72 Wash. 73, 129 Pac. 1085; *Gray v. Davison*, 78 Wash. 482, 139 Pac. 219.

This section is in derogation of the common law, and to be strictly construed, so far as it restricts the remedy; and its object must be held to prevent a multiplicity of suits and save expense and not to prevent a deficiency judgment: *Hays v. Miller*, 1 W. T. 143.

The fact that a mortgagee prosecuted another action for the same matter while foreclosing his mortgage, although contrary to the provisions of this section, cannot be urged by way of collateral attack upon the judgment of foreclosure:

Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

In an action brought to foreclose a chattel mortgage, an attachment cannot be issued and levied upon other property, in anticipation of an unknown deficiency, in view of this section: *Advance Thresher Co. v. Schimke*, 47 Wash. 162, 91 Pac. 645.

Effect upon mortgage lien of entry of judgment upon debt secured. 24 L. R. A. (N. S.) 1095.

Prior action in equity in which claim for foreclosure might have been asserted by counterclaim, setoff or cross-petition as bar to independent action for foreclosure. 8 A. L. R. 719.

§ 1126. Installments not Due—Proceedings.

Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest or installment of the principal, and there are other installments not due, if the defendant pay into the court the principal and interest due, with costs, at any time before the final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any installment of the principal or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue. [Cf. L. '54, p. 208, § 414; L. '69, p. 147, § 569; Cd. '81, § 615; 2 H. C., § 633.]

Cited in 29 Wash. 238; 60 Wash. 612, 613; 62 Wash. 420; 67 Wash. 581; 82 Wash. 63, 64.

Successive Sales: See *Remington's Digest*, Mtg., § 211-1; *Naden v. Christopher*, 67 Wash. 578, 122 Pac. 2; *Strandell v. Strand*, 82 Wash. 59, 143 Pac. 442; *Du Pont De Nemours Powder Co. v. Virges*, 94 Wash. 35, 161 Pac. 833.

This section does not apply where, by reason of default of breach, the mortgagor has declared the whole principal sum due, in accordance with the provisions of the mortgage; since such pro-

visions are valid and must be given force, and consequently no other installments are due: *Knisell v. Brunet*, 60 Wash. 610, 111 Pac. 894.

Where the mortgage provides for foreclosure only after maturity of the principal, no right to foreclose an installment of overdue interest is given by this section: *Bank v. Doherty*, 29 Wash. 233, 69 Pac. 732, 92 Am. St. Rep. 933.

Right to successive foreclosure of mortgage payable in installments. *Ann. Cas.* 1912C, 846.

§ 1127. Sale in Parcels—Order.

In such cases, after final judgment, the court shall ascertain whether the property can be sold in parcels, and if it can be done without injury to the interests of the parties, the court shall direct so much only of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs, and the judgment shall remain and be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected. [L. '54, p. 208, § 415; Cd. '81, § 616; 2 H. C., § 634.]

Cited in 11 Wash. 689; 60 Wash. 568; 62 Wash. 420; 67 Wash. 581; 82 Wash. 63, 64.

Sale in Parcels: See *Remington's Digest*, Mtg., § 208; *Naden v. Christopher*, 62 Wash. 413, 113 Pac. 1116; *Feek v.*

Brewer, 11 Wash. 264, 39 Pac. 655; Manhattan Trust Co. v. Seattle Coal & Iron Co., 19 Wash. 493, 53 Pac. 951; Dalgardno v. Barthrop, 40 Wash. 191, 82 Pac. 285; Bartlett Estate Co. v. Fairhaven Land Co., 56 Wash. 437, 105 Pac. 848; Black v. Suydam, 81 Wash. 279, 142 Pac. 700, Ann. Cas. 1916D, 1113.

Order of Offering for Sale: See Rem-

ington's Digest, Mtg., § 209; Solicitors Loan & Trust Co. v. Washington etc. R. Co., 11 Wash. 684, 40 Pac. 344; Stulb v. Ainslie, 14 Wash. 567, 45 Pac. 157.

Effect of sale en masse by sheriff directed to sell separately parcels of land separately mortgaged. 15 L. R. A. (N. S.) 549.

§ 1128. Sale of Whole—Application of Proceeds.

If the mortgaged premises cannot be sold in parcels, the court shall order the whole to be sold, and the proceeds of the sale shall be applied first to the payment of the principal due, interest, and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction shall be made therefrom by discounting the legal interest; and in all cases where the proceeds of the sale shall be more than sufficient to pay the amount due and costs, the surplus shall be paid to the mortgage debtor, his heirs and assigns. [L. '54, p. 208, § 416; Cd. '81, § 617; 2 H. C., § 635.]

Cited in 62 Wash. 419, 420; 67 Wash. 581; 82 Wash. 63, 64.

Confirmation: See Remington's Digest, Mtg., § 213; Parker v. Dacres, 1 Wash. 190, 24 Pac. 192; Feek v. Brewer, 11 Wash. 264, 39 Pac. 655; State ex rel. Steele v. Northwestern & Pac. Hypotheek Bank, 18 Wash. 118, 50 Pac. 1023; Brooks v. Lewis, 22 Wash. 192, 60 Pac. 121; Terry v. Furth, 40 Wash. 493, 82 Pac. 882; Hyde v. Heaton, 43 Wash. 433, 86 Pac. 664; Vietzen v. Otis, 46 Wash. 402, 90 Pac. 264; Johnson v. Bartlett, 50 Wash. 114, 96 Pac. 833; Strand v. Griffith, 63 Wash. 334, 115 Pac. 512; Scandinavian-American State Bank v. Downs, 76 Wash. 62, 135 Pac. 807.

See, also, Bird v. Cox, 105 Wash. 51, 177 Pac. 675.

Persons Who may Question Validity: See Remington's Digest, Mtg., § 215; Snipes v. Kelleher, 31 Wash. 386, 72 Pac. 67.

Opening or Vacating: See Remington's Digest, Mtg., § 216; Brooks v. Lewis, 22 Wash. 192, 60 Pac. 121; Terry v. Furth, 40 Wash. 493, 82 Pac. 882; Boyez v. Turk Min. Co., 56 Wash. 515, 106 Pac. 475; Strand v. Griffith, 63 Wash. 334, 115 Pac. 512.

Property and Rights Passing by Sale: See Remington's Digest, Mtg., § 217; Ryan v. Fergusson, 3 Wash. 356, 28 Pac. 910; Merz v. Mehner, 67 Wash. 135, 120 Pac. 893.

Bona Fide Purchasers: See Remington's Digest, Mtg., § 218; Jones v. Herrick, 35 Wash. 434, 77 Pac. 798.

Effect of Defects or Irregularities in Judgment, Decree, or Sale: See Remington's Digest, Mtg., § 219; Smithsonian Land Co. v. Brautigam, 16 Wash. 174, 47 Pac.

434; Investment Securities Co. v. Adams, 37 Wash. 211, 79 Pac. 625; Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949; Thomas v. Scougale, 90 Wash. 162, 135 Pac. 847, Ann. Cas. 1918C, 452.

Effect of Reversal of Judgment or Decree: See Remington's Digest, Mtg., § 220; State ex rel. Manhattan Trust Co. v. Superior Court, 17 Wash. 380, 49 Pac. 507; Hinchman v. Point Defiance R. Co., 17 Wash. 399, 49 Pac. 1061.

DISPOSITION OF PROCEEDS AND SURPLUS: See Remington's Digest, Mtg., §§ 233—235.

§ 233. **Prior Liens and Encumbrances:** Goetzing v. Rosenfeld, 16 Wash. 392, 47 Pac. 882, 38 L. R. A. 257; Wakefield v. Fish, 62 Wash. 564, 114 Pac. 180.

Where a first mortgage was given on an undivided three-fourths of a quarter-section, a second mortgage upon the whole tract, the third mortgage upon an undivided one-fourth, and a fourth mortgage upon the whole tract, the third mortgage could not be satisfied out of the proceeds of the sale of the undivided one-fourth, because the second mortgage was a prior lien thereon, after satisfaction of the first mortgage: Watson v. Barnard, 105 Wash. 536, 178 Pac. 477.

§ 234. **Application to Mortgage Debt:** Smythe v. New England Loan etc. Co., 12 Wash. 424, 41 Pac. 184; Naden v. Christopher, 62 Wash. 413, 113 Pac. 1116.

§ 234-1. — **Debts or Obligations Secured by Same Mortgage:** Bradley Eng. & Mfg. Co. v. Heyburn, 55 Wash. 628, 106 Pac. 170, 134 Am. St. Rep. 1127.

§ 235. **Right to Surplus:** Soderberg v. King County, 15 Wash. 194, 45 Pac. 785, 55 Am. St. Rep. 878, 33 L. R. A.

670; *Moody v. Northwestern etc. Bank*, 20 Wash. 413, 55 Pac. 568; *Kelso v. Russell*, 33 Wash. 474, 74 Pac. 561.

See, also, *Watson v. Barnard*, 105 Wash. 536, 178 Pac. 477.

Right to priority in distribution of proceeds of mortgaged property as between several notes secured by mortgage. *Ann. Cas.* 1914C, 143.

Right of junior mortgagee as to surplus upon foreclosure under senior mortgage to which he was not a party. 20 *L. R. A. (N. S.)* 47.

Right of mortgagor or owner of equity of redemption to maintain action for money had and received for surplus received by mortgagee on sale of property. 44 *L. R. A. (N. S.)* 1041.

CHAPTER III.

LIENS OF MECHANICS AND MATERIALMEN.

§ 1129. Who may have Lien.

Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power or any other structure or who performs labor in any mine or mining claim or stone quarry, has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter: Provided, that whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics, and materialmen, and persons who supply such contractors with provisions, all just dues to such persons or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor. [L. '93, p. 32, § 1; L. '05, p. 229, § 1.]

For former laws see: L. '54, pp. 392, 393; L. '60, pp. 286, 287; L. '63, pp. 418-420; L. '73, pp. 441-444; L. '77, p. 219; Cd. '81, §§ 1957-1971; L. '88, p. 131; 1 H. C., §§ 1663-1667.

Cited in 11 Wash. 311; 13 Wash. 263; 16 Wash. 139; 20 Wash. 410; 21 Wash. 622; 27 Wash. 86, 322, 341; 36 Wash. 339, 536, 537; 42 Wash. 293, 294, 296; 43 Wash. 2; 44 Wash. 386; 45 Wash. 659; 52 Wash. 562; 53 Wash. 232, 236; 59 Wash. 298, 649; 62 Wash. 57; 63 Wash. 389; 66 Wash. 363; 67 Wash. 610, 611; 68 Wash. 55; 71 Wash. 474; 72 Wash. 439; 74 Wash. 94; 75 Wash. 69; 77 Wash. 73, 306, 307; 87 Wash. 367; 88 Wash. 653, 654; 90 Wash. 228, 230-232; 94 Wash. 462; 99 Wash. 644;

100 Wash. 176, 177; 102 Wash. 103, 109; 105 Wash. 58.

This act works a repeal of 1 Hill's Code, section 1671, which provides that should the owner of any land desire to prevent the lien from attaching, he may do so by giving notice in writing, posted in some conspicuous place upon said land or improvement, to the effect that he will not be responsible for said improvement: *Stetson-Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862.

Effect of Change or Repeal of Lien Laws: See Remington's Digest, Mech. Liens, § 3; Seattle & Walla Walla R. Co. v. Ah Kow, 2 W. T. 36, 3 Pac. 188; Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815.

The title to laws of 1893, page 32, section 1, "An act creating and providing for the enforcement of liens for labor and material," is not sufficiently broad to include a clause rendering a railroad contractor liable for "provisions" furnished to him in the prosecution of the work, since "materials" as used in the lien laws, means something that becomes part of the finished structure: Armour & Co. v. Western Const. Co., 36 Wash. 529, 78 Pac. 1106.

RIGHT TO LIEN—SERVICES RENDERED AND MATERIALS FURNISHED: See Remington's Digest, Mech. Liens, §§ 15-1—19-1.

Removal of Building: Sound Transfer Co. v. Phinney Realty & Inv. Co., 71 Wash. 473, 128 Pac. 1047.

Architects and Preparation of Plans and Specifications: Spaulding v. Burke, 33 Wash. 679, 74 Pac. 829; Gould v. McCormick, 75 Wash. 61, 134 Pac. 676, Ann. Cas. 1915A, 710, 47 L. R. A. (N. S.) 765; Lipscomb v. Exchange National Bank, 80 Wash. 296, 141 Pac. 686.

Materials Used, but not Incorporated in Work: Gilbert Hunt Co. v. Parry, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B, 225; Stimson Mill Co. v. Feigenson Engineering Co., 100 Wash. 172, 170 Pac. 573.

Materials Prepared or Furnished, but not Used: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073; Knudson-Jacob Co. v. Brandt, 44 Wash. 68, 87 Pac. 43; Fuller & Co. v. Ryan, 44 Wash. 385, 87 Pac. 485; Crane Co. v. Farnandis, 46 Wash. 436, 90 Pac. 1134.

Defective Materials: Childs Lumber & Mfg. Co. v. Page, 28 Wash. 128, 68 Pac. 373; Yundt v. Schultz-Degginger Co., 62 Wash. 308, 113 Pac. 760; Belknap Glass Co. v. Brown, 69 Wash. 127, 124 Pac. 390.

Services or Materials for Particular Building or Work: Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. 923; Whittier v. Puget Sound Loan etc. Co., 4 Wash. 666, 30 Pac. 1094, 31 Am. St. Rep. 944; Knudson-Jacob Co. v. Brandt, 44 Wash. 68, 87 Pac. 43; Little Bros. Mill Co. v. Baker, 57 Wash. 311, 106 Pac. 910, 135 Am. St. Rep. 980.

Transportation of Materials: Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739; Siler Mill Co. v. Nelson Co., 94 Wash. 477, 162 Pac. 590; Stimson Mill Co. v. Feigenson Engineering Co., 100 Wash. 172, 170 Pac. 573.

Reliance on Credit of Building: See Remington's Digest, Mech. Liens, § 20; Heald v. Hodder, 5 Wash. 677, 32 Pac. 728; Finlay v. Tagholm, 62 Wash. 341, 113 Pac. 1083; Smith v. Hopper, 67 Wash. 224, 121 Pac. 77; Lipscomb v. Exchange National Bank, 80 Wash. 296, 141 Pac. 686.

AGREEMENT OR CONSENT OF OWNER: See Remington's Digest, Mech. Liens, §§ 21—29.

§ 21. Element of Lien in General: Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Ward v. Thorndyke, 65 Wash. 11, 117 Pac. 593.

§ 22. Ownership or Possession of Land—Lessee or Other Tenant: Masow v. Fife, 10 Wash. 528, 39 Pac. 140; Kremer v. Walton, 11 Wash. 120, 39 Pac. 374, 48 Am. St. Rep. 870; Dahlman v. Thomas, 8 Wash. 653, 153 Pac. 1065; Prinz v. Second Street Theatre Co., 98 Wash. 149, 167 Pac. 39.

§ 24. Necessity for Contract or Consent by Owner—Improvements by Lessee: Kremer v. Walton, 16 Wash. 139, 47 Pac. 238; Sheehan v. Winchill, 18 Wash. 447, 51 Pac. 1065; Stetson & Post Mill Co. v. Brown, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862.

§ 25. Authority to Contract or Consent—Husband or Wife: Cattell v. Fergusson, 3 Wash. 541, 28 Pac. 750; Littell & Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Douthitt v. MacClusky, 11 Wash. 601, 40 Pac. 186.

§ 26. — Agent or Other Representative: Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Heald v. Hodder, 5 Wash. 677, 32 Pac. 728; Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Kremer v. Walton, 16 Wash. 139, 47 Pac. 238; Seattle Lumber Co. v. Sweeney, 43 Wash. 1, 85 Pac. 677; Baker v. Yakima Valley Canal Co., 77 Wash. 70, 137 Pac. 342; Nelson & Castrup v. Culver, 94 Wash. 548, 162 Pac. 978; Stimson Mill Co. v. Feigenson Engineering Co., 100 Wash. 172, 170 Pac. 573.

§ 27. Form and Requisites of Consent: Masow v. Fife, 10 Wash. 528, 39 Pac. 140.

§ 28. Estoppel: Spears v. Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789; Bell v. Swalwell Land etc. Co., 20 Wash. 602, 56 Pac. 401.

§ 29. Notice or Protest by Owner to Prevent Lien: Cutter v. Striegel, 4 Wash. 346, 30 Pac. 326; St. Paul & Tacoma Lumber Co. v. Bolton, 5 Wash. 763, 32 Pac. 787; Stetson & Post Mill Co. v. Brown, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862.

OPERATION AND EFFECT—AMOUNT AND EXTENT OF LIEN:

See Remington's Digest, Mech. Liens, §§ 66-1—68-1.

§ 66-1. Limitation to Amount Payable Under Contract—Subcontractors and Materialmen: Chavelle v. Island Gun Club, 77 Wash. 304, 137 Pac. 511.

§ 67. Time of Accrual or Commencement—Delivery of Materials: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 12, 32 Pac. 1073; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680.

§ 68. — Relation Back: Nason v. Northwestern Mill. & Power Co., 17 Wash. 142, 49 Pac. 235; Bradley v. Donovan-Pattison Realty Co., 84 Wash. 654, 147 Pac. 421.

§ 68-1. Interest: Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739; Siler Mill Co. v. Nelson Co., 94 Wash. 477, 162 Pac. 590.

PERSONS ENTITLED IN GENERAL: See Remington's Digest, Mech. Liens, §§ 31—36.

§ 31. Laborers and Other Unskilled Workmen: Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396; Howe v. Myers, 94 Wash. 563, 162 Pac. 1000, L. R. A. 1917D, 349.

§ 31-1. Materialmen—In General: Popiella v. Zolawenski, 51 Wash. 39, 97 Pac. 972.

Foreign Corporations: See Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.

§ 32. Contractors—Services of Workmen: Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815; Powell v. Nolan, 27 Wash. 318, 67 Pac. 312, 68 Pac. 389; Smyth v. Lance & Peters, 52 Wash. 560, 100 Pac. 995; Heim v. Elliott, 66 Wash. 361, 119 Pac. 826.

One who took a contract to repair a building at five dollars a day for his labor, and costs, and hired all the help and bought all the materials on his own credit, furnishes the labor and materials and is entitled to a lien therefor: McPherson v. Jarvis, 106 Wash. 486, 180 Pac. 415.

§ 33. — Materials: Powell v. Nolan, 27 Wash. 318, 67 Pac. 312.

§ 34. — Modification of Contract: Cochran v. Yoho, 34 Wash. 238, 75 Pac. 1077; Jones v. Nelson, 61 Wash. 167, 112 Pac. 88.

§ 35. — Rescission or Abandonment of Contract: Huetter v. Redhead, 31 Wash. 320, 71 Pac. 1016; Cochran v. Yoho, 34 Wash. 238, 75 Pac. 1077.

§ 36. — Performance of Contract: Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Washington Bridge Co. v. Land & River Imp. Co., 12 Wash. 272, 40 Pac. 982; Windham v. Independent

Tel. Co., 35 Wash. 166, 76 Pac. 946; Sweatt v. Hunt, 42 Wash. 96, 84 Pac. 1; Seattle Lumber Co. v. Sweeney, 43 Wash. 1, 85 Pac. 677; United Iron Works v. Hosea, 81 Wash. 234, 142 Pac. 673; Evans v. Goist, 90 Wash. 100, 155 Pac. 780.

WAIVER, DISCHARGE, RELEASE AND SATISFACTION: See Remington's Digest, Mech. Liens, §§ 73—78. **Assignment:** Potvin v. Denny Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002.

§ 73-1. Taking or Transfer of Bill or Note: Ward v. Thorndyke, 65 Wash. 11, 117 Pac. 593.

§ 73-2. Implied Waiver in General: Smith v. Hopper, 67 Wash. 224, 121 Pac. 77; Gray v. Hickey, 94 Wash. 370, 162 Pac. 564; Siler Mill Co. v. Nelson Co., 94 Wash. 477, 162 Pac. 590; Wroten v. Robbins, 103 Wash. 393, 174 Pac. 968.

§ 74. Estoppel to Claim Lien: Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; Pacific Lumber & Timber Co. v. Dailey, 60 Wash. 566, 111 Pac. 869; Seattle Lumber Co. v. Cutler, 63 Wash. 662, 116 Pac. 1.

§ 75. Extinguishment or Loss—Delay in Assertion or Enforcement of Lien: Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; Bellingham Bay Imp. Co. v. Fairhaven etc. R. Co., 17 Wash. 371, 49 Pac. 514.

§ 76. — Release: Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Seattle Lumber Co. v. Cutler, 63 Wash. 662, 116 Pac. 1.

§ 76-1. Payment of Debt in General: Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633.

§ 77. — Part Payment and Application of Payments: Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Spaulding v. Burke, 33 Wash. 679, 74 Pac. 829; Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633; Heim v. Elliott, 66 Wash. 361, 119 Pac. 826.

§ 78. Payment to Contractors: Spokane Mfg. & Lumber Co. v. McClesney, 1 Wash. 609, 21 Pac. 198; Nelson & Castrup v. Culver, 94 Wash. 548, 162 Pac. 978.

LIENS AND MORTGAGES—Liens on Railroads for Labor or Supplies: See Remington's Digest, R. R., § 23; Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396; Tsutakawa v. Kumamoto, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766; Laidlaw v. Portland, Vancouver etc. R. Co., 42 Wash. 292, 84 Pac. 855; Holm v. Chicago, M. & P. S. R. Co., 59 Wash. 293, 109 Pac. 799.

Foreclosure of Railroad Lien—Pleading: See Remington's Digest, R. R., § 39; Tsutakawa v. Kumamoto, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766.

Liability and Actions on Contractor's Bond: See Remington's Digest, R. R.,

§ 40; *Du Pont De Nemours Powder Co. v. National Surety Co.*, 90 Wash. 227, 155 Pac. 1050; *Du Pont De Nemours Powder Co. v. National Surety Co.*, 94 Wash. 461, 162 Pac. 866; *Clarke v. Murphy*, 99 Wash. 643, 170 Pac. 141; *Dixon v. Parker, Moran & Parker*, 102 Wash. 101, 172 Pac. 856.

For text treatment of "Mechanics' Liens," see 18 *R. C. L.* 868.

Who is "laborer" within statute giving lien to laborers. *Ann. Cas.* 1913B, 138; *Ann. Cas.* 1915D, 931.

Who is "subcontractor" within mechanic's lien law. *Ann. Cas.* 1917C, 801.

Right of corporation to mechanic's lien. 7 *Ann. Cas.* 430.

Architect's right to mechanic's lien. 9 *Ann. Cas.* 97; *Ann. Cas.* 1913A, 275; *Ann. Cas.* 1915A, 714; 16 *L. R. A.* 600; 36 *L. R. A.* (N. S.) 354; *L. R. A.* 1915D, 204.

Right to lien of renter of appliances, teams, etc., to contractor for use

in erecting building or other work. 15 *Ann. Cas.* 383.

Enforceability of a mechanic's lien against the property of a married woman for work performed or materials furnished under a contract made with her husband. 4 *A. L. R.* 1025.

Construction of word "materials" as used in lien statute for materials furnished for railroad construction. 9 *Ann. Cas.* 309.

Validity and effect of provision in contract against mechanics' liens. 13 *A. L. R.* 1065; 1 *Ann. Cas.* 954; *Ann. Cas.* 1913E, 562; 3 *L. R. A.* (N. S.) 574.

Tools and appliances used for construction work as materials for which lien may be had. *Ann. Cas.* 1912A, 227; *Ann. Cas.* 1915B, 966.

Right to lien for transportation of materials to be used in connection with improvement. *Ann. Cas.* 1916E, 1030.

§ 1130. Land Subject to.

The lot, tract or parcel of land upon which the improvement is made or the property is situated, subject to the lien created by section 1129, supra, or so much thereof as may be necessary to satisfy the lien and the judgment thereon, to be determined by the court on rendering judgment in a foreclosure of the lien, is also subject to the lien to the extent of the interest of the person or company, who in his or its own behalf, or who, through any of the persons designated in section 1129 to be agent of the owner or owners caused the performance of the labor, or the construction, alteration or repair of the property. [L. '93, p. 33, § 2; L. '05, p. 230, § 2.]

Cited in 80 Wash. 302; 87 Wash. 578; 88 Wash. 655.

PROPERTY, ESTATES AND RIGHTS SUBJECT TO LIEN: See Remington's Digest, Mech. Liens, §§ 5—7.

Property Which may be Subject to Lien—In General: *Quinby v. Slipper*, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899.

— **Public Buildings and Other Property:** *Maxon v. School District No. 34*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110.

— **Homestead:** *Parsons v. Pearson*, 9 Wash. 48, 36 Pac. 974; *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803, *Ann. Cas.* 1917E, 739.

Estate, Right or Interest Subject to Lien: See Remington's Digest, Mech. Liens, §§ 8—10.

In General: *Front St. Cable R. Co. v. Johnson*, 2 Wash. 112, 25 Pac. 1084, 11 *L. R. A.* 693; *Nelson v. Clerf*, 4 Wash. 405, 30 Pac. 716; *Baker v. Sinclair*, 22 Wash. 462, 61 Pac. 170; *Cutler v. Keller*,

88 Wash. 334, 153 Pac. 15, *L. R. A.* 1917C, 1116.

See, also, *Gile Investment Co. v. Fisher*, 104 Wash. 613, 177 Pac. 710.

— **Leasehold:** *Cowie v. Ahrenstedt*, 1 Wash. 416, 25 Pac. 458; *Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265; *Masow v. Fife*, 10 Wash. 528, 39 Pac. 140; *Kremer v. Walton*, 11 Wash. 120, 39 Pac. 374, 48 Am. St. Rep. 870; *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. 217; *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727.

— **Lien on Reversion of Landlord for Improvements by Tenant:** *Masow v. Fife*, 10 Wash. 528, 39 Pac. 140; *Stetson & Post Mill Co. v. Brown*, 21 Wash. 619, 59 Pac. 597, 75 Am. St. Rep. 862; *Housekeeper v. Livingstone*, 48 Wash. 209, 93 Pac. 217; *Shaw v. Spencer*, 57 Wash. 587, 107 Pac. 383.

Extent of Land Affected: See Remington's Digest, Mech. Liens, §§ 11—15.

Separate Lots: *Sly v. Palo Alto Gold Min. Co.*, 28 Wash. 485, 68 Pac. 871.

§ 12. — **Necessity of Annexation or Benefit to Real Property:** Kellogg v. Littell & Smythe Mfg. Co., 1 Wash. 407, 25 Pac. 461; Whittier v. Stetson & Post Mill Co., 6 Wash. 190, 33 Pac. 393, 36 Am. St. Rep. 149; Potvin v. Denny Hotel Co., 37 Wash. 323, 79 Pac. 940.

§ 13. — **Particular Portions of Building or Structure:** Wright v. Cowie, 5 Wash. 341, 31 Pac. 878; Stetson & Post Lumber Co. v. Sloane Co., 61 Wash. 180, 112 Pac. 248.

§ 14. — **Fixtures:** Vendome Turkish Bath Co. v. Schettler, 2 Wash. 457, 27 Pac. 76; Second Nat. Bank of Colfax v. Hatch, 24 Wash. 421, 64 Pac. 727; American Radiator Co. v. Pendleton, 62 Wash. 56, 112 Pac. 1117; Mattocks v. Great Northern R. Co., 94 Wash. 44, 162 Pac. 19.

§ 15. **Lien on Interest of Vendor for Improvements by Purchaser:** St. Paul & Tacoma Lumber Co. v. Bolton, 5 Wash. 763, 32 Pac. 787; Mentzer v. Peters, 6 Wash. 540, 33 Pac. 1078; Iliff v. Forsell, 7 Wash. 225, 34 Pac. 928; Northwest

Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Chavelle v. Island Gun Club, 77 Wash. 304, 137 Pac. 511; Adams v. Dose, 87 Wash. 575, 152 Pac. 9.

Mechanic's lien on realty for improvements with consent but not at expense of the owner. 11 Ann. Cas. 1082; 19 Ann. Cas. 734; Ann. Cas. 1916C, 1133; Ann. Cas. 1918C, 1019.

Homestead as subject to mechanic's lien. Ann. Cas. 1917E, 747; 9 Ann. Cas. 12; L. R. A. 1918B, 818.

Right to mechanic's lien against charitable or religious institution. Ann. Cas. 1915D, 1145; 51 L. R. A. (N. S.) 161.

Application of mechanics' lien laws to railroads. 7 Ann. Cas. 269; Ann. Cas. 1913C, 95.

Mechanics' liens on leasehold estates. 3 Ann. Cas. 1096; 14 Ann. Cas. 1031.

Statutes giving lien on "lot" or "tract." 26 L. R. A. (N. S.) 836.

§ 1131. Improvements at Request of Owner.

Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears, grades, fills in or otherwise improves the same, or any street or road in front of, or adjoining the same, has a lien upon such real property for the labor performed, or the materials furnished for such purposes. [L. '93, p. 33, § 3.]

Cited in 23 Wash. 570; 26 Wash. 15; 29 Wash. 527; 51 Wash. 296; 71 Wash. 475; 79 Wash. 169; 88 Wash. 378; 94 Wash. 563.

Liens and Preferences in General: See Remington's Digest, Mast. & S. § 18; Stringham v. Davis, 23 Wash. 568, 63 Pac. 230; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421; Cook v. Washington-Oregon Corp., 84 Wash. 68, 146 Pac. 156, 149 Pac. 325; Daugherty v. Gunther, 88 Wash. 378, 153 Pac. 336; Williams v. Pacific Coast Casualty Co., 79 Wash. 164, 140 Pac. 74, Ann. Cas. 1915C, 678.

A lien for labor in wrecking and removing an old building on a lot preparatory to the erection of a new building cannot be claimed under this section:

Sound Transfer Co. v. Phinney Realty & Inv. Co., 71 Wash. 473, 128 Pac. 1047.

One who clears land under a contract with the owner is entitled to a lien thereon, under this section: Stringham v. Davis, 23 Wash. 568, 63 Pac. 230.

A claim for the rental of scrapers, due to the owner from a contractor who cleared and graded certain lots, is not one for "labor performed or materials furnished," within this section: Hall v. Cowen, 51 Wash. 295, 98 Pac. 670.

A lien for labor in clearing land attaches against a leasehold estate: Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

Statutes giving lien for improvements made by contract with or at request of owner. 23 L. R. A. (N. S.) 608; L. R. A. 1917D, 580.

§ 1131-1. Liens on Orchards—Right to Lien.

Any person or corporation who shall do or cause to be done any labor upon any orchard or orchard lands, in pruning, spraying, cultivating and caring for the same, at the request of the owner thereof, or his agent, shall have a lien upon such orchard and orchard lands for such work and labor so performed. [L. '17, p. 410, § 1.]

§ 1131-2. Notice of Orchard Lien—Requisites.

Any person or corporation claiming the benefit of this chapter, must within forty days after the close of such work or labor for each season during which such work and labor is done, file for record with the county auditor of the county in which said work and labor was performed and in which said land or part thereof is situated, a claim of lien which shall be in substance in accordance with the provisions of section 1134, so far as the same is applicable, which said claim of lien shall be verified as in said section provided, and such lien may be enforced in a civil action in the same manner as near as may be, provided in section 1140. [L. '17, p. 410, § 2.]

§ 1131-3. Limitation on Action—Costs and Attorney's Fees.

Any action to foreclose such claim of lien shall be brought within eight calendar months after the filing of such claim for lien as provided in section 1131-2 and in any such action brought to enforce such lien, the court shall allow as part of the costs the money paid for making, filing and recording such claim of lien and a reasonable attorney's fee. [L. '17, p. 411, § 3.]

§ 1132. Priority Over Subsequent Encumbrances.

The liens created by this chapter are preferred to any lien, mortgage or other encumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given by this chapter, and are also preferred to any lien, mortgage or other encumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant had no notice. [L. '93, p. 33, § 4.]

Cited in 17 Wash. 146; 20 Wash. 606; 22 Wash. 466; 27 Wash. 338; 51 Wash. 35; 66 Wash. 517; 84 Wash. 234, 657; 88 Wash. 339; 94 Wash. 565; 97 Wash. 509, 510; 98 Wash. 142; 104 Wash. 157.

PRIORITY: See Remington's Digest, Mech. Liens, §§ 69—72.

§ 69. Mechanics' Liens on Same Property: Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001.

§ 70. Liens and Encumbrances in General: Alexander v. Hemrick, 4 Wash. 727, 31 Pac. 21.

§ 71. Mortgages: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073; Potvin v. Denny Hotel Co., 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002; Nason v. Northwestern Mill. & P. Co., 17 Wash. 142, 49 Pac. 235; Home Sav. & L. Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Stetson & Post Mill Co. v. Brown, 21 Wash. 619, 59 Pac. 507, 75 Am. St. Rep. 862; Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147; Keene Guaranty Sav. Bank v. Lawrence, 32 Wash. 572, 73 Pac. 680; Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082; Lipscomb v. Exchange National Bank, 80

Wash. 296, 141 Pac. 686; Cutler v. Keller, 88 Wash. 334, 153 Pac. 15, L. R. A. 1917C, 1116; Zurfluh v. Hartman, 103 Wash. 452, 174 Pac. 963.

See, also, Andersonian Inv. Co. v. Jones, 104 Wash. 142, 176 Pac. 17; Gile Inv. Co. v. Fisher, 104 Wash. 613, 177 Pac. 710.

Where the contractor, at the time of entering into the contract, knew that a mortgage was to be given as a prior lien to raise money to pay for the work, the mortgage is prior to the claims of the contractor, although work was commenced before the mortgage was executed and filed, and is superior to claims for materials furnished to the contractor long after the mortgage was made and recorded: Jahn & Co. v. Mortgage Trust & Savings Bank, 97 Wash. 504, 166 Pac. 1137.

§ 72. Vendors' Liens: St. Paul & Tacoma Lumber Co. v. Bolton, 5 Wash. 763, 32 Pac. 787; Bell v. Swalwell Land etc. Co., 20 Wash. 602, 56 Pac. 401; Baker v. Sinclair, 22 Wash. 462, 61 Pac. 170.

Rights of seller of fixtures, retaining title thereto or a lien thereon, as

against holder of mechanic's lien.
13 A. L. R. 459.

Priority as between mortgage for
future advances and mechanics'
liens. 5 A. L. R. 398.

Priority as between mortgage of
property and mechanic's lien there-
on. Ann. Cas. 1916B, 634, 667,
669, 672, 674.

§ 1133. Prerequisites—Duplicate Statements to be Furnished.

Every person, firm or corporation furnishing materials or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, well, fence, machinery, railroad, street railway, wagon road, aqueduct to create hydraulic power or any other building, or any other structure, or mining claim or stone quarry, shall, not later than five (5) days after the date of the first delivery of such materials or supplies to any contractor or agent, deliver or mail to the owner or the reputed owner of the property, on, upon or about which such materials or supplies are to be used, a notice in writing, stating in substance and effect that such person, firm or corporation has commenced to deliver materials and supplies for use thereon, with the name of the contractor or agent ordering the same, and that a lien may be claimed for all materials and supplies furnished by such person, firm or corporation for use thereon; and no further notice to the owner shall be necessary. No materialman's lien shall be enforced unless the provisions of this act have been complied with. [L. '11, p. 376, § 1. Cf. L. '09, p. 71 § 1.]

Cited in 59 Wash. 77, 84; 60 Wash. 540, 588; 62 Wash. 343; 63 Wash. 390; 66 Wash. 199, 363, 517, 672; 68 Wash. 54; 69 Wash. 584, 585; 72 Wash. 122; 73 Wash. 461, 647; 74 Wash. 254, 255; 77 Wash. 74; 85 Wash. 605, 615; 86 Wash. 192; 87 Wash. 367, 368; 94 Wash. 246, 482; 100 Wash. 180; 106 Wash. 489; 111 Wash. 632, 633.

The term "agent" must be construed as meaning agent of the owner and not of the contractor and includes a lessee in possession under obligation to make the improvements, as agent of the owner: *Hays v. Montesano Mill Co.*, 85 Wash. 604, 148 Pac. 881.

This section did not impliedly repeal the provisions of sections 1182, 1183, governing the subject of mechanics' liens on boats and vessels; repeals by implication not being favored, and the later act not being a complete law on the subject: *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993.

Rem. & Bal. Code, section 1133, requiring notice of the furnishing of materials for certain enumerated structures to be given to the owner, having been amended by Rem. 1915 Code, section 1133, by omitting therefrom the words "steamer, vessel, boat," it was the intention to dispense with the necessity of notice to owners of boats, and the same would therefore not come within the general terms "or any other building or any other structure," contained in the amending act: *Siler Mill Co. v. Nelson Co.*, 94 Wash. 477, 162 Pac. 590.

Duplicate Statements—Necessity: See *Remington's Digest, Mech. Liens*, § 40-1; *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083; *Heim v. Elliott*, 66 Wash. 361, 119 Pac. 826; *Seattle Lumber Co. v. Richardson & Elmer Co.*, 66 Wash. 671, 120 Pac. 517; *Johnson v. Heirgood*, 72 Wash. 120, 129 Pac. 909; *Culbert v. Lindvall*, 73 Wash. 643, 132 Pac. 729.

A duplicate statement of materials furnished for the construction of a building, mailed June 6, 1911, in compliance with, and one day prior to the taking effect of Laws of 1911, page 376, section 1, amending the law relating to duplicate statements was premature and ineffective for any purpose; since the amendatory act of 1911 was not retroactive: *Walker v. Lanning*, 74 Wash. 253, 133 Pac. 462.

Materials Delivered to Owner: *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851; *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177; *Hewitt-Lea Lumber Co. v. Sandell*, 66 Wash. 515, 119 Pac. 848; *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993; *Ringel v. Newman*, 69 Wash. 583, 125 Pac. 943; *Spokane Valley Lumber & Box Co. v. Dawson*, 94 Wash. 246, 161 Pac. 1191.

See, also, *Miller v. Schober*, 111 Wash. 631, 191 Pac. 800.

Sufficiency of Statement: *Ringel v. Newman*, 69 Wash. 583, 125 Pac. 943; *Hallett v. Phillips*, 73 Wash. 457, 132 Pac. 51; *Culbert v. Lindvall*, 73 Wash. 643, 132 Pac. 729; *Ehrlich-Harrison Co. v. Cushman*, 86 Wash. 190, 149 Pac. 708.

Sufficiency of Notice or Service: Finlay v. Tagholm, 60 Wash. 539, 111 Pac. 782; Finlay v. Tagholm, 62 Wash. 341, 113 Pac. 1083; Hillyard Lumber Co. v. Codd, 85 Wash. 612, 149 Pac. 30; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739; Heim v. Elliott, 66 Wash. 361, 119 Pac. 826; Seattle Lumber Co. v. Richardson & Elmer Co., 66 Wash. 671, 120 Pac. 517; Johnson v. Heirgood, 72 Wash. 120,

129 Pac. 909; Hallett v. Phillips, 73 Wash. 457, 132 Pac. 151.

See, also, McPherson v. Jarvis, 106 Wash. 486, 180 Pac. 415.

Sufficiency of service of notice of lien on owner of premises. 16 Ann. Cas. 355.

Sufficiency of statement or notice naming owner or person against whose interest lien is claimed in caption, but not in body of instrument. 20 Ann. Cas. 1162.

§ 1134. Requisites of Claim, Form, Time of Filing.

No lien created by this chapter shall exist, and no action to enforce the same shall be maintained, unless within ninety days from the date of the cessation of the performance of such labor or of the furnishing of such materials, a claim for such lien shall be filed for record as hereinafter provided, in the office of the county auditor of the county in which the property, or some part thereof to be affected thereby, is situated. Such claim shall state, as nearly as may be, the time of the commencement and cessation of performing the labor, or furnishing the material, the name of such person who performed the labor, or furnished the material, the name of the person by whom the laborer was employed (if known) or to whom the material was furnished, a description of the property to be charged with the lien sufficient for identification, the name of the owner, or reputed owner if known, and if not known, that fact shall be mentioned, the amount for which the lien is claimed, and shall be signed by the claimant, or by some person in his behalf, and be verified by the oath of the claimant, or some person in his behalf, to the effect that the affiant believes the claim to be just; in case the claim shall have been assigned the name of the assignee shall be stated; and such claim of lien may be amended in case of action brought to foreclose the same, by order of the court, as pleadings may be, in so far as the interests of third parties shall not be affected by such amendment. A claim for lien substantially in the following form shall be sufficient:—

—, claimant, vs. —

Notice is hereby given that on the — day (date of commencement of performing labor or furnishing material) — at the request of — commenced to perform labor (or to furnish material to be used) upon — (here describe property subject to the lien) of which property the owner, or reputed owner, is — (or if the owner or reputed owner is not known, insert the word “unknown”), the performance of which labor (or the furnishing of which material) ceased on the — day of —; that said labor performed (or material furnished) was of the value of — dollars, for which labor (or material) the undersigned claims a lien upon the property herein described for the sum of — dollars. (In case the claim has been assigned, add the words “and — is assignee of said claim,” or claims, if several are united.)

— — Claimant.

State of Washington, }
County of —, } ss.

—, being sworn, says: I am the claimant (or attorney of the claimant) above named; I have heard the foregoing claim read and know the contents thereof, and believe the same to be just.

Subscribed and sworn to before me this — day of —.

Any number of claimants may join in the same claim for the purpose of filing the same and enforcing their liens, but in such case the amount claimed by each original lienor, respectively, shall be stated: Provided, it shall not be necessary to insert in the notice of claim of lien provided for by this chapter any itemized statement or bill of particulars of such claim. [L. '93, p. 34, § 5.]

Cited in 13 Wash. 263; 22 Wash. 144, 188; 26 Wash. 22; 27 Wash. 341; 33 Wash. 694; 40 Wash. 201; 42 Wash. 295, 298; 48 Wash. 271; 52 Wash. 512; 58 Wash. 637; 61 Wash. 182; 63 Wash. 389; 68 Wash. 55; 72 Wash. 439; 87 Wash. 360, 371; 90 Wash. 231; 92 Wash. 413, 416; 94 Wash. 566; 96 Wash. 278; 102 Wash. 111; 111 Wash. 567.

Joint Notice by Distinct Claimants: See Remington's Digest, Mech. Liens, § 42; Hopkins v. Jameson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815.

Time for Filing Claim or Statement: See Remington's Digest, Mech. Liens, § 43; Seattle & Walla Walla R. Co. v. Ah Kow, 2 W. T. 36, 3 Pac. 188; Huttig Bros. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073; Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; Washington Bridge Co. v. Land & Imp. Co., 12 Wash. 272, 40 Pac. 982; Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001; Ellsworth v. Layton, 37 Wash. 340, 79 Pac. 947; Cascade Lumber Co. v. Aetna Ind. Co., 56 Wash. 503, 106 Pac. 158; Rieflin v. Grafton, 63 Wash. 387, 115 Pac. 851 (overruling on rehearing, Id., 92 Wash. 411); McMullen & Co. v. Croft, 96 Wash. 275, 164 Pac. 930.

Failure to file notice of lien upon a temporary structure is not excused by the appointment of a receiver and a receiver's sale: Brown v. Hunt & Mottett, 111 Wash. 564, 191 Pac. 860.

Form and Contents of Claim or Statement: See Remington's Digest, Mech. Liens, §§ 44—60.

In General: Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316.

§ 45. — **Designation of Parties:** Installment Bldg. & Loan Co. v. Wentworth, 1 Wash. 467, 25 Pac. 298; Littell v. Saulsberry, 40 Wash. 550, 82 Pac. 909; Chavelle v. Island Gun Club, 77 Wash. 304, 137 Pac. 511.

§ 46. — **Description of Property:**

Kellogg v. Littell & Smythe Mfg. Co., 1 Wash. 407, 25 Pac. 461; Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. 458; Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Young v. Howell, 5 Wash. 239, 31 Pac. 629; Mount Tacoma Mfg. Co. v. Cultum, 5 Wash. 294, 32 Pac. 95; Whittier v. Stetson & Post Mill Co., 6 Wash. 190, 33 Pac. 393, 36 Am. St. Rep. 149; McHugh v. Slack, 11 Wash. 370, 39 Pac. 674; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571; Farrington v. Bushnell, 88 Wash. 155, 152 Pac. 991.

§ 47. — **Ownership or Possession of Property:** Cutter v. Striegel, 4 Wash. 346, 30 Pac. 326; Harrington v. Miller, 4 Wash. 808, 31 Pac. 325; Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396; Collins v. Snoke, 9 Wash. 566, 38 Pac. 161; Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815; McHugh v. Slack, 11 Wash. 370, 39 Pac. 674; Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001.

§ 48. — **Property of Husbands and Wives:** Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744; Parsons v. Pearson, 9 Wash. 48, 36 Pac. 974; Collins v. Snoke, 9 Wash. 566, 38 Pac. 161; Washington Rock Plaster Co. v. Johnson, 10 Wash. 445, 39 Pac. 115; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1999; Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

§ 49. — **Description of Improvement:** Merchant v. Humeston, 2 W. T. 433, 7 Pac. 903; Tacoma Lumber & Mfg. Co. v. Wilson, 3 Wash. 786, 29 Pac. 829; Collins v. Snoke, 9 Wash. 566, 38 Pac. 161; Peterman v. Milwaukee Brewing Co., 11 Wash. 199, 39 Pac. 452.

§ 50. — **Description of Services or Materials:** Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Tacoma Lumber etc. Co. v. Wilson, 3 Wash. 786, 29 Pac. 829; Tacoma Lumber & Mfg. Co. v. Kennedy, 4 Wash. 305, 30 Pac. 79; Fairhaven Land

Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099.

§ 51. — **Averments as to Use, or Furnishing for Use in Building:** Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729.

§ 52. — **Statement as to Agreement or Consent of Owner:** Heald v. Hodder, 5 Wash. 677, 32 Pac. 728; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.

§ 53. — **Averment of Relation Between Employer and Owner:** Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Tacoma Lumber etc. Co. v. Wilson, 3 Wash. 786, 29 Pac. 829; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Collins v. Snoke, 9 Wash. 566, 38 Pac. 161; Sautter v. McDonald, 12 Wash. 27, 40 Pac. 418; Kremer v. Walton, 16 Wash. 139, 47 Pac. 238; Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996.

§ 54. — **Designation of Employer or Contractor:** Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815; McHugh v. Slack, 11 Wash. 370, 39 Pac. 674; Sautter v. McDonald, 12 Wash. 27, 40 Pac. 418.

§ 55. — **Statement as to Terms of Contract:** Gates v. Brown, 1 Wash. 470, 25 Pac. 914; Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Tacoma Lumber & Mfg. Co. v. Kennedy, 4 Wash. 305, 30 Pac. 79; Tacoma Lumber & Mfg. Co. v. Wolff, 5 Wash. 264, 31 Pac. 753, 32 Pac. 462; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Washington Mill Co. v. Craig, 7 Wash. 556, 35 Pac. 413; United States Sav. etc. Co. v. Jones, 9 Wash. 434, 37 Pac. 666; Spears v. Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789; Washington Rock Plaster Co. v. Johnson, 10 Wash. 445, 39 Pac. 115; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815; Greene v. Finnell, 22 Wash. 186, 60 Pac. 144; Seattle Lumber Co. v. Sweeney, 33 Wash. 691, 74 Pac. 1001.

§ 56. — **Setting Out or Annexing Contract:** Mras v. Duff, 11 Wash. 36, 39 Pac. 267.

§ 57. — **Statement as to Time of Rendering Services or Furnishing Materials:** Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316.

§ 58. — **Statement as to Amount Due or to Become Due:** Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729.

§ 59. — **Statement as to Credits and Offsets:** Wheeler v. Port Blakely Mill Co., 2 W. T. 71, 3 Pac. 635; Merchant v. Humeston, 2 W. T. 433, 7 Pac. 903; Gates v. Brown, 1 Wash. 470, 25 Pac. 914; Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316.

§ 60. — **Itemized Statement or Account:** Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316; United States Sav. etc. Co. v. Jones, 9 Wash. 434, 37 Pac. 666; Spears v. Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789.

Verification of Claim or Statement: See Remington's Digest, Mech. Liens, § 61; Stetson & Post Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108; Gates v. Brown, 1 Wash. 470, 25 Pac. 914; Johnston v. Harrington, 5 Wash. 73, 31 Pac. 316; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073; Sautter v. McDonald, 12 Wash. 27, 40 Pac. 418; Cornelius v. Washington Steam Laundry, 52 Wash. 272, 100 Pac. 727; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739.

— **Notice and Enforcement of Liens by Servants:** See Remington's Digest, Mast. & S., § 20; Howey v. Bingham, 14 Wash. 450, 44 Pac. 886; Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.

Under section 1667 of the General Statutes it is unnecessary that the attorney verifying a mechanic's lien notice for a foreign corporation should be specially authorized by appointment and the appointment filed in the office of the Secretary of State: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.

Effect of Errors or Defects in Claim or Statement: See Remington's Digest, Mech. Liens, §§ 63, 64; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Peterman v. Milwaukee Brewing Co., 11 Wash. 199, 39 Pac. 452; Hillman v. Donaldson, 67 Wash. 410, 121 Pac. 866; Gould v. McCormick, 75 Wash. 61, 134 Pac. 676, Ann. Cas. 1915A, 710, 47 L. R. A. (N. S.) 765.

Inclusion of Nonlienable Items: Whittier v. Stetson & Post Mill Co., 6 Wash. 190, 33 Pac. 393, 36 Am. St. Rep. 149; Peterman v. Milwaukee Brewing Co., 11 Wash. 199, 39 Pac. 452; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Powell v. Nolan, 27 Wash. 318, 67 Pac. 312; Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721; Bellingham v. Linck, 53 Wash. 208, 101 Pac. 843; Gilbert Hunt Co. v. Parry, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B, 225; Knibb v. Mortensen, 89 Wash. 595, 154 Pac. 1109.

Effect of Filing Claim or Statement: See Remington's Digest, Mech. Liens, § 66; Potvin v. Wickersham, 15 Wash. 646, 47 Pac. 25.

Amendment of Claim or Statement: See Remington's Digest, Mech. Liens, § 65; Stetson & Post Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108; Sullivan v. Treen, 13 Wash. 261, 43 Pac. 38; Brown v. Trimble, 48 Wash. 270, 93 Pac. 317;

Malfa v. Crisp, 52 Wash. 509, 100 Pac. 1912; *Stetson & Post Lumber Co. v. Sloane Co.*, 61 Wash. 180, 112 Pac. 248; *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739; *McMullen & Co. v. Croft*, 92 Wash. 411, 159 Pac. 375 (overruled); *McMullen & Co. v. Croft*, 96 Wash. 275, 164 Pac. 930; *Canyon Lumber Co. v. Sexton*, 93 Wash. 620, 161 Pac. 841.

Effect of incorrect designation of owner of property in statement of claim for lien. 14 Ann. Cas. 689.

Effect of mechanic's lien of filing claim for more than is due. Ann. Cas. 1914D, 878; 29 L. B. A. (N. S.) 306.

Right to amend statement or notice of mechanic's lien. Ann. Cas. 1915A, 60.

Extension of time for filing claim of lien by substitution of new materials for those already furnished. Ann. Cas. 1912C, 217; 35 L. B. A. (N. S.) 907.

§ 1135. Recording Claim.

The county auditor must record the claims mentioned in this chapter in a book to be kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed. [L. '93, p. 35, § 6.]

Cited in 92 Wash. 413.

Mode and Sufficiency of Filing or Record of Claim or Statement: See Reming-

ton's Digest, Mech. Liens, § 62; *Bolster v. Stocks*, 13 Wash. 460, 43 Pac. 532, 534, 1099.

§ 1136. Assignment of Lien.

Any lien or right of lien created by law and the rights of action to recover therefor, shall be assignable so as to vest in the assignee all rights and remedies of the assignor, subject to all defenses thereto that might be made if such assignment had not been made. [L. '93, p. 35, § 7.]

The assignment by the contractor of his claim against the owner will not deprive him of the right to assert a lien upon the premises, when the assignment was given merely as security for indebtedness. *Potvin v. Denny Hotel Co.*, 9 Wash. 316, 37 Pac. 320, 38 Pac. 1002.

The lien given by statute (§ 1947, Code 1881) is personal to the laborer; and where the laborer combines with his own claim one assigned him by another laborer, he loses all right to take benefit of foreclosure: *Dexter, Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070.

Although the inchoate right of lien cannot be assigned, yet where the lien is perfected by the filing of notice thereof, the assignment of the claim will give the assignee the benefit of the security: *Casey v. Ault*, 4 Wash. 167, 29 Pac. 1048.

The foregoing adjudications were made prior to the enactment of this section.

Right of assignee of lienable claim to mechanic's lien. 21 Ann. Cas. 962; Ann. Cas. 1915C, 1119.

§ 1137. Segregation of Claims.

In every case in which one claim is filed against two or more separate pieces of property owned by the same person, or owned by two or more persons who jointly contracted for the labor or material for which the lien is claimed, the person filing such claim must designate in the claim the amount due him on each piece of property, otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon either of such pieces of property. [L. '93, p. 35, § 8.]

Cited in 27 Wash. 343; 33 Wash. 696.

Filing One or More Claims Against Different Buildings: See Remington's Digest, Mech. Liens, § 41; *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Sullivan v. Treen*, 13 Wash. 261, 43 Pac. 38; *Powell v. Nolan*, 27 Wash.

318, 67 Pac. 312; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001; *Sarginson v. Turner Investment Co.*, 69 Wash. 234, 124 Pac. 379.

Right to file single mechanic's lien under entire contract against two or more separate buildings on dif-

ferent lots in same ownership. 10
A. L. R. 1026; 2 Ann. Cas. 685.

Joint or separate liens on lots owned
in severalty for improvements
made under entire contract. Ann.

Cas. 1912C, 873; 30 L. R. A. (N.
S.) 1219.

Mechanic's lien on separate buildings
located on noncontiguous lots. 2
Ann. Cas. 685.

§ 1138. Limitations of Actions.

No lien created by this chapter binds the property subject to the lien for a longer period than eight calendar months after the claim has been filed unless an action be commenced in the proper court within that time to enforce such lien; or, if credit be given, then eight calendar months after the expiration of such credit; and in case such action be not prosecuted to judgment within two years after the commencement thereof, the court, in its discretion, may dismiss the same for want of prosecution, and the dismissal of such action or a judgment rendered therein, that no lien exists, shall constitute a cancellation of the lien. [L.'93, p. 35, § 9.]

Cited in 27 Wash. 86, 346; 42 Wash. 453, 454; 58 Wash. 638; 65 Wash. 394; 90 Wash. 673, 675; 91 Wash. 510; 101 Wash. 116, 118; 104 Wash. 617.

Time to Sue, Limitations and Laches:
See Remington's Digest, Mech. Liens, § 83; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Powell v. Nolan, 27 Wash. 318, 67 Pac. 112, 68 Pac. 389; Service v. McMahon, 42 Wash. 452, 85 Pac. 33; Rees v. Wilson, 50 Wash. 339, 97 Pac. 245; Lindley v. McGlaulin, 58 Wash. 636,

109 Pac. 118; Davis v. Bartz, 65 Wash. 395, 118 Pac. 334; City Sash & Door Co. v. Bunn, 90 Wash. 669, 156 Pac. 854, Ann. Cas. 1918B, 31.

Where mechanics' liens that were subsequent to a mortgage were foreclosed without making the mortgagee a party, he is not bound, and the liens expire if suit is not commenced within the eight months limited by Rem. Code, § 1138: Gile Investment Co. v. Fisher, 104 Wash. 613, 177 Pac. 710.

§ 1139. Extent of Contractor's Liability—Rights of Owner.

The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed and materials furnished; and in all cases where a claim shall be filed under this chapter for labor performed or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which the claim is filed; and in case of judgment against the owner or his property, upon the lien, the owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of the judgment and costs, and if the amount of such judgment and costs shall exceed the amount due by him to the contractor or if the owner shall have settled with the contractors in full, he shall be entitled to recover back from the contractor the amount, including costs for which the lien is established in excess of any sum that may remain due from him to the contractor. [L. '93, p. 36, § 10.]

Cited in 52 Wash. 562; 77 Wash. 306, 309; 108 Wash. 87.

SUBCONTRACTORS, AND CONTRACTORS' WORKMEN AND MATERIALMEN: See Remington's Digest, Mech. Liens, §§ 36-1—39.

§ 36-1. Grounds and Requisites of Lien in General: Finlay v. Tagholm, 62 Wash. 341, 113 Pac. 1083; Chavelle v. Island Gun Club, 77 Wash. 304, 137 Pac. 511.

Rem. Wash. Code Vol. I—47

§ 37. Subrogation to Lien of Principal Contractor: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073; Home Sav. & L. Assn. v. Burton, 20 Wash. 688, 56 Pac. 940; Baker v. Yakima Valley Canal Co., 77 Wash. 70, 137 Pac. 342.

§ 38. Default in Performance of Principal Contract: Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073.

§ 38-1. Performance of Subcontract: Ward v. Pantages, 73 Wash. 208, 131 Pac. 642.

§ 39. Payment to Principal Contractor: Spokane Mfg. & L. Co. v. McChesney, 1 Wash. 609, 21 Pac. 198.

This section is not a limitation upon the right of the owner to protect his property, and does not require judgment upon a lien to entitle the owner to indemnity: Simpson v. Sisters of Charity of the House of Providence, 108 Wash. 82, 182 Pac. 937.

§ 1140. Foreclosure—Parties.

The liens provided by this chapter, for which claims have been filed, may be foreclosed and enforced by a civil action in the court having jurisdiction; in any action brought to foreclose a lien, all persons who, prior to the commencement of such action, have legally filed claims of liens against the same property, or any part thereof shall be joined as parties, either plaintiff or defendant; and no person shall begin an action to foreclose a lien upon any property while a prior action begun to foreclose another lien on the same property is pending, but if not made a party plaintiff or defendant to such prior action, he may apply to the court to be joined as a party thereto, and his lien may be foreclosed in such action; and no action to foreclose a lien shall be dismissed at the instance of a plaintiff therein to the prejudice of another party to the suit who claims a lien. [L. '93, p. 36, § 11.]

Cited in 17 Wash. 147; 24 Wash. 30; 27 Wash. 333; 37 Wash. 599; 65 Wash. 401.

ENFORCEMENT—Nature and Form of Remedy in General: See Remington's Digest, Mech. Liens, §§ 79, 80; Kilroy v. Mitchell, 2 Wash. 407, 26 Pac. 865; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Siler Mill Co. v. Nelson Co., 94 Wash. 477, 162 Pac. 590; Harrington v. Miller, 4 Wash. 808, 31 Pac. 325.

The pendency of a mortgage foreclosure will not prevent the commencement of an action to foreclose a mechanic's lien on the same property, since this section, providing that no person shall begin such an action "while a prior action begun to foreclose another lien on the same property is pending," relates only to other mechanics' liens: Nason v. Northwestern Milling & P. Co., 17 Wash. 142, 49 Pac. 235.

An action to foreclose a mechanic's lien under this section is an equitable action and a jury trial is not demandable: Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Defenses: See Remington's Digest, Mech. Liens, §§ 81, 82.

In General: Pacific Mfg. Co. v. Brown, 8 Wash. 347, 36 Pac. 273; Cornelius v. Washington Steam Laundry, 52 Wash. 272, 100 Pac. 727; Mondoli & Stewart v. American Building Co., 83 Wash. 584, 145 Pac. 577.

See, also, Schwager-Nettleton Mills v. Carstens, 106 Wash. 392, 180 Pac. 137.

Setoff and Counterclaim: Cochran v. Yoho, 34 Wash. 238, 75 Pac. 1077; Bur-

nett v. Ewing, 39 Wash. 45, 80 Pac. 855; Rieflin v. Grafton, 63 Wash. 387, 115 Pac. 851.

Parties Plaintiff—Necessity of Joining.—This section requires the joinder of all lien claimants as parties plaintiff or defendant in any action for the foreclosure of their liens: Fitch v. Applegate, 24 Wash. 25, 64 Pac. 147.

Parties Defendant—In General: See Remington's Digest, Mech. Liens, § 84; Harrington v. Miller, 4 Wash. 808, 31 Pac. 325; Wright v. Cowie, 5 Wash. 341, 31 Pac. 878; Quinby v. Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899; Rees v. Wilson, 50 Wash. 339, 97 Pac. 245; Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 Pac. 1082; Davis v. Bartz, 65 Wash. 395, 118 Pac. 334; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739; City Sash & Door Co. v. Bunn, 90 Wash. 669, 156 Pac. 854, Ann. Cas. 1918B, 31.

Husbands and Wives: See Remington's Digest, Mech. Liens, § 85; Littell & Smythe Mfg. Co. v. Miller, 3 Wash. 480, 28 Pac. 1035; Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744; Harrington v. Johnson, 10 Wash. 542, 39 Pac. 141; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Rasmusson v. Liming, 50 Wash. 184, 96 Pac. 1044.

Intervention, Addition or Substitution of Parties: See Remington's Digest, Mech. Liens, § 86; Fairhaven Land Co. v. Jordan, 5 Wash. 729, 32 Pac. 729; Washington Rock Plaster Co. v. Johnson, 10 Wash. 445, 39 Pac. 115; Nason v.

Northwestern Mill. & P. Co., 17 Wash. 142, 49 Pac. 235; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

Pleading: See *Remington's Digest*, *Mech. Liens*, §§ 87—90.

Complaint: *Cutter v. Striegel*, 4 Wash. 346, 30 Pac. 326; *Bolster v. Stocks*, 13 Wash. 460, 43 Pac. 532, 534, 1099; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373; *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001; *Lee v. Kimball*, 45 Wash. 656, 88 Pac. 1121; *Belknap Glass Co. v. Kelleher*, 72 Wash. 529, 130 Pac. 1123.

§ 88. — **Answer:** *Cowie v. Ahrenstedt*, 1 Wash. 416, 25 Pac. 458; *Rourk v. Miller*, 3 Wash. 73, 27 Pac. 1029; *Burnett v. Ewing*, 39 Wash. 45, 80 Pac. 855; *Dickerman v. Reeder*, 59 Wash. 405, 109 Pac. 1060.

§ 89. — **Cross-complaint:** *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Maher & Co. v. Farnandis*, 70 Wash. 250, 126 Pac. 542.

§ 90. **Issues, Proof and Variance:** See *Remington's Digest*, *Mech. Liens*, § 90; *Childs Lumber & Mfg. Co. v. Page*, 28 Wash. 128, 68 Pac. 373.

EVIDENCE: See *Remington's Digest*, *Mech. Liens*, §§ 91—94.

§ 91. **Presumptions and Burden of Proof:** *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Pacific Lumber & Timber Co. v. Dailey*, 60 Wash. 566, 111 Pac. 869.

See, also, *Pesha v. Pratt*, 111 Wash. 382, 191 Pac. 639.

§ 92. — **Admissibility:** *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 72, 68 Pac. 389.

§ 93. — **Lien, Claim or Statement and Record Thereof:** *Jewett v. Darlington*,

1 W. T. 601; *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, 32 Pac. 108; *Greene v. Finnell*, 22 Wash. 186, 60 Pac. 144; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

§ 94. — **Weight and Sufficiency:** *Seattle & Walla Walla R. Co. v. Ah Kow*, 2 W. T. 36, 3 Pac. 188; *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316; *Heald v. Hodder*, 5 Wash. 677, 32 Pac. 728; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Huetter v. Redhead*, 31 Wash. 320, 71 Pac. 1016; *Cochran v. Yoho*, 34 Wash. 238, 75 Pac. 1077; *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727; *Pacific Lumber & Timber Co. v. Dailey*, 60 Wash. 566, 111 Pac. 869; *Smith v. Hopper*, 67 Wash. 224, 121 Pac. 77; *Behne v. Stapish*, 68 Wash. 204, 122 Pac. 1002; *Johnson v. Heirgood*, 72 Wash. 120, 129 Pac. 909.

Trial or Hearing: See *Remington's Digest*, *Mech. Liens*, §§ 95—97. Conduct in general: *Installment Bldg. & Loan Co. v. Wentworth*, 1 Wash. 467, 25 Pac. 298; *Vendome Turkish Bath Co. v. Schettler*, 2 Wash. 457, 27 Pac. 76; *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

§ 96. — **Questions for Jury:** *Johnston v. Harrington*, 5 Wash. 73, 31 Pac. 316.

§ 97. — **Verdict and Findings:** *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851.

Necessary or proper parties to action to foreclose mechanic's lien. *Ann. Cas.* 1918B, 3, 28, 31, 34, 41.

Contractor as a necessary party to a bill to enforce a mechanic's lien. 33 *L. R. A. (N. S.)* 69.

§ 1141. Rank of Liens—Attorney's Fees.

In every case in which different liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien or class of liens, which shall be in the following order:—

1. All persons performing labor;
2. All persons furnishing material;
3. The subcontractors;
4. The original contractor.

And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon

the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor. The court may allow, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney's fee in the superior and supreme courts. [L. '93, p. 37, § 12.]

Cited in 23 Wash. 570; 27 Wash. 341; 31 Wash. 429; 33 Wash. 684; 40 Wash. 553; 77 Wash. 257, 306, 309.

Judgment or Decree: See Remington's Digest, Mech. Liens, §§ 98—100. In general: Douthitt v. MacCulsky, 11 Wash. 601, 40 Pac. 186; Huetter v. Redhead, 31 Wash. 320, 71 Pac. 1016; Friend v. Ralston, 35 Wash. 422, 77 Pac. 794; Argo Mfg. Co. v. Parker, 52 Wash. 100, 100 Pac. 188; Cornelius v. Washington Steam Laundry, 52 Wash. 272, 100 Pac. 727; Maher & Co. v. Farnandis, 70 Wash. 250, 126 Pac. 542; Adams v. Dose, 87 Wash. 575, 152 Pac. 9; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739.

§ 99. Restraining Execution and Enforcement of Judgment in General: Quinby v. Slipper, 7 Wash. 475, 35 Pac. 116, 38 Am. St. Rep. 899; Turner v. Bellingham Bay Lumber etc. Co., 9 Wash. 484, 37 Pac. 674.

§ 100. Sale—Mortgaged or Otherwise Encumbered Property: Stetson & Post Mill Co. v. Pacific Amusement Co., 37 Wash. 335, 79 Pac. 935.

Deficiency and Personal Liability: See Remington's Digest, Mech. Liens, §§ 101—104.

§ 101. Personal Liability on Failure to Establish Lien: Eisenbeis v. Wakeman, 3 Wash. 534, 28 Pac. 923; Warren v. Quade, 3 Wash. 750, 29 Pac. 827; Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; Littell v. Miller, 8 Wash. 566, 36 Pac. 492; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721; Spaulding v. Burke, 33 Wash. 679, 74 Pac. 829; Service v. McMahon, 42 Wash. 452, 85 Pac. 33; Pacific Iron & Steel Works v. Goerig, 55 Wash. 149, 104 Pac. 151; Hallett v. Phillips, 73 Wash. 457, 132 Pac. 51; Mattocks v. Great Northern R. Co., 94 Wash. 44, 162 Pac. 19; Gray v. Hickey, 94 Wash. 370, 162 Pac. 564.

§ 102. — Personal Judgment Against Owner: Mentzer v. Peters, 6 Wash. 540, 33 Pac. 1078; Spears v. Lawrence, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739.

§ 103. — Personal Judgment Against Contractor: Tacoma Lumber & Mfg. Co. v. Wolff, 7 Wash. 478, 35 Pac. 115, 755; Stetson & Post Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108.

§ 104. — Actions to Enforce Personal Liability: Marks v. Pence, 31 Wash. 426, 71 Pac. 1096.

Fees and Costs: See Remington's Digest, Mech. Liens, §§ 106, 107; Seattle & Walla Walla R. Co. v. Ah Kow, 2 W. T. 36, 3 Pac. 188; Bolster v. Stocks, 13 Wash. 460, 43 Pac. 532, 534, 1099; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571; Lavanway v. Cannon, 37 Wash. 593, 79 Pac. 1117; Sweatt v. Hunt, 42 Wash. 96, 84 Pac. 1; Little v. Soulsberry, 40 Wash. 550, 82 Pac. 909; Hughes & Co. v. Flint, 61 Wash. 460, 112 Pac. 633. **Amount and Reasonableness:** Seattle & Walla Walla R. Co. v. Ah Kow, 2 W. T. 36, 3 Pac. 188; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709; Huttig Bros. Mfg. Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073; Greene v. Finnell, 22 Wash. 186, 60 Pac. 144; Littell v. Soulsberry, 40 Wash. 550, 82 Pac. 909; Lee v. Kimball, 45 Wash. 656, 88 Pac. 1121; Culbert v. Lindvall, 73 Wash. 643, 132 Pac. 729.

Review: See Remington's Digest, Mech. Liens, § 105; Fox v. Nachtsheim, 3 Wash. 684, 29 Pac. 140; Griffith v. Maxwell, 20 Wash. 403, 55 Pac. 571; Hildebrandt v. Savage, 4 Wash. 524, 30 Pac. 643, 32 Pac. 109; Wheeler, Osgood & Co. v. Ralph, 4 Wash. 617, 30 Pac. 709; Dearborn Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327; Vincent v. Snoqualmie Mill Co., 7 Wash. 566, 35 Pac. 396; Littell v. Miller, 8 Wash. 566, 36 Pac. 492; Olson v. Snake River Valley R. Co., 22 Wash. 139, 60 Pac. 156; Greene v. Finnell, 22 Wash. 186, 60 Pac. 144; Peterson v. Dillon, 27 Wash. 78, 67 Pac. 397; Lee v. Kimball, 45 Wash. 656, 88 Pac. 1121; Cornelius v. Washington Steam Laundry, 52 Wash. 272, 100 Pac. 727; Morgan v. Chittenden Land Co., 92 Wash. 364, 159 Pac. 129.

Validity of statutory provision for attorney's fees in proceeding to foreclose mechanic's lien. 11 A. L. R. 906; 20 L. R. A. 565; L. R. A. 1915E, 947.

§ 1142. Personal Action.

Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for labor performed or material furnished to maintain a personal action to recover such debt against the person liable therefor. [L. '93, p. 37, § 13.]

§ 1143. Lien not Discharged by Taking Note.

The taking of a promissory note or other evidence of indebtedness for any labor performed or material furnished for which lien is created by law, shall not discharge the lien therefor, unless expressly received as payment and so specified therein. [L. '93, p. 37, § 14.]

Cited in 65 Wash. 14; 74 Wash. 88; 94 Wash. 550.

Where work is done on a building under an oral agreement that part cash and a note for the balance would be received in payment for the work, a mechanic's lien is waived if it was so specified in the note, under this section: *Ward v. Thorndyke*, 65 Wash. 11, 117 Pac. 593.

Under this section, a lien for installing an elevator in a building is not waived by the taking of a promissory note under a contract which merely provided for payment "in terms of a promissory note" and which expressly reserved a lien "until final payment": *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86, 132 Pac. 867, Ann. Cas. 1915A, 959.

§ 1144. Material Exempt from Attachment, etc., When.

Whenever material shall have been furnished for use in the construction, alteration or repair of property subject to a lien created by this chapter, such material shall not be subject to attachment, execution, or other legal process, to enforce any debt due by the purchaser of such material, except a debt due for the purchase money thereof, so long as in good faith the said material is about to be applied in the construction, alteration or repair of such property. [L. '93, p. 37, § 15.]

The fact that a materialman, who has furnished building material to a contractor, has filed notice of lien against the owner of the building in which it is to be used, will not, when the lien claim has not been paid, vest the title to such material in the owner of the building so as to render it liable to execution on judgments against him: *Potvin v. Wickersham*, 15 Wash. 646, 47 Pac. 25.

Under 1 H. C., § 1675, exempting from execution material designed in good faith to be used in the construction of a building, such material will be exempt, although the completion of the building has been delayed for a number of years pending litigation, and whether the material is to be used by the one engaged in the construction of the building at the time of its purchase or by one succeeding to his rights: *Id.*

§ 1145. Community Interest, How Subjected.

The claim of lien, when filed as required by this chapter, shall be notice to the husband or wife of the person who appears of record to be the owner of the property sought to be charged with the lien, and shall subject all the community interest of both husband and wife to said lien. [L. '93, p. 38, § 16.]

§ 1146. When Land not Subject to Lien—Power of Court.

When, for any reason the title or interest in the land, upon which the property subject to the lien is situated cannot be subjected to the lien, the court may order the sale and removal from the land of the property subject to the lien to satisfy the lien. [L. '93, p. 38, § 17.]

Cited in 20 Wash. 605; 88 Wash. 339; 104 Wash. 618; 111 Wash. 566.

Where a vendor of land who has given an executory contract for its sale stands

by and sees materials furnished for improvements made thereon by third parties in ignorance of his rights, under a lease of the premises by his vendee, he is estopped from claiming a forfeiture as to the improvements, and they may be removed and sold under this section: *Bell v. Swallow Land, L. & T. Co.*, 20 Wash. 602, 56 Pac. 401.

This section has application only to cases where the work or material was furnished at the instance of the owner of less than the fee, and not to liens placed by the owner of premises subject to prior mortgages: *Gile Investment Co. v. Fisher*, 104 Wash. 613, 177 Pac. 713.

§ 1147. Liberal Construction.

The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects. [L. '93, p. 38, § 18.]

Cited in 27 Wash. 338; 33 Wash. 695; 52 Wash. 278, 512, 562; 58 Wash. 638; 61 Wash. 182; 66 Wash. 363; 77 Wash. 307, 309; 84 Wash. 657; 86 Wash. 193; 92 Wash. 416; 96 Wash. 278.

Liberal Construction of Lien Laws: *Seattle Lumber Co. v. Sweeney*, 33 Wash. 691, 74 Pac. 1001; *Smyth v. Lance & Peters*, 52 Wash. 560, 100 Pac. 995; *Lindley v. McGlauffin*, 58 Wash. 636, 109 Pac. 118; *Chavelle v. Island Gun Club*,

77 Wash. 304, 137 Pac. 511; *Bradley v. Donovan-Pattison Realty Co.*, 84 Wash. 654, 147 Pac. 421; *Ehrlich-Harrison Co. v. Cushman*, 86 Wash. 190, 149 Pac. 708; *McMullen & Co. v. Croft*, 92 Wash. 411, 159 Pac. 375.

Under this section all proceedings on the foreclosure of a mechanic's lien are to be liberally construed: *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727.

§ 1148. Existing Rights Preserved.

All rights acquired under any existing law of this state are hereby preserved, and all actions now pending shall be proceeded with under the law as it exists at the time this act shall take effect. [L. '93, p. 38, § 19.]

Cited in 11 Wash. 311.

CHAPTER IV.

LIENS OF EMPLOYEES.

§ 1149. Laborer's Lien on Property, Franchises, etc.

Every person performing labor for any person, company or corporation, in the operation of any railway, canal or transportation company, or any water, mining or manufacturing company, sawmill, lumber or timber company, shall have a prior lien on the franchise, earnings, and on all the real and personal property of said person, company or corporation, which is used in the operation of its business, to the extent of the moneys due him from such person, company or corporation, operating said franchise or business, for labor performed within six months next preceding the filing of his claim therefor, as hereinafter provided; and no mortgage, deed of trust or conveyance shall defeat or take precedence over said lien. [L. '97, p. 55, § 1.]

Liens on farm products, see *infra*, § 1188.

Cited in 22 Wash. 512; 24 Wash. 32, 598; 41 Wash. 113; 45 Wash. 649, 651; 71 Wash. 229; 77 Wash. 75; 84 Wash. 69, 72, 230, 232, 233, 234; 101 Wash. 115.

A laborer engaged in cutting logs in the woods at a distance from a mill, paid by the thousand feet, is not an employee of the mill or engaged in performing labor in its operation, within the

meaning of this section: *Graham v. Gardner*, 45 Wash. 648, 89 Pac. 171.

The lien upon operating property of a mine is confined to the interests of lessee in possession and holding also under a conditional sales contract, where the lessee employed the lien claimants, none of whom performed labor for the owner and lessor: *Cook v. Washington-Oregon*

Corp., 84 Wash. 68, 146 Pac. 156, 149 Pac. 325.

Lien of contractor for hired labor which in no wise changed the contract price or the relations between the employer and the lienor: *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966.

Priorities: See *Remington's Digest, Mast. & S.*, § 19; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147.

For text treatment of "Liens," generally, see 17 *R. C. L.* 594.

Who is "laborer" within statute giving lien for labor performed. *Ann. Cas.* 1913B, 138; 18 *L. R. A.* 305.

Priority of employee's statutory lien for wages. 10 *Ann. Cas.* 344.

Subrogation to laborer's lien of person advancing money to pay wages. 10 *Ann. Cas.* 211.

§ 1150. Notice of Lien.

No person shall be entitled to the lien given by the preceding section, unless he shall, within ninety days after he has ceased to perform labor for such person, company or corporation, file for record with the county auditor of the county in which said labor was performed, or in which is located the principal office of such person, company or corporation in this state, a notice of claim, containing a statement of his demand, after deducting all just credits and offsets, the name of the person, company or corporation, and the name of the person or persons employing claimant, if known, with the statement of the terms and conditions of his contract, if any, and the time he commenced the employment, and the date of his last service, and shall serve a copy thereof on said person, company or corporation within thirty days after the same is so filed for record. [L. '97, p. 56, § 2.]

Cited in 45 Wash. 650; 71 Wash. 227, 229, 230; 84 Wash. 70, 230, 232; 101 Wash. 115.

Under this section, a copy of the notice of a laborer's lien must be served upon

the employer within thirty days after the same is filed for record, or the lien cannot be enforced: *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 128 Pac. 211.

§ 1151. Service of Notice.

Service of notice, as herein required, may be made in the same manner as summons in civil actions. [L. '97, p. 56, § 3.]

Cited in 71 Wash. 229; 84 Wash. 230, 232.

§ 1152. Foreclosure of Lien.

Any such lien may be enforced within the same time and in the same manner as mechanics' liens are foreclosed. [L. '97, p. 56, § 4.]

Cited in 84 Wash. 230, 232; 101 Wash. 116.

§ 1153. How Claims are to be Paid by Receiver or Assignee.

Whenever a receiver or assignee is appointed for any person, company or corporation, the court shall require such receiver or assignee to pay all claims for which a lien could be filed under this chapter, before the payment of any other debts or claims, other than operating expenses. [L. '97, p. 56, § 5.]

Cited in 71 Wash. 229; 84 Wash. 230, 232; 101 Wash. 117.

This section applies only to proceed-

ings in state courts, and not to a trustee in bankruptcy: *McDermott v. Tolt Land Co.*, 101 Wash. 114, 172 Pac. 207.

CHAPTER V.

LIENS ON CHATTELS.

§ 1154. Lien on Chattels for Labor and Material.

Every person, firm or corporation who shall have performed labor or furnished material in the construction or repair of any chattel at the request of its owner, shall have a lien upon such chattel for such labor performed or material furnished, notwithstanding the fact that such chattel be surrendered to the owner thereof: Provided, however, that no such lien shall continue, after the delivery of such chattel to its owner, as against the rights of third persons who, prior to the filing of the lien notice as hereinafter provided for, may have acquired the title to such chattel in good faith, for value and without actual notice of the lien. [L. '17, p. 229, § 1. Cf. L. '05, p. 137, § 1; L. '09, p. 626, § 1.]

Cited in 85 Wash. 238; 88 Wash. 111; 92 Wash. 216; 95 Wash. 642; 99 Wash. 586; 113 Wash. 518.

Section 1182, *infra*, was not repealed by implication by this act, §§ 1154 to 1157a: *Erickson v. Perica*, 113 Wash. 510, 194 Pac. 963.

A plumber doing work upon a soda water fountain is not entitled to a lien under the provisions of Laws of 1905, page 137, section 1, giving a lien to blacksmiths, wagon-makers, machinists, and boiler-makers, expending labor on any chattel; as "machinist" does not include a plumber: *Modern Plumbing & Heating Co. v. American Soda Fountain Co.*, 57 Wash. 148, 106 Pac. 628, 135 Am. St. Rep. 975.

The common law does not favor liens;

it deems a surrender of possession a waiver of lien: *Price v. Frankel*, 1 W. T. 33.

Lien upon automobile for repairs or storage. *Ann. Cas.* 1916A, 630; *L. R. A.* 1918D, 330.

Common-law lien on personalty for work performed thereon upon the owner's premises. 3 *A. L. R.* 862.

Right to lien for repairs or other services under contract with purchaser under conditional sale. *L. R. A.* 1915D, 1141.

Assignability of lien for repairs. *Ann. Cas.* 1916A, 619.

Improvement of personal property at bailee's request as creating liability against bailor or property. 38 *L. R. A. (N. S.)* 97.

§ 1155. Notice of Lien on Chattel.

In order to make such lien effectual the lien claimant shall, within sixty days from the date of delivery of such chattel to the owner, file in the office of the auditor of the county in which such chattel is kept, a lien notice, which notice shall state the name of the claimant, the name of the owner, a description of the chattel upon which the claimant has performed labor or furnished material, the amount for which a lien is claimed and the date upon which such expenditure of labor or material was completed, which notice shall be signed by the claimant or someone on his behalf, and may be in substantially the following form:

Chattel Lien Notice.

_____, Claimant,
against
_____, Owner.

Notice is hereby given that _____ has and claims a lien upon [here insert description of chattel], owned by _____ for the sum of _____ dollars, for and

on account of labor, skill and material expended upon said — which was completed upon the — day of —, 19—.

Claimant.

[L. '17 p. 229, § 2. Cf. L. '05, p. 137, § 2.]

Cited in 55 Wash. 150; 57 Wash. 148; Jamieson, 88 Wash. 109, 152 Pac. 679; 59 Wash. 261; 88 Wash. 110, 111; 89 Barbour v. Hodge, 99 Wash. 578, 170 Pac. 115; Everett v. McCulloch, 102 Wash. 51, 172 Pac. 863; Young v. Borzone, 26 Wash. 4, 66 Pac. 135, 421.
Proceedings to Perfect: See Remington's Digest, Liens, §§ 5, 6; Campen v.

§ 1156. Ownership—Priority of Lien.

The liens created by this chapter are preferred to any lien, mortgage or other encumbrance which may attach subsequently to the time of the commencement of the performance of the labor, or the furnishing of the materials for which the right of lien is given by this chapter, and are also preferred to any lien, mortgage or other encumbrance which may have attached previously to that time, and which was not filed or recorded so as to create constructive notice of the same prior to that time, and of which the lien claimant has no notice. [L. '17, p. 230, § 3. Cf. L. '05, p. 138, § 3.]

Cited in 85 Wash. 238, 239; 92 Wash. 216; 99 Wash. 585.

A prior chattel mortgage is superior to the lien given by section 1154, and "any lien thereon" in this section refers to a reservation of title or lien in aid of ownership, and not to a chattel mortgage; and in view of the subsequent act, section 3780, *infra*, reaffirming the standing of chattel mortgages under sections

3779—3789, *infra*, which was not intended to be impliedly repealed by the chattel lien law: Rothweiler v. Winton Motor Car Co., 92 Wash. 215, 158 Pac. 737.

When the vendor of an automobile was authorized to contract for the work, so as to create a lien upon it superior to the title of the vendee, under this section: Barbour v. Hodge, 99 Wash. 578, 170 Pac. 115.

§ 1157. Enforcement of Lien.

The lien herein provided for may be enforced against all persons having a junior or subsequent interest in any such chattel, by notice and sale in the same manner that a chattel mortgage is foreclosed or by decree of any court in this state exercising original equity jurisdiction in the county wherein such chattel may be, in an action commenced within nine months after the filing of such lien notice, and if no such action shall be commenced within such time such lien shall cease. [L. '17, p. 230, § 4. Cf. L. '05, p. 138, § 4.]

Cited in 88 Wash. 110; 89 Wash. 504; 99 Wash. 582, 587—589.

§ 1157a. Priority of Labor Over Material Liens—Personal Judgment—Deficiency.

In every case originating in or removed to a court of competent jurisdiction, in which different liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien or class of liens, which shall be in the following order:

1. All persons performing labor;
2. All persons furnishing material;

And the proceeds of the sale of the property must be applied to each lien or class of liens in the order of its rank; and personal judgment may be rendered in an action brought to foreclose a lien, against any party per-

sonally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages; and the amount realized by such enforcement of the lien shall be credited upon the proper personal judgment, and the deficiency, if any, remaining unsatisfied, shall stand as a personal judgment, and may be collected by execution against the party liable therefor. The court may allow, as part of the costs of the action, the moneys paid for filing or recording the claim, and a reasonable attorney's fee in the action. [L, '17, p. 231, § 5.]

Cited in 113 Wash. 518.

§ 1158. Filing of Notice.

Upon presentation of such lien notice to the auditor of any county, and the payment to him of fifteen cents, he shall file the same, and indorse thereon the time of the reception, the number thereof, and shall enter the same in a suitable book or file (but need not record the same). Such book or file shall have herewith an alphabetic index, in which the county auditor shall index such notice by noting the name of the owner, name of lien claimant, description of property, date of lien (which shall be the date upon which such expenditure of labor, skill or material was completed), date of filing and when released, the date of release. [L. '05, p. 138, § 5.]

Cited in 95 Wash. 642.

CHAPTER VI.

SECURITY FOR LABOR, ETC., ON PUBLIC WORKS.

§ 1159. Contractor's Bond—Filing.

Whenever, any board, council, commission, trustees or body acting for the state or any county or municipality or any public body shall contract with any person or corporation to do any work for the state, county or municipality, or other public body, city, town or district, such board, council, commission, trustees or body shall require the person or persons with whom such contract is made to make, execute and deliver to such board, council, commission, trustees or body a good and sufficient bond, with two or more sureties, or with a surety company as surety, conditioned that such person or persons shall faithfully perform all the provisions of such contract and pay all laborers, mechanics and subcontractors and materialmen, and all persons who shall supply such person or persons, or subcontractors, with provisions and supplies for the carrying on of such work, which bond shall be filed with the county auditor of the county where such work is performed or improvement made, except in cases of cities and towns, in which cases such bond shall be filed with the clerk or comptroller thereof, and any person or persons performing such services or furnishing material to any subcontractor shall have the same right under the provisions of such bond as if such work, services or material was furnished to the original contractor: Provided, however, that the provisions of this act shall not apply to any money loaned or advanced to any such contractor, subcontractor or other person in the performance of any such work. [L. '15, p. 61, § 1. Cf. L. '09, p. 716, § 1; L. '88, p. 15, § 1; 1 H. C., § 2415; L. '97, p. 57, § 1.]

Cited in 5 Wash. 145, 146, 586; 6 Wash. 121; 7 Wash. 272, 280, 281, 283, 485; 8 Wash. 328, 457; 9 Wash. 6, 429; 11 Wash. 162, 476; 12 Wash. 120; 13 Wash. 392, 560, 575; 19 Wash. 592, 627; 21 Wash. 508; 22 Wash. 107; 28 Wash. 93; 29 Wash. 527; 39 Wash. 556; 46 Wash. 435; 55 Wash. 264; 56 Wash. 507; 60 Wash. 587; 63 Wash. 684; 67 Wash. 602, 607, 612; 69 Wash. 352; 71 Wash. 29; 72 Wash. 300, 301, 304, 305, 570; 74 Wash. 92; 79 Wash. 564; 81 Wash. 55, 136, 267; 82 Wash. 276, 279, 283, 447, 448; 84 Wash. 545; 85 Wash. 661, 662; 86 Wash. 181, 490, 491; 89 Wash. 316, 405; 92 Wash. 53, 54; 93 Wash. 103; 94 Wash. 77, 78; 95 Wash. 75, 248; 97 Wash. 218; 99 Wash. 70, 424; 100 Wash. 371; 101 Wash. 214; 102 Wash. 60, 61, 105, 109; 104 Wash. 665, 667; 105 Wash. 55, 59; 106 Wash. 263; 107 Wash. 75, 77; 108 Wash. 541, 542; 112 Wash. 392.

Constitution, article IX, section 2, providing that "the entire revenue derived from the common-school fund and the state tax for common schools shall be exclusively applied to the support of the common schools," is not violated by this section, requiring bonds to be taken by school districts as municipal corporations from contractors for payment of mechanics, etc., as neither of these funds need be trenched upon to pay judgments against such districts, they having other resources: *Pacific Mfg. Co. v. School District*, 6 Wash. 121, 33 Pac. 68.

The fact that the legislature in amending this section added a proviso that the act shall not apply to money loaned or advanced does not show that it construed the former law to include such items: *American Savings Bank & Trust Co. v. National Surety Co.*, 104 Wash. 663, 177 Pac. 646.

A person loaning money to a contractor on county highway work is not entitled to file a claim against the contractor's bond conditioned in the exact language of this section, to pay . . . all persons supplying the contractor with provisions or supplies, "all just debts, dues and demands" incurred in the performance of the work; since the quoted words refer to the classes of persons named, and do not include creditors or persons loaning money: *American Savings Bank & Trust Co. v. National Surety Co.*, 104 Wash. 663, 177 Pac. 646.

INDEMNITY AGAINST LIENS—Indemnity by Contractor to Owner in General: See Remington's Digest, Mech. Liens, § 108; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Exposition Amusement Co. v. Empire State Surety Co.*, 49 Wash. 637, 96 Pac. 158.

The vendor in a conditional sales contract of machinery sold to a contractor for a municipal power plant may pursue the property under the contract, and is

not restricted to a remedy by action upon the contractor's bond, under this section: *Allis-Chalmers Mfg. Co. v. Ellensbury*, 108 Wash. 533, 185 Pac. 811.

Estoppel of Principal or Sureties to Claim Lien: See Remington's Digest, Mech. Liens, § 109; *Spears v. Lawrence*, 10 Wash. 368, 38 Pac. 1049, 45 Am. St. Rep. 789; *Morse v. Mansfield*, 10 Wash. 373, 38 Pac. 1050; *Kent Lumber Co. v. Ward*, 37 Wash. 60, 79 Pac. 485; *Todd v. Fransvog*, 44 Wash. 520, 87 Pac. 831.

Contractors' Bonds on Municipal Work—Necessity: See Remington's Digest, Mun. Corp., § 156; *Clough v. Spokane*, 7 Wash. 279, 34 Pac. 934; *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278; *Gate City Lumber Co. v. Montezano*, 60 Wash. 586, 111 Pac. 799; *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140; *Dixon v. Parker*, *Moran & Parker*, 102 Wash. 101, 172 Pac. 856.

An irrigation district is a municipal corporation, within the meaning of this section, since the words "other municipal corporation" were not used in any restricted sense, as defined by hard-and-fast rules, but to all public corporations created by general law and exercising governmental functions: *Brown Brothers v. Columbia Irr. Dist.*, 82 Wash. 274, 144 Pac. 74.

This section is applicable to contracts by a county for road improvements, under Laws of 1893, page 301, although the county may be liable for only one-third of the cost of constructing the road, and the balance of cost is assessable against abutting property: *Rounds v. Whatcom County*, 22 Wash. 106, 60 Pac. 139.

Requisites and Validity: See Remington's Digest, Mun. Corp., § 157; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Wadsworth v. School District*, 7 Wash. 485, 35 Pac. 371; *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29; *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119; *Pacific Bridge Co. v. United States Fidelity Co.*, 33 Wash. 47, 73 Pac. 772; *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112; *Yost v. Empire State Surety Co.*, 69 Wash. 397, 125 Pac. 167; *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575.

Persons Secured: See Remington's Digest, Mun. Corp., § 158; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Sears v. Williams*, 9 Wash. 428, 37 Pac. 665, 38 Pac. 135, 39 Pac. 280; *Schmidt v. North Yakima*, 12 Wash. 121, 40 Pac. 790; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345; *Moody v. Westerman*, 13 Wash. 709, 43 Pac. 347; *National Lumber & Box Co. v. Title Guaranty & Surety Co.*,

85 Wash. 660, 149 Pac. 16; Title Guaranty & Surety Co. v. First National Bank, 94 Wash. 55, 162 Pac. 23; United States Rubber Co. v. American Bonding Co., 86 Wash. 180, 149 Pac. 706, L. R. A. 1915F, 951; National Market Co. v. Maryland Casualty Co., 100 Wash. 370, 170 Pac. 1009.

See, also, Western Hdw. & Metal Co. v. Maryland Casualty Co., 105 Wash. 54, 177 Pac. 703, 181 Pac. 700.

The creditors of a subcontractor on state work cannot maintain an action upon his bond, not required by any statute, but given to the principal contractor to secure performance of the subcontract, since there is no privity between the parties to the action; even though such bond was conditioned, in part, in the language of this section, following the language of the principal contractor's bond to the state: Spokane Merchants' Assn. v. Pacific Surety Co., 86 Wash. 489, 150 Pac. 1054.

A bond under this section covers fuel for steam shovel used in excavating; also the services performed by teams with drivers furnished to the contractor, together with hay and grain to feed the horses: National Surety Co. v. Bratnober Lumber Co., 67 Wash. 601, 122 Pac. 337.

Moneys loaned to a state contractor for the purpose of, and actually used for, the payment of labor performed and materials furnished for the construction of a state bridge, for which the surety on the contractor's bond would have been liable, are debts and demands secured by the bond, for which notice of claim against the bond may be filed under this section: Title Guaranty & Surety Co. v. Coffman, Dobson & Co., 97 Wash. 211, 166 Pac. 620.

Liabilities on Contractors' Bonds—In General: See Remington's Digest, Mech. Liens, § 110; Stetson & Post Mill Co. v. McDonald, 5 Wash. 496, 32 Pac. 108; Sheard v. United States Fidelity & Guaranty Co., 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; Crane Co. v. United States Fid. & Guar. Co., 74 Wash. 91, 132 Pac. 872.

Sureties cannot escape liability from the fact that the bond was not signed by the contractor, when it has been delivered by him to, and accepted by, the other contracting party with the knowledge and consent of the sureties: Eureka Sandstone Co. v. Long, 11 Wash. 161, 39 Pac. 446.

A bond given under the provisions of an act for the protection of those furnishing labor and materials to a contractor upon public improvements, is an official bond: Ihrig v. Scott, 13 Wash. 559, 43 Pac. 633.

A contractor's bond, reciting that it is given in compliance with the statute re-

quiring bonds for the benefit of specified persons, must be held to be intended as a statutory bond, and not an agreement making the surety a joint principal with the contractor on city work without right to the defenses of a surety: Pasco v. Pacific Coast Casualty Co., 101 Wash. 496, 172 Pac. 566.

A bond given to secure the faithful performance of a contract to furnish all labor and material for an improvement guarantees payment of a subcontractor doing work on the job for which the subcontractor had a lien, although the contract did not expressly provide for a bond to secure performance: Island Gun Club v. National Sur. Co., 101 Wash. 185, 172 Pac. 209.

The surety, when liable for the amount of the contract price which was paid to it upon a dispute arising, and which it paid to the contractor, after notice that a subcontractor had not been paid and had a claim for a lien exceeding the sum paid over: Island Gun Club v. National Sur. Co., 101 Wash. 185, 172 Pac. 209.

— **Liabilities of Sureties on Municipal Work:** See Remington's Digest, Mun. Corp., § 159; Baum v. Whatcom County, 19 Wash. 626, 54 Pac. 29; Spokane & Idaho Lumber Co. v. Boyd, 28 Wash. 90, 68 Pac. 337; Spokane v. Costello, 57 Wash. 183, 106 Pac. 764; Gate City Lumber Co. v. Montesano, 60 Wash. 586, 111 Pac. 799; Kongsbach v. Casey, 66 Wash. 643, 120 Pac. 108; Gate City Lumber Co. v. Montesano, 67 Wash. 594, 122 Pac. 26; Brown Brothers v. Columbia Irr. Dist., 82 Wash. 274, 144 Pac. 74; National Surety Co. v. Bratnober Lumber Co., 67 Wash. 601, 122 Pac. 337; Standard Boiler Works v. National Surety Co., 71 Wash. 28, 127 Pac. 573, 43 L. R. A. (N. S.) 162; City Retail Lumber Co. v. Title Guaranty & Surety Co., 72 Wash. 300, 130 Pac. 345; Mitchell v. Berlin-McNitt Co., 91 Wash. 582, 158 Pac. 264; Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co., 99 Wash. 68, 168 Pac. 1124.

The amount due from a surety on a contractor's bond under this section draws interest at eight per cent, where so provided in the contract evidencing the debt secured by the bond, as the interest was a legal part of the debt: Puget Sound State Bank v. Gallucci, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767.

Liabilities on Contractors' Bonds on County Work: See Remington's Digest, Counties, § 46; Wallace v. Skagit County, 8 Wash. 457, 36 Pac. 252; Gilmore v. Westerman, 13 Wash. 390, 43 Pac. 345; Baum v. Whatcom County, 19 Wash. 626, 54 Pac. 29; Cascade Lumber & Shingle Co. v. Wright, 99 Wash. 421, 169 Pac. 833; Aberdeen State Bank v. Spokane Paving & Constr. Co., 102 Wash. 68,

172 Pac. 827; *King County v. Guardian Casualty & Guaranty Co.*, 103 Wash. 509, 175 Pac. 166.

See, also, Highways—Contractor's bonds—Reserve fund—Rights of creditors and sureties: *Denham v. Pioneer Sand & Gravel Co.*, 104 Wash. 357, 176 Pac. 333.

— Contractors' bonds — "Statutes" — Money loaned: *American Sav. Bank & Trust Co. v. National Surety Co.*, 134 Wash. 663, 177 Pac. 646.

— Contractor's bonds — Notice — Waiver: *Cascade Construction Co. v. Snohomish County*, 105 Wash. 484, 178 Pac. 470.

— Contractor's bonds—Notice of claim—Sufficiency: *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

— Payment—Application: *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

— Labor—Notice of furnishing—Statutes—Liability—Reasonable value of service: *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

— Contractor's bonds — Actions — Claims—Payment to contractor—Liability

of surety: *Lewis County v. Aetna Accident & Liability Co.*, 111 Wash. 333, 191 Pac. 146.

Contractors' Bonds on School Work:

See *Remington's Digest, Schools*, § 28; *Pacific Mfg. Co. v. School District*, 6 Wash. 121, 33 Pac. 68; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Wadsworth v. School District*, 7 Wash. 485, 35 Pac. 371; *Puget Sound Brick etc. Co. v. School District*, 12 Wash. 118, 40 Pac. 608; *Price v. Scott*, 13 Wash. 574, 43 Pac. 634; *Crane Co. v. Aetna Ind. Co.*, 43 Wash. 516, 86 Pac. 849; *Washington Monumental & Cut Stone Co. v. Murphy*, 81 Wash. 266, 142 Pac. 665; *School District No. 75 of Pierce County v. Qualls*, 95 Wash. 247, 163 Pac. 761.

Nature of labor or materials which will support an action upon a contractor's bond. 43 **L. R. A. (N. S.)** 162; **L. R. A.** 1915F, 951.

Contractor's bond for the payment of claims for labor and material as a contract of indemnity against liability or against loss. **L. R. A.** 1918D, 1074.

§ 1159-1. Notice to Contractor—Condition Precedent to Action.

Every person, firm or corporation furnishing materials, supplies or provisions to be used in the construction, performance, carrying on, prosecution or doing of any work for the state, or any county, city, town, district, municipality or other public body, shall, not later than ten days after the date of the first delivery of such materials, supplies or provisions to any subcontractor or agent of any person, firm or corporation having a subcontract for the construction, performance, carrying on, prosecution or doing of such work, deliver or mail to the contractor a notice in writing stating in substance and effect that such person, firm or corporation has commenced to deliver materials, supplies or provisions for use thereon, with the name of the subcontractor or agent ordering or to whom the same is furnished and that such contractor and his bond will be held for the payment of the same, and no suit or action shall be maintained in any court against the contractor or his bond to recover for such material, supplies or provisions or any part thereof unless the provisions of this act have been complied with. [L. '15, p. 525, § 1.]

Duplicate statements to contractor, see *supra*, § 1133.

Cited in 99 Wash. 425; 104 Wash. 358; 105 Wash. 56, 254, 488, 490; 106 Wash. 265.

Actual knowledge on the part of the contractor on county work that materials are being furnished does not dispense with the necessity of notice under this section: *Cascade Lumber & Shingle Co. v. Wright*, 99 Wash. 421, 169 Pac. 833.

A notice given after commencing to furnish lumber is sufficient to bind the contractor as to all deliveries subsequent to the notice, when they were not

made under a specific contract for a fixed quantity at a given price: *Id.*

It will be assumed that the judicial definition of "supplies" prior to this section giving a right of action on a contractor's bond, was incorporated therein on the passage of that act: *Ledingham v. Blaine*, 105 Wash. 253, 177 Pac. 783.

Where a subcontract on county highway work was not consented to and filed with the county commissioners as required by the principal contract, the subcontractor was merely the agent of

the principal contractor for the purchase of supplies, and not a subcontractor within the meaning of this section: *Cascade Construction Co. v. Snohomish County*, 105 Wash. 484, 178 Pac. 470.

A subcontractor to haul all the sand, gravel and cement used on county road

work agrees to furnish labor, and is not within this section, requiring notice within ten days to the principal contractor of the furnishing of "materials, supplies or provisions": *Bishop v. Ryan Construction Co.*, 106 Wash. 254, 180 Pac. 126.

§ 1160. Liability for Failure to Take Bond.

If any board of county commissioners of any county, or mayor and common council of any incorporated city or town, or tribunal transacting the business of any municipal corporation shall fail to take such bond as herein required, such county, incorporated city or town, or other municipal corporation, shall be liable to the persons mentioned in section 1159, to the full extent and for the full amount of all such debts so contracted by such contractor. [L. '88, p. 15, § 2; 1 H. C., § 2416; L. '09, p. 717, § 2.]

Cited in 7 Wash. 280, 282; 9 Wash. 429; 22 Wash. 110; 28 Wash. 93; 55 Wash. 264; 82 Wash. 276, 279, 283, 284, 447; 98 Wash. 414; 108 Wash. 541, 542.

The fact that the first section of this act refers, as amended, to municipal corporations, or "other public bodies," while this section, fixing liability for failure to take the bond omits "other public bodies," does not show that an irrigation district, being a public body, is not a municipal corporation, and so not amenable to this section, under the rule

of *expressio unius est exclusio alterius*: *Brown Brothers v. Columbia Irr. Dist.*, 82 Wash. 274, 144 Pac. 74.

This section does not limit a party to this remedy where machinery was sold under a conditional sales contract to be used in the construction of public works: *Allis-Chalmers Mfg. Co. v. Ellensburg*, 108 Wash. 533, 185 Pac. 811.

Liability of municipality or officer for failure to take bond from contractor. *Ann. Cas.* 1917B, 1089; *L. R. A.* 1915F, 629.

§ 1161. Conditions of Bond—Action on.

The bond mentioned in section 1159 shall be in an amount equal to the full contract price agreed to be paid for such work or improvement, and shall be to the state of Washington, except in cases of cities and towns, in which cases such municipalities may by general ordinance fix and determine the amount of such bond and to whom such bond shall run: Provided, the same shall not be for a less amount than twenty-five per cent (25%) of the contract price of any such improvement, and may designate that the same shall be payable to such city, and not to the state of Washington, and all such persons mentioned in said section 1159 shall have a right of action in his, her, or their own name or names on such bond for work done by such laborers or mechanics, and for materials furnished or provisions and goods supplied and furnished in the prosecution of such work, or the making of such improvements; Provided, that such persons shall not have any right of action on such bond for any sum whatever, unless within thirty (30) days from and after the completion of the contract with an acceptance of the work by the affirmative action of the board, council, commission, trustees, officer, or body acting for the state, county or municipality, or other public body, city, town or district, the laborer, mechanic or subcontractor, or materialman, or person claiming to have supplied materials, provisions or goods for the prosecution of such work, or the making of such improvement, shall present to and file with such board, council, commission, trustees or body acting for the

state, county or municipality, or other public body, city, town or district, a notice in writing in substance as follows:

To (here insert the name of the state, county or municipality or other public body, city, town or district):

Notice is hereby given that the undersigned (here insert the name of the laborer, mechanic or subcontractor, or materialman, or person claiming to have furnished labor, materials or provisions for or upon such contract or work) has a claim in the sum of — dollars (here insert the amount) against the bond taken from — (here insert the name of the principal and surety or sureties upon such bond) for the work of — (here insert a brief mention or description of the work concerning which said bond was taken).

(Here to be signed) — —.

Such notice shall be signed by the person or corporation making the claim or giving the notice, and said notice, after being presented and filed, shall be a public record open to inspection by any person, and in any suit or action brought against such surety or sureties by any such person or corporation to recover for any of the items hereinbefore specified, the claimant shall be entitled to recover in addition to all other costs, attorney's fees in such sum as the court shall adjudge reasonable: Provided, however, that no attorney's fees shall be allowed in any suit or action brought or instituted before the expiration of thirty days following the date of filing of the notice hereinbefore mentioned: Provided further, that any city may avail itself of the provisions of this act, notwithstanding any charter provisions in conflict herewith: And provided further, that any city or town may impose any other or further conditions and obligations in such bond as may be deemed necessary for its proper protection in the fulfillment of the terms of the contract secured thereby, and not in conflict herewith. [L. '15, p. 62, § 2. Cf. L. '09, p. 717, § 3; L. '88, p. 16, § 3; 1 H. C., § 2417; L. '99, p. 172, § 1.]

Cited in 55 Wash. 264; 60 Wash. 588; 66 Wash. 643; 71 Wash. 29; 611; 72 Wash. 570; 78 Wash. 331; 79 Wash. 565; 81 Wash. 55, 274; 82 Wash. 53, 276, 279, 447, 449, 457; 84 Wash. 470, 547; 85 Wash. 661; 89 Wash. 317, 318; 92 Wash. 499; 93 Wash. 107; 94 Wash. 80, 81; 95 Wash. 74; 97 Wash. 214; 99 Wash. 71, 424; 102 Wash. 61, 72, 73, 105; 105 Wash. 57.

This section is not a limitation on the right of the state board of control to delegate to the architects the right to accept the building: *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446.

— **Necessity and Sufficiency of Notice of Claim Against Bond:** See *Remington's Digest*, *Mun. Corp.*, § 159-2; *Huggins v. Sutherland*, 39 Wash. 552, 82 Pac. 112; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106; *Gate City Lumber Co. v. Montesano*, 60 Wash. 586, 111 Pac. 799; *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382; *Crab Creek Lumber Co. v. Othello*, 81 Wash. 52, 142 Pac. 429; *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446; *Puget Sound*

State Bank v. Gallucci, 82 Wash. 445, 144 Pac. 698, *Ann. Cas.* 1916A, 767; *Carstens Packing Co. v. Empire State Surety Co.*, 84 Wash. 545, 147 Pac. 36; *Denny-Renton Clay & Coal Co. v. National Surety Co.*, 93 Wash. 103, 160 Pac. 1; *Title Guaranty & Surety Co. v. First National Bank of Hoquiam*, 94 Wash. 55, 162 Pac. 23; *Herren v. Kansas City Casualty Co.*, 94 Wash. 77, 162 Pac. 17; *Carstens Packing Co. v. Mitchell*, 95 Wash. 72, 163 Pac. 1; *Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co.*, 99 Wash. 68, 168 Pac. 1124; *Pearson v. Puget Sound Machinery Depot*, 99 Wash. 596, 169 Pac. 961; *Maryland Casualty Co. v. Hill*, 100 Wash. 289, 170 Pac. 594.

Actions on Bonds—In General: See *Remington's Digest*, *Mech. Liens*, § 111; *Crowley v. United States Fid. & Guar. Co.*, 29 Wash. 268, 69 Pac. 784; *Exposition Amusement Co. v. Empire State Surety Co.*, 49 Wash. 637, 96 Pac. 158; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158.

A materialman's right of action on a bond given under section 1159, is assignable: *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345; *Moody v. Westerman*, 13 Wash. 709, 43 Pac. 347.

An action on the bond of a contractor, given under section 1159, is not barred by the procuring of a judgment against the contractor personally prior to the institution of suit upon his bond: *Fischer v. Quigley*, 8 Wash. 327, 35 Pac. 1071.

A complaint against principal and sureties upon a contractor's bond given in compliance with section 1159, but which had not been signed by the principal, is not demurrable on the ground of misjoinder of parties defendant, for the reason that the obligations of the parties and the rights of the plaintiff are identical, although founded in the case of the principal on the contract, and in the case of the sureties upon the bond: *Eureka Sandstone Co. v. Long*, 11 Wash. 161, 39 Pac. 446.

See, also, *Remington's Digest*, States, §§ 20, 20-1; *State ex rel. Fairhaven Land Co. v. Cheetham*, 17 Wash. 131, 49 Pac. 227; *Union Iron Works v. Strauser*, 82 Wash. 51, 143 Pac. 446; *McGowan Brothers Hardware Co. v. Fidelity & Deposit Co.*, 84 Wash. 470, 147 Pac. 44; *Holly-Mason Hdw. Co. v. National Surety Co.*, 107 Wash. 74, 180 Pac. 901; *Wheeler, Osgood Co. v. Fidelity & Deposit Co.*, 78 Wash. 328, 139 Pac. 53; *Rodgers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444; *Title Guaranty & Surety Co. v. Coffman, Dobson & Co.*, 97 Wash. 211, 16 Pac. 620; *Crane Co. v. Maryland Casualty Co.*, 102 Wash. 59, 172 Pac. 866.

— **Actions on Municipal Bonds:** See *Remington's Digest*, Mun. Corp., § 159-1;

Maxon v. School District, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; *Fischer v. Quigley*, 8 Wash. 327, 35 Pac. 1071; *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345; *Moody v. Westerman*, 13 Wash. 709, 43 Pac. 347; *Spokane & Idaho Lumber Co. v. Boyd*, 28 Wash. 90, 68 Pac. 337; *Spokane v. Costello*, 33 Wash. 98, 74 Pac. 58; *American Mill Co. v. Montesano*, 63 Wash. 683, 116 Pac. 257; *Brown Brothers v. Columbia Irr. Dist.*, 82 Wash. 274, 144 Pac. 74; *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A, 767; *Maryland Casualty Co. v. Hill*, 100 Wash. 289, 170 Pac. 594.

See, also, *Ledingham v. Blaine*, 105 Wash. 253, 177 Pac. 783.

Actions upon Contractor's Bonds: See *Remington's Digest*, Schools, § 29; *Pacific Mfg. Co. v. School District*, 6 Wash. 121, 33-Pac. 68; *Maxon v. School District*, 5 Wash. 142, 31 Pac. 462, 32 Pac. 110; *Crane Co. v. Aetna Indemnity Co.*, 43 Wash. 516, 86 Pac. 849; *Sexton v. School District*, 9 Wash. 5, 36 Pac. 1052; *School District No. 75 of Pierce County v. Qualls*, 95 Wash. 247, 163 Pac. 761.

Rights and Remedies of Third Persons: See *Remington's Digest*, Mun. Corp., § 181; *Hambach v. Ward*, 69 Wash. 351, 125 Pac. 140; *Dixon v. Parker, Moran & Parker*, 102 Wash. 101, 172 Pac. 856.

See, also, *Allis-Chalmers Mfg. Co. v. Ellensburg*, 108 Wash. 533, 185 Pac. 811.

Right of subcontractor, materialman, or laborer to maintain action on bond taken for benefit of public. 49 L. B. A. (N. S.) 1175; Ann. Cas. 1916A, 758, 773.

§ 1161-1. Retroactive Effect Given Sections 1159 and 1161.

All bonds issued and given prior to June 12, 1915, which embody the terms and provisions prescribed and provided for and which conform to and comply with the terms and provisions of that certain act entitled, "An act relating to contractors and bonds upon public works, and amending sections 1159 and 1161 of *Remington & Ballinger's Annotated Codes and Statutes of Washington*," passed the House February 8, 1915, passed the senate February 24, 1915, and passed notwithstanding the governor's veto on March 3, 1915, shall have the same legal force and effect and be construed, and the rights and liabilities of all parties thereto and thereunder shall be the same as though the said act entitled, "An act relating to contractors and bonds upon public works, and amending section 1159 and 1161 of *Remington & Ballinger's Annotated Codes and Statutes of Washington*" had been in full force and effect at the time any such bond was given, and the courts of this state shall give to such bonds the same force and effect and no other or greater force and effect than would have been given had the said act entitled: "An act relating to contractors and bonds upon public works, and amending sections 1159 and 1161 of

Remington & Ballinger's Annotated Codes and Statutes of Washington'' been in force and effect at the time such bond was signed and given. [L. '15, p. 548, § 1]

Cited in 92 Wash. 499; 97 Wash. 218; 106 Wash. 263.

In a suit by a surety on a contractor's bond, to preserve the twenty per cent reserve provided for the protection of creditors, in which creditors are brought in and awarded judgment against the surety, attorney's fees cannot be allowed as provided for by this section in actions upon the contractor's bond, as the suit is not such an action: Maryland Casualty Co. v. Washington Nat. Bank, 92 Wash. 497, 159 Pac. 689.

One general notice of claim against two bonds of a contractor on county road work substantially complies with this sec-

tion, and is sufficient although it covers two contracts and bonds for distinct portions of the improvement, where the items charged against each project were segregated, all the parties were the same in each case, and the work was sublet to the claimant to be performed as a whole: Bishop v. Ryan Construction Co., 106 Wash. 254, 180 Pac. 126.

Such a claim is not rendered uncertain by acknowledgment of a cash payment without specifying its application; since the law would make the application pro rata: Bishop v. Ryan Construction Co., 106 Wash. 254, 180 Pac. 126.

CHAPTER VII.

LIENS UPON LOGS AND OTHER TIMBER.

§ 1162. Who may have Liens.

Every person performing labor upon, or who shall assist in obtaining or securing sawlogs, spars, piles, cordwood, shingle-bolts, or other timber, and the owner or owners of any tugboat, or towboat, which shall tow or assist in towing, from one place to another within this state, any sawlogs, spars, piles, cordwood, shingle-bolts, or other timber, and the owner or owners of any team or any logging engine, which shall haul or assist in hauling from one place to another within this state, any sawlogs, spars, piles, cordwood, shingle-bolts, or other timber, and the owner or owners of any logging or other railroad over which sawlogs, spars, piles, cordwood, shingle-bolts, or other timber shall be transported and delivered, shall have a lien upon the same for the work or labor done upon, or in obtaining, or securing, or for services rendered in towing, transporting, hauling, or driving, the particular sawlogs, spars, cordwood, shingle-bolts, or other timber in said claim of lien described, whether such work, labor or services was done, rendered or performed at the instance of the owner of the same or his agent. The cook in a logging camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned. [L. '07, p. 14, § 1. Cf. L. '60, p. 340, § 1; L. '77, p. 217, § 3; L. '79, p. 100, § 2; Cd. '81, § 1941; 1 H. C., § 1679; L. '93, p. 428, § 1; L. '95, p. 175, § 1.]

Cited in 5 Wash. 430, 431; 6 Wash. 343, 480, 481; 8 Wash. 469, 471; 10 Wash. 86; 11 Wash. 206, 691; 12 Wash. 340; 13 Wash. 161, 375; 14 Wash. 227; 20 Wash. 124, 593; 30 Wash. 460, 461; 45 Wash. 650, 652; 49 Wash. 396, 444; 59 Wash. 261; 64 Wash. 429, 430, 431; 67 Wash. 181; 94 Wash. 372; 101 Wash. 671, 672; 103 Wash. 366.

A statutory right of lien given loggers for labor in getting out logs becomes such a part of the contract for such labor as to be unaffected by the repeal of the statute pending the enforcement of

the lien: Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463; Hopkins v. Jamieson-Dixon Mill Co., 11 Wash. 308, 39 Pac. 815.

Property Subject: See Remington's Digest, Logs, § 22; Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Winsor v. Johnson, 5 Wash. 429, 32 Pac. 215; Overbeck v. Calligan, 6 Wash. 342, 33 Pac. 825; Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Hadlock v. Shumway, 11 Wash. 690, 40 Pac. 346; Forsberg v. Lundgren, 64 Wash. 427, 117 Pac. 244;

Douglass v. Woodbury Lumber Co., 101 Wash. 668, 172 Pac. 906.

Assignment of Lien: See Remington's Digest, Logs, § 23; Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Casey v. Ault, 4 Wash. 167, 29 Pac. 1048.

Services, Supplies or Advances: See Remington's Digest, Logs, § 23-1; Braeger

v. Bolster & Barnes, 60 Wash. 579, 111 Pac. 797; Hunt v. Panhandle Lumber Co., 66 Wash. 645, 120 Pac. 538; Akers v. Lord, 67 Wash. 179, 121 Pac. 51.

By whom and for what labor or service loggers' lien may be claimed. **Ann. Cas.** 1916C, 198; 6 **L. R. A.**, 362.

§ 1163. Lien on Lumber—Lumber, Defined.

Every person performing work or labor or assisting in manufacturing sawlogs and other timber into lumber and shingles, has a lien upon such lumber while the same remains at the mill where it was manufactured, or in the possession or under the control of the manufacturer, whether such work or labor was done at the instance of the owner of such logs or his agent or any contractor or subcontractor of such owner. The term lumber, as used in this chapter, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from sawlogs or other timber. [Cf. L. '77, p. 217, § 4; Cd. '81, § 1942; 1 H. C., § 1680; L. '93, p. 19, § 1; L. '93, p. 428, § 2.]

Cited in 11 Wash. 205, 691; 13 Wash. 161, 351, 375; 16 Wash. 696; 18 Wash. 269; 30 Wash. 460, 461; 49 Wash. 444; 64 Wash. 429, 430, 431; 67 Wash. 181; 91 Wash. 554, 556, 557, 559; 101 Wash. 671, 673.

PERSONS ENTITLED: See Remington's Digest, Logs, §§ 25—27.

§ 25. **In General:** Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Campbell v. Sterling Mfg. Co., 11 Wash. 204, 39 Pac. 451; Ryan v. Guilfoil, 13 Wash. 373, 43 Pac. 351; Munroe v. Sedro Lumber & Shingle Co., 16 Wash. 694, 48 Pac. 405; Judge v. Bay Mill Co., 18 Wash. 269, 51 Pac. 378; Cross v. Dore, 20 Wash. 121, 54 Pac. 1003; Blumauer v. Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; Robins v. Paulson, 30 Wash. 459, 70 Pac. 1113; O'Brien v. Perfection Pile Preserving Co., 49 Wash. 395, 95 Pac. 489; O'Connor v. Burnham, 49 Wash. 443, 95 Pac. 1013.

§ 26. — **Contractors:** Campbell v. Sterling Mfg. Co., 11 Wash. 204, 39

Pac. 451; O'Connor v. Burnham, 49 Wash. 443, 95 Pac. 1013.

§ 27. **Building Road or Passageway:** Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Duggan v. Washougal Land & Logging Co., 10 Wash. 84, 38 Pac. 856.

Waiver, Loss or Discharge: See Remington's Digest, Logs, §§ 37, 38; Campbell v. Vincent, 8 Wash. 650, 36 Pac. 685; Beal v. Nichols, 12 Wash. 157, 40 Pac. 789; Anderson v. Tingley, 24 Wash. 537, 64 Pac. 747, 85 Am. St. Rep. 595; Mariz v. Clevenger, 29 Wash. 395, 69 Pac. 1089; Hunt v. Panhandle Lumber Co., 66 Wash. 645, 120 Pac. 538. Loss of possession: Swartwood v. Red Star Shingle Co., 13 Wash. 349, 43 Pac. 21; Akers v. Lord, 67 Wash. 179, 121 Pac. 51; Du Bois Lumber Co. v. Dietderich, 97 Wash. 1, 165 Pac. 884.

LIEN WHILE "AT THE MILL": See Forsberg v. Lundgren, 64 Wash. 427, 117 Pac. 244; Vaughan v. Fifer, 91 Wash. 553, 158 Pac. 93.

§ 1164. Lien for Stumpage.

Any person who shall permit another to go upon his timber land and cut thereon sawlogs, spars, piles, or other timber, has a lien upon the same for the price agreed to be paid for such privilege, or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price. [Cf. L. '77, p. 217, § 5; Cd. '81, § 1943; 1 H. C., § 1681; L. '93, p. 429, § 3.]

§ 1165. Preferred Liens.

The liens provided for in this chapter are preferred liens and are prior to any other liens, and no sale or transfer of any sawlogs, spars, piles or other timber or manufactured lumber or shingles shall divest the lien thereon as herein provided, and as between liens provided for in this chapter those for work and labor shall be preferred: Provided, that as between liens for work and labor claimed by several laborers on the same logs or lot of logs the claim or claims for work or labor done or performed on the identical logs proceeded against to the extent that said logs can be identified, shall be preferred as against the general claim of lien for work and labor recognized and provided for in this chapter. [Cf. L. '77, p. 217, § 6; Cd. '81, § 1944; 1 H. C., § 1682; L. '93, p. 429, § 4.]

Cited in 14 Wash. 227; 20 Wash. 593.

Priorities: See Remington's Digest, Logs, § 36; Casey v. Ault, 4 Wash. 167, 29 Pac. 1048; Munholland v. Ault, 4

Wash. 170, 32 Pac. 294; Du Bois Lumber Co. v. Dietderich, 97 Wash. 1, 165 Pac. 884.

§ 1166. Limitation of Filing Lien for Labor.

The person rendering the service of [or] doing the work or labor named in sections 1162 and 1163 of this chapter is only entitled to the liens as provided herein for services, work or labor for the period of eight calendar months, or any part thereof next preceding the filing of the claim, as provided in section 1169 of this chapter. [Cf. L. '77, p. 217, § 7; Cd. '81, § 1945; 1 H. C., § 1683; L. '93, p. 429, § 5.]

"Section 1169" substituted for "section 8" of the act of 1893, while "section 7" [§ 1168, *infra*] was evidently intended.

§ 1167. Limitation of Filing Lien for Stumpage.

The person granting the privilege mentioned in section 1164 of this chapter is only entitled to the lien as provided therein for sawlogs, spars, piles and other timber cut during the eight months next preceding the filing of the claim, as herein provided in the next succeeding section of this chapter. [Cf. L. '77, p. 217, § 8; Cd. '81, § 1946; 1 H. C., § 1684; L. '93, p. 429, § 6.]

§ 1168. Filing of Claim for Labor, etc.

Every person within thirty days after the close of the rendition of the services, or after the close of the work or labor mentioned in the preceding sections (1162, 1163) claiming the benefit hereof, must file for record with the county auditor of the county in which such sawlogs, spars, piles and other timber were cut, or in which such lumber or shingles were manufactured, a claim containing a statement of his demand and the amount thereof, after deducting as nearly as possible all just credits and offsets, with the name of the person by whom he was employed, with a statement of the terms and conditions of his contract, if any, and in case there is no express contract, the claim shall state what such service, work or labor is reasonably worth; and it shall also contain a description of the property to be charged with the lien sufficient for identification with reasonable certainty, which claim must be verified by the oath of himself or

some other person to the effect that the affiant believes the same to be true, which claim shall be substantially in the following form:—

— Claimant, vs. —.

Notice is hereby given that — of — county, state of Washington, claims a lien upon a — of —, being about — in quantity, which were cut or manufactured in — county, state of Washington, are marked thus —, and are now lying in —, for labor performed upon and assistance rendered in — said —; that the name of the owner or reputed owner is —; that — employed said — to perform such labor and render such assistance upon the following terms and conditions, to wit:—

The said — agreed to pay the said — for such labor and assistance —; that said contract has been faithfully performed and fully complied with on the part of said —, who performed labor upon and assisted in — said — for the period of —; that said labor and assistance were so performed and rendered upon said —, between the — day of — and the — day of —; and the rendition of said service was closed on the — day of —, and thirty days have not elapsed since that time; that the amount of claimant's demand for said service is —; that no part thereof has been paid except —, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of —, in which amount he claims a lien upon said —. The said —, also claims a lien on all said — now owned by said — of said county to secure payment for the work and labor performed in obtaining or securing the said logs, spars, piles or other timber, lumber or shingles herein described.

State of Washington, } ss.
County of —, }

— being first duly sworn, on oath says that he is — named in the foregoing claim, has heard the same read, knows the contents thereof, and believes the same to be true.

Subscribed and sworn to before me this — day of —.

[Cf. L. '77, p. 217, § 9; L. '79, p. 100, § 4; Cd. '81, § 1947; 1 H. C., § 1685; L. '93, p. 429, § 7.]

Cited in 2 Wash. 167, 172; 14 Wash. 228; 20 Wash. 594; 29 Wash. 403; 40 Wash. 200.

PROCEDURE: See Remington's Digest, Logs, §§ 28—35.

Proceedings to Obtain or Perfect—Notice of Claim: Chevret v. Mechanics' Mill & Lumber Co., 4 Wash. 721, 31 Pac. 24; Winsor v. Johnson, 5 Wash. 429, 32 Pac. 215; Overbeck v. Calligan, 6 Wash. 342, 33 Pac. 825.

§ 29. — **Verification of Claim:** Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Duggan v. Washougal Land etc. Co., 10 Wash. 84, 38 Pac. 856.

§ 30. — **Construction of Notice or Demand—Description:** Wheeler v. Port

Blakeley Mill Co., 2 W. T. 71, 3 Pac. 635; Wheeler v. Port Blakeley Mill Co., 2 W. T. 71, 3 Pac. 898; Doyle v. McLeod, 4 Wash. 732, 31 Pac. 96; Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Dexter Horton & Co. v. Wiley, 2 Wash. 171, 25 Pac. 1071; Casey v. Ault, 4 Wash. 167, 29 Pac. 1048; Marlette v. Crawford, 17 Wash. 603, 50 Pac. 495.

§ 31. **Amount and Extent:** Dexter Horton & Co. v. Sparkman, 2 Wash. 165, 25 Pac. 1070; Wheeler v. Port Blakeley Mill Co., 2 W. T. 71, 3 Pac. 635; Baxter v. Smith, 2 W. T. 97, 4 Pac. 35; Howey v. Bingham, 14 Wash. 450, 44 Pac. 886.

§ 32. — **Claim for Nonlienable Items:** Proulx v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; Duggan v.

Washougal Land & Logging Co., 10 Wash. 84, 38 Pac. 856.

§ 33. — **Intermingled Logs:** Creighton v. Cole, 10 Wash. 472, 38 Pac. 1007.

§ 35. — **Time of Commencement and Duration:** Overbeck v. Calligan, 6 Wash. 342, 33 Pac. 825; Beal v. Nichols, 12 Wash. 157, 40 Pac. 789.

§ 1169. Filing of Claim for Stumpage.

Every person mentioned in section 1164 claiming the benefit thereof must file for record with the county auditor of the county in which such sawlogs, spars, piles, or other timber were cut, a claim in substance the same as provided in the next preceding section of this chapter and verified as therein provided. [Cf. L. '77, p. 218, § 10; Cd. '81, § 1948; 1 H. C., § 1686; L. '93, p. 431, § 8.]

§ 1170. Recording Claim.

The county auditor must record any claim filed under this act in a book kept by him for that purpose, which record must be indexed, as deeds and other conveyances are required by law to be indexed, and for which he may receive the same fees as are allowed by law for recording deeds and other instruments. [Cf. L. '77, p. 218, § 11; Cd. '81, § 1949; 1 H. C., § 1687; L. '93, p. 431, § 9.]

§ 1171. Limitation of Actions.

No lien provided for in this chapter binds any sawlogs, spars, piles or other timber, or lumber and shingles, for a longer period than eight calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court, within that time, to enforce the same: Provided, however, that in case such civil action so commenced should for any cause other than the merits, be nonsuited or dismissed, then the lien shall continue for the term of one calendar month, if the said eight months have expired, to permit the commencement of another action thereon, which shall be as effective in prolonging the lien as if it had been entered during the term of eight months hereinbefore stated. [Cf. L. '77, p. 218, § 12; L. '79, p. 100, § 5; Cd. '81, § 1950; 1 H. C., § 1688; L. '93, p. 431, § 10.]

Cited in 4 Wash. 169; 91 Wash. 509.

Time to Sue: See Remington's Digest, Logs, § 42; McQuesten v. Morrill, 12 Wash. 335, 41 Pac. 56; Grays Harbor

Boom Co. v. Lytle Logging etc. Co., 36 Wash. 151, 78 Pac. 795; McDermott v. Tolt Land Co., 101 Wash. 114, 172 Pac. 207.

§ 1172. Jurisdiction—Procedure.

The liens provided for in this chapter shall be enforced by a civil action in the superior court of the county wherein the lien was filed, and shall be governed by the laws regulating the proceedings in civil actions touching the mode and manner of trial, and the proceedings and laws to secure property so as to hold it for the satisfaction of any lien that be against it; except as hereinafter otherwise provided. [Cf. L. '97, p. 218, § 13; Cd. '81, § 1951; 1 H. C., § 1689; L. '93, p. 431, § 11.]

Cited in 6 Wash. 346; 20 Wash. 594; 59 Wash. 261.

ACTIONS FOR ENFORCEMENT: See Remington's Digest, Logs, §§ 39—46-1.

§§ 39, 40. — **Venue:** Overbeck v. Calligan, 6 Wash. 342, 33 Pac. 825; State ex rel. Port Blakely Mill Co. v. Superior Court, 9 Wash. 673, 38 Pac. 155.

§ 41. — **Right of Action and Defenses:** *Casey v. Ault*, 4 Wash. 167, 29 Pac. 1048.

§ 43. — **Parties:** *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Duggan v. Smith*, 27 Wash. 702, 68 Pac. 356; *Grimm v. Pacific Creosoting Co.*, 50 Wash. 415, 97 Pac. 297.

§ 44. — **Pleading:** *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Chevret v. Mechanics' Mill etc. Co.*, 4 Wash. 721, 31 Pac. 24; *Cady v. Case*, 11 Wash. 124, 39 Pac. 375; *McQuesten v. Morrill*, 12 Wash. 335, 41 Pac. 56; *Mason v. McGee*, 15 Wash. 272, 46 Pac. 237; *Cross v. Dore*, 20 Wash. 121, 54 Pac. 1003; *Duggan v. Smith*, 27 Wash. 702, 68 Pac. 356; *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752.

§ 45. — **Issues, Proof and Variance:**

Cowie v. Ahrenstedt, 1 Wash. 416, 25 Pac. 458; *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Marlette v. Crawford*, 17 Wash. 603, 50 Pac. 495.

§ 46. — **Evidence:** *Garneau v. Port Blakely Mill Co.*, 8 Wash. 467, 36 Pac. 463; *McPherson v. Smith*, 14 Wash. 226, 44 Pac. 255; *Mason v. McGee*, 15 Wash. 272, 46 Pac. 237; *Wishkah Boom Co. v. Greenwood Timber Co.*, 100 Wash. 472, 171 Pac. 234.

§ 46-1. — **Verdict and Findings:** *Forsberg v. Lundgren*, 64 Wash. 427, 117 Pac. 244; *Wishkah Boom Co. v. Greenwood Timber Co.*, 100 Wash. 472, 171 Pac. 234.

Appeal: See *Remington's Digest, Logs*, § 49; *McPherson v. Smith*, 14 Wash. 226, 44 Pac. 255; *Anderson v. Tingley*, 20 Wash. 592, 56 Pac. 371.

§ 1173. Sheriff as Receiver.

The sheriff of the county wherein the lien is filed shall be the receiver when one is appointed, and the superior court upon a showing made shall appoint such receiver without notice, who shall be allowed such fees as may seem just to the court, which fees shall be accounted for by such sheriff as other fees collected by him in his official capacity: Provided, that at any time when any property is in the custody of such sheriff under the provisions of this act, and any person claiming any interest therein, may deposit with the clerk of the court in which such action is pending, a sum of money in an amount equal to the claim sued upon, together with one hundred (\$100) dollars, to cover costs and interest, (unless the court shall make an order fixing a different amount to cover such costs and interest, then such an amount as the court shall fix to secure such costs and interest, which such action is being prosecuted) and shall have the right to demand and receive forthwith from such sheriff the possession and custody of such property: Provided, that in no action brought under the provisions of this act shall costs be allowed to lienholders unless a demand has been made for payment of his lien claim before commencement of suit, unless the court shall find the claimants at time of bringing action had reasonable ground to believe that the owner or the person having control of the property upon which such lien is claimed was attempting to defraud such claimant, or prevent the collection of such lien. [L. '93, p. 432, § 12; L. '99, p. 143, § 1.]

Cited in 8 Wash. 475; 20 Wash. 594; 26 Wash. 660; 51 Wash. 600; 89 Wash. 628.

Necessity of demand for payment before suit: See *Fraser v. Rutherford*, 26 Wash. 658, 67 Pac. 366.

Under this section demand before the filing of the lien will entitle the claimant to costs: *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752.

Costs and Attorney's Fees: See *Remington's Digest, Logs*, § 48; *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467; *Fraser v. Rutherford*, 26 Wash. 658, 67 Pac. 366; *Grimm v. Pacific Creosoting Co.*, 50 Wash. 415, 97 Pac. 297; *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752.

§ 1174. Answer of Defendant—Hearing.

If the defendant or defendants appear in a suit to enforce any lien provided by this chapter he or they shall make their answer on the merits of the complaint, and any motion or demurrer against the said complaint must be filed with the answer; and no motion shall be allowed to make complaint more definite and certain, if it appear to the court that the defendant or defendants have or should have knowledge of the facts, or that it can be made more certain and definite by facts which will appear necessarily in the testimony; but the case, unless the court sustains the demurrer to the complaint, shall be heard on the merits as speedily, as possible, and amendments of the pleadings, if necessary, shall be liberally allowed. [L. '93, p. 432, § 13.]

Cited in 13 Wash. 159; 29 Wash. 404.

In loggers' lien complaint where the claim of each plaintiff is separately pleaded, if any of the causes of action are well pleaded a general demurrer to the complaint for want of sufficient facts should be overruled: *Chevret v. Mechanics' Mill & Lbr. Co.*, 4 Wash. 721, 31 Pac. 24.

An answer setting up a tender "at the time of the filing of the lien" and plaintiff's failure to make a demand before such filing, dispenses with plaintiff's proof of the filing of the lien, which defendant had denied on information and belief: *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752.

§ 1175. Enforcement of Lien Against Whole or Part.

Any person who shall bring a civil action to enforce the lien herein provided for, or any person having a lien as herein provided for, who shall be made a party to any such civil action, has the right to demand that such lien be enforced against the whole or any part of the sawlogs, spars, piles or other timber or manufactured lumber or shingles upon which he has performed labor or which he has assisted in securing or obtaining, or which he has cut on his timber land during the eight months next preceding the filing of his lien, for all his labor upon or for all his assistance in obtaining or securing said logs, spars, piles or other timber, or in manufacturing said lumber or shingles during the whole or any part of the eight months mentioned in section 1168, or for timber cut during the whole or any part of the eight months above mentioned. And where proceedings are commenced against any lot of sawlogs, spars, piles or other timber or lumber or shingles as herein provided, and some of the lienors claim liens against the specific logs, spars, piles or other timber or lumber or shingles proceeded against, and others against the same generally, to secure their claims for work and labor, the priority of the liens shall be determined as hereinbefore provided. [Cf. L. '77, p. 218, § 14; Cd. '81, § 1952; 1 H. C., § 1690; L. '93, p. 432, § 14.]

"Section 1168" substituted for "section 7" of the act of 1893, while "section 5" [§ 1166, supra] was evidently intended.

Cited in 6 Wash. 480, 481; 20 Wash. 594; 27 Wash. 110; 91 Wash. 559.

Lien on Part of Logs for Work Done on Whole, or Vice Versa: See Remington's Digest, Logs, § 34; *Doyle v. McLeod*, 4 Wash. 732, 31 Pac. 96; *Proulx*

v. Stetson & Post Mill Co., 6 Wash. 478, 33 Pac. 1067; *McPherson v. Smith*, 14 Wash. 226, 44 Pac. 255; *Grimm v. Pacific Creosoting Co.*, 50 Wash. 415, 97 Pac. 297; *Vaughan v. Fifer*, 91 Wash. 553, 158 Pac. 93.

§ 1176. Errors not to Invalidate Lien, When.

No mistake or error in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance asserted to be due to

claimant, nor in the description of the property against which the claim is filed, shall invalidate the lien, unless the court finds that such mistake or error in the statement of the demand, credits and offsets or of the balance due was made with intent to defraud, or the court shall find that an innocent third party without notice, direct or constructive, has, since the claim was filed, become the bona fide owner of the property lienied upon. and that the notice of claim was so deficient that it did not put the party upon further inquiry, in any manner. [L. '93, p. 433, § 15.]

Cited in 17 Wash. 605; 27 Wash. 107; 29 Wash. 404; 36 Wash. 154; 40 Wash. 201.

See *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599; *Maris v. Clevenger*, 29 Wash. 395, 69 Pac. 1089.

Amendments and Immaterial Defects:

§ 1177. Innocent Third Party, Who is.

It shall be conclusively presumed by the court that a party purchasing the property lienied upon within thirty days given herein to claimants wherein to file their liens, is not an innocent third party, nor that he has become a bona fide owner of the property lienied upon, unless it shall appear that he has paid full value for the said property, and has seen that the purchase money of the said property has been applied to the payment of such bona fide claims as are entitled to liens upon the said property under the provisions of this chapter, according to the priorities herein established. [L. '93, p. 433, § 16.]

Cited in 27 Wash. 107; 40 Wash. 201; 89 Wash. 313; 97 Wash. 5, 6; 101 Wash. 671, 672.

Persons Liable: See *Remington's Digest*, Logs. § 24; *Proulx v. Stetson & Post Mill Co.*, 6 Wash. 478, 33 Pac. 1067; *Duggan v. Washougal Land etc. Co.*, 10 Wash. 84, 38 Pac. 856; *McCoy v. Spithill*, 13 Wash. 158, 42 Pac. 546; *Livingstone v. Lovgren*, 27 Wash. 102, 67 Pac. 599; *Douglass v. Woodbury Lumber Co.*, 101 Wash. 668, 172 Pac. 906.

The latter part of this section is not open to objection that it seeks, without due process of law, to dispose of the purchase money, and vest in the buyer the authority to apply it to such claims as he may see fit to consider bona fide

and entitled to liens on the property sold, in violation of the constitution, article I, §§ 3—16: *McCoy v. Spithill*, 13 Wash. 158, 42 Pac. 546.

Under this section, mortgagees taking the crop after the adjudication of the lien, although without actual notice of it, take subject to all the rights of the lienholder, and are liable for the amount of the lien: *Hubbard v. Johnson*, 89 Wash. 310, 154 Pac. 457, Ann. Cas. 1918C, 84.

In such case, it is immaterial whether the action be one to foreclose the lien or recover damages for destroying or confusing the identity of the crop: *Hubbard v. Johnson*, 89 Wash. 310, 154 Pac. 457, Ann. Cas. 1918C, 84.

§ 1178. Joinder—Costs.

Any number of persons claiming liens under this chapter may join in the affidavit in section 1168 provided, and may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing, making and recording the claim, and a reasonable attorney's fee for each person claiming a lien. [L. '01, p. 20, § 1. Cf. L. '77, p. 219, § 15; Cd. '81, § 1953; 1 H. C., § 1691; L. '93, p. 433, § 17.]

Cited in 4 Wash. 722; 10 Wash. 174; 16 Wash. 416; 17 Wash. 647.

The joinder of several claimants' liens in one notice of lien, where the character of the claims is the same, the property

is proceeded against and each claim is separately stated, as authorized by section 1691, 1 Hill's Code, which provides for the joinder in one action of foreclosure by persons claiming liens against

the same property: *Chevret v. Mechanics' Mill & Lbr. Co.*, 4 Wash. 721, 31 Pac. 24.

Where a number of loggers have filed liens on a certain boom of logs they may all join in the action: *Peterson v. Say-*

ward, 9 Wash. 503, 37 Pac. 657; and damages may be recovered in the lien foreclosure or by separate action: *Id.*

As to attorney's fees in cases of joinder of action: See *Ivall v. Willis*, 17 Wash. 645, 50 Pac. 467.

§ 1179. Judgment, Enforcement of.

In each civil action judgment must be rendered in favor of each person having a lien for the amount due to him, and the court or judge thereof shall order any property subject to the lien herein provided for to be sold by the sheriff of the proper county in the same manner that personal property is sold on execution, and the court or judge shall apportion the proceeds of such sale to the payment of each judgment, according to the priorities established in this act pro rata in its class according to the amount of such judgment. [Cf. L. '77, p. 219, § 16; Cd. '81, § 1954; 1 H. C., § 1692; L. '93, p. 434, § 18.]

Cited in 59 Wash. 261.

Judgment: See *Remington's Digest*, Logs, § 47; *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Winsor v. Johnson*, 5 Wash. 429, 32 Pac. 215; *Garneau v. Port Blakely Mill Co.*,

8 Wash. 467, 36 Pac. 463; *Grays Harbor Boom Co. v. Lytle Log etc. Co.*, 36 Wash. 151, 78 Pac. 795; *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Wishkah Boom Co. v. Greenwood Timber Co.*, 100 Wash. 472, 171 Pac. 234.

§ 1180. Sale as Personalty.

The court or judge may order any property subject to a lien as in this chapter provided to be sold by the sheriff as personal property is sold on execution either before or at the time judgment is rendered, as provided in section next preceding, and the proceeds of such sale must be paid into court, to be applied as in said section directed. [Cf. L. '77, p. 219, § 17; Cd. '81, § 1955; 1 H. C., § 1693; L. '93, p. 434, § 19.]

§ 1181. Damages for Eloigning or Removing Marks, etc.—Recoverable, When.

Any person who shall eloin, injure or destroy, or who shall render difficult, uncertain or impossible of identification any sawlogs, spars, piles, shingles or other timber upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the amount secured by his lien, and it being shown to the court in the civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment for the amount in such action against the said person, provided he be a party to such action, or the damages may be recovered by a civil action against such person. [Cf. L. '77, p. 219, § 18; Cd. '81, § 1956; 1 H. C., § 1694; L. '93, p. 434, § 20.]

Cited in 5 Wash. 383; 8 Wash. 475, 578; 9 Wash. 505, 506; 12 Wash. 37; 27 Wash. 109; 50 Wash. 416; 67 Wash. 182; 89 Wash. 312, 313; 101 Wash. 671, 672.

ACTIONS FOR REMOVAL, DESTRUCTION OR INJURY TO LOGS OR LUMBER—Right of Action in General: See *Remington's Digest*, Logs, § 50; *Tom v.*

Sayward, 5 Wash. 383, 31 Pac. 976; *Peterson v. Sayward*, 9 Wash. 503, 37 Pac. 657; *McCoy v. Spithill*, 13 Wash. 158, 42 Pac. 546.

— **Defenses:** See *Remington's Digest*, Logs, §§ 24, 51; *Peterson v. Sayward*, 9 Wash. 503, 37 Pac. 657; *O'Connor v. Burnham*, 49 Wash. 443, 95 Pac. 1013; *Akers*

v. Lord, 67 Wash. 179, 121 Pac. 51; Douglass v. Woodbury Lumber Co., 101 Wash. 668, 172 Pac. 906.

Parties: See Remington's Digest, Logs, § 52: Singer v. Wallace, 8 Wash. 576, 36 Pac. 466; Peterson v. Sayward, 9 Wash. 503, 37 Pac. 657; Garneau v. Port Blakely Mill Co., 20 Wash. 97, 54 Pac. 771.

— **Pleading and Evidence:** See Remington's Digest, Logs, § 53; Peterson v. Sayward, 9 Wash. 503, 37 Pac. 657; Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599.

— **Verdict and Judgment:** See Rem-

ington's Digest, Logs, § 54; Livingstone v. Lovgren, 27 Wash. 102, 67 Pac. 599; Shields v. Doty Lumber & Shingle Co., 48 Wash. 679, 94 Pac. 644.

See, also, Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

Appeal: An action for eloignment is an action at law substantially for damages, as no foreclosure of the lien is sought, and no appeal lies if the amount in controversy is less than \$200: Tom v. Sayward, 5 Wash. 383, 31 Pac. 976; Chapin v. Kenoyer, 12 Wash. 536, 41 Pac. 916; Durand v. Simpson Logging Co., 21 Wash. 21, 56 Pac. 846.

CHAPTER VIII.

LIENS ON STEAMERS, BOATS, ETC.

§ 1182. Vessels, etc., Liable for Liens.

All steamers, vessels and boats, their tackle, apparel and furniture, are liable—

1. For service rendered on board at the request of, or under contract with, their respective owners, charterers, masters, agents or consignees.

2. For work done or material furnished in this state for their construction, repair or equipment at the request of their respective owners, charterers, masters, agents, consignees, contractors, subcontractors, or other person or persons having charge in whole or in part of their construction, alteration, repair or equipment; and every contractor, builder or person having charge, either in whole or in part, of the construction, alteration, repair or equipment of any steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter, and for supplies furnished in this state for their use, at the request of their respective owners, charterers, masters, agents or consignees, and any person having charge, either in whole or in part, of the purchasing of supplies for the use of any such steamer, vessel or boat, shall be held to be the agent of the owner for the purposes of this chapter.

3. For their wharfage and anchorage within this state.

4. For nonperformance or malperformance of any contract for the transportation of persons or property between places within this state, or to or from places within this state, made by their respective owners, masters, agents or consignees.

5. For injuries committed by them to persons or property within this state, or while transporting such persons or property to or from this state. Demands for these several causes constitute liens upon all steamers, vessels and boats, and their tackle, apparel and furniture, and have priority in the order of the subdivisions hereinbefore enumerated, and have preference over all other demands; but such liens continue in force only for a period of three years from the time the cause of action accrued. [L. '01, p. 21, § 1. Cf. L. '58, p. 29, § 1; L. '77, p. 216, § 1; Cd. '81, § 1939; 1 H. C., § 1678.]

Cited in 1 Wash. 612, 615; 3 Wash. 586; Wash. 478, 480; 107 Wash. 621; 108 Wash. 47 Wash. 422; 51 Wash. 87; 56 Wash. 582; 667; 113 Wash. 518, 519.
57 Wash. 553; 68 Wash. 54, 55, 57, 58; 94

Section 1133, *supra*, providing for duplicate statements to the owners of all material or supplies for which a mechanic's lien is claimed, did not impliedly repeal the provisions of sections 1182, 1183: *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993.

Vessels and Other Property Subject to Lien and Ownership: See *Remington's Digest*, Mar. Liens, §§ 6, 7, 9; *Callahan v. Aetna Indemnity Co.*, 33 Wash. 583, 74 Pac. 693; *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 Pac. 815; *Thompson v. Allen*, 56 Wash. 582, 106 Pac. 173, 134 Am. St. Rep. 1124.

See, also, *Erickson v. Perico*, 113 Wash. 510, 194 Pac. 963.

This section gives a lien for damages by a vessel to the pier of a bridge: *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324.

Proceedings to Perfect Statutory Lien:

See *Remington's Digest*, Mar. Liens, § 10; *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993.

See, also, *Erickson v. Perico*, 113 Wash. 510, 194 Pac. 963.

Waiver, Loss or Discharge: See *Remington's Digest*, Mar. Liens, § 11; *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 Pac. 815.

Under Maritime Law: See *Remington's Digest*, Mar. Liens, §§ 1—4; *Price v. Frankel*, 1 W. T. 33; *Waddell v. Steamer Daisy*, 2 W. T. 76, 3 Pac. 616.

A contract to build a vessel not being a maritime contract, the foreclosure of liens therefor under this section is not within the jurisdiction of admiralty, and is properly brought against a foreign owner in a state court: *Siler Mill Co. v. Nelson Co.*, 94 Wash. 477, 162 Pac. 590.

Lien for construction of vessel. *Ann. Cas.* 1915D, 47, 54.

§ 1183. Enforcement of Liens.

Such liens may be enforced, in all cases of maritime contracts or service, by a suit in admiralty, in rem, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime, by a civil action in any district court of this territory. [L. '77, p. 216, § 2; Cd. '81, § 1940.]

Cited in 47 Wash. 422; 56 Wash. 583; 68 Wash. 54, 58; 108 Wash. 667.

Statutory Remedies—Retention of Possession: See *Remington's Digest*, Mar. Liens, § 15; *Fairbanks-Morse Co. v. Union Bank & Trust Co.*, 55 Wash. 538, 104 Pac. 815.

Enforcement—Nature and Jurisdiction: See *Remington's Digest*, Mar. Liens, §§ 12, 13; *Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *McCreery v. Carter*, 73 Wash. 394, 131 Pac. 1125.

The court, in virtue of its inherent equity power, has jurisdiction, in a pending action to foreclose liens for the construction of a ship, to release the property and substitute therefor a deposit of

money or a bond; this section simply providing that the liens may be foreclosed in a civil action, and being silent as to the matter of substitution of security: *State ex rel. Eureka Cedar Lumber & Shingle Co. v. Superior Court*, 107 Wash. 620, 182 Pac. 607.

Decree: See *Remington's Digest*, Mar. Liens, §§ 14, 16; *Thompson v. Allen*, 56 Wash. 582, 106 Pac. 173, 134 Am. St. Rep. 1124; *McCreery v. Carter*, 73 Wash. 394, 131 Pac. 1125; *Kalbgilbert Lumber Co. v. Cram*, 60 Wash. 664, 111 Pac. 1050.

Exclusive or Concurrent Jurisdiction: *West v. Martin*, 47 Wash. 417, 92 Pac. 334.

§ 1184. Liens for Services of Stevedores.

All steamers, vessels and boats, their tackle, apparel and furniture shall be held liable at all ports and places within this state or within the jurisdiction of the courts of this state or within the jurisdiction of the courts of the United States in said state for services rendered by stevedores, longshoremen or others engaged in the loading, unloading, stowing or dunnaging of cargo in or from any steamer, vessel or boat in any harbor or at any other place within said state, or within the jurisdiction of the courts thereof as above stated, and said steamers, vessels and boats shall further be liable as per their contracts for all services performed upon wharfs or landing places by stevedores, longshoremen or others: Pro-

vided, that such services must have been so performed in and about and be connected with the loading, unloading, dunnaging or stowing of said cargo. [L. '01, p. 136, § 1.]

§ 1185. Priority.

Demands for wages and all sums due under contracts or otherwise for the performance of all or any of the services mentioned in the last preceding section shall constitute liens upon all steamers, vessels and boats, their tackle, apparel and furniture, and shall have priority over all other demands save and excepting the demands mentioned in the first three subdivisions of section 1182, supra, to which said demands the lien hereby provided shall be subordinate: Provided, that such liens shall only continue in force for the period of three years from the date when such work was done or the last services performed by such stevedores, longshoremen or others. [L. '01, p. 137, § 2.]

§ 1186. Suits in Rem.

The liens hereby created may be enforced by a suit, in rem, and the law regulating like proceedings shall govern in all such suits. [L. '01, p. 137, § 3.]

§ 1187. Liens for Towage and Dunnage.

Whenever the owner, charterer, or any person or corporation operating, managing or controlling any steamship, vessel or boat shall willfully fail, neglect or refuse to carry out or perform any express contract or portion thereof for the towing, loading, unloading, dunnaging or stevedoring of such steamship, vessel or boat, any person or persons, firm or corporation sustaining thereby any loss or damage which is capable of definite ascertainment shall have a lien upon such steamship, vessel or boat for said loss or damage. The rank and priority of the lien hereby created and the manner of its enforcement shall be fixed, controlled and regulated by the provisions of the existing law pertaining to liens for similar services already performed. [L. '03, p. 286, § 1.]

CHAPTER IX.

LIENS ON FARM PRODUCTS.

§ 1188. Farm Laborers' and Landlords' Liens.

Any person who shall do labor upon any farm or land, in tilling the same or in sowing or harvesting or threshing any grain, as laborer, contractor, or otherwise, or laboring upon, or securing or assisting in securing or housing any crop or crops sown, raised, or threshed thereon during the year in which said work or labor was done, such person shall have a lien upon such crops as shall have been raised upon all or any of such land, for such work or labor, and every landlord shall have a lien upon the crops grown or growing upon the demised lands of any year for the rents accrued or acquiring for such year, whether the same is paid wholly or in part in money or specific articles of property, or products of the premises, or labor, and also for the faithful performance of the lease: and the lien created by the provisions of this section shall be a preferred lien, and shall

be prior to all other liens. [Cf. L. '79, p. 150, § 1; Cd. '81, § 1975; L. '86, p. 114, § 1; L. '91, p. 144, § 1; 1 H. C., § 1695.]

Liens on orchards, see *supra*, §§ 1131-1—1131-3.

Liens of employees, see *supra*, § 1149.

Cited in 10 Wash. 174; 14 Wash. 624, 625; 40 Wash. 201; 59 Wash. 679; 89 Wash. 312, 314; 95 Wash. 642; 103 Wash. 366.

Agricultural Liens: See Remington's Digest, Agri., §§ 4—6. In general: Essency v. Essency, 10 Wash. 375, 38 Pac. 1130; Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

§ 5. — **Right to Lien:** Mohr v. Clark, 3 W. T. 440, 19 Pac. 28; Essency v. Essency, 10 Wash. 375, 38 Pac. 1130; Hubbard v. Johnson, 89 Wash. 310, 154 Pac. 457, Ann. Cas. 1918C, 84.

§ 6. — **Waiver and Release:** Hogue v. Sheriff of Lewis County, 1 W. T. 172.

Subject Matter to Which Landlord's

Lien Attaches: See Remington's Digest, Land. & Ten., § 118; McLeod v. Russell, 59 Wash. 676, 110 Pac. 626.

Proceedings to Perfect: See Remington's Digest, Agri., § 7; Pain v. Isaacs, 10 Wash. 173, 38 Pac. 1038; Dexter v. Olsen, 40 Wash. 199, 82 Pac. 286.

— **Priorities:** See Remington's Digest, Agri., § 8; Hogue v. Sheriff of Lewis County, 1 W. T. 172; Pain v. Isaacs, 10 Wash. 173, 38 Pac. 1038; Sitton v. Dubois, 14 Wash. 624, 45 Pac. 303.

Right of farm laborer to lien on crops. 20 Ann. Cas. 356.

Who is "farm laborer" within statute giving lien. 19 L. E. A. (N. S.) 1039; L. E. A. 1917D, 382.

§ 1189. Priority of Liens.

The liens provided for in the last section are preferred liens, and are prior to any other liens or encumbrance upon said crop or crops, except that the interest of any lessor in any portion of the crop raised where the premises are leased in consideration of a share of the crop raised, shall not be subject to such lien. [L. '79, p. 150, § 2; Cd. '81, § 1976; L. '83, p. 45, § 5.]

Cited in 91 Wash. 509.

§ 1190. Time for Filing—Lien for Rents—How Enforced.

Any person claiming the benefit of this chapter must, within forty days after the close of said work and labor, or after the expiration of the term, or after the expiration of each year of the lease, for which any lands were demised, file for record with the county auditor of the county in which said work and labor was performed, or said demised lands are situated, a claim which shall be in substance in accordance with the provisions of section 1168, so far as the same may be applicable, which said claim shall be verified as in said section provided, and said liens may be enforced in a civil action in the same manner, as near as may be, as provided in section 1172: Provided, that the lien hereby created in favor of landlords for rents shall apply when the lease has been recorded, and the recording of the lease shall dispense with the necessity of filing or recording any other notice or claim of lien for rents during the leasehold period. Any claim for damages to the landlord for failure of faithful performance of the lease must be filed and recorded at the time and in the manner heretofore specified. [L. '19, p. 521, § 1. Cf. L. '79, p. 150, § 3; Cd. '81, § 1977; L. '86, p. 115, § 2; L. '88, p. 130, § 1; 1 H. C., § 1696.]

Cited in 11 Wash. 174; 59 Wash. 680; 89 Wash. 312.

Under this section giving farm laborers liens, all may join in filing claims, but the verification may be made by one of the number: Pain v. Isaacs, 10 Wash. 173, 38 Pac. 1038.

A notice of lien describing products as eight hundred and fifty sacks of wheat raised on certain described premises, without locating or describing the sacks, is insufficient, and cannot be amended: Dexter v. Olsen, 40 Wash. 199, 82 Pac. 286.

Under the statute requiring a notice of lien on farm crops to contain a description of the property to be charged [see supra, § 1168], sufficient for identification, lien claims upon a crop of wheat are insufficient where the only description of the subject matter was the legal description of the land and a "certain crop" grown thereon: *Northwestern Grain Co. v. Kerr Gifford Warehouse Co.*, 76 Wash. 689, 136 Pac. 1154.

Evidence held insufficient to sustain

findings that laborers' contracts to clear land had been fully performed and that they quit work because ordered to do so: *Zizich v. Holman Security Inv. Co.*, 77 Wash. 392, 137 Pac. 1028, 139 Pac. 57.

Under this section a lien may be filed after the rent has accrued not later than the time fixed, and is not void as premature because filed before the expiration of the year: *McLeod v. Russell*, 59 Wash. 676, 110 Pac. 626.

§ 1190a. Provisions Extended to Farm Laborers.

All rights secured to the holders of liens upon logs, under the provisions of chapter VII, shall inure to the benefit of those holding liens under the provisions of this chapter, and the said lienholders hereunder, shall have the same right to have their liens recorded, the same right of foreclosure, of joinder of parties, of judgment over against the person primarily liable, and against any person who shall injure or impair their lien or any of their rights, as are above secured to the holders of liens upon logs, under said chapter VII. [Cd. '81, § 1978.]

"This chapter" in the Code of 1881 included chapters IX, XIV and XV of this Title; but this section relates only to chapter IX.

Cited in 89 Wash. 312; 91 Wash. 509; 103 Wash. 366.

This section was omitted from Hill's compilation by mistake, and is still law,

and, upon foreclosure, an attorney's fee may be allowed each claimant: *Pain v. Isaacs*, 10 Wash. 173, 38 Pac. 1038.

CHAPTER X.

LIENS FOR STORAGE AND ADVANCE CHARGES.

§ 1191. When Lien Exists.

Whenever property upon which charges for advances, freight, transportation, wharfage, or storage, due and unpaid, and a lien shall remain and be held in store by the person or persons in whose favor such lien exists uncalled for, it shall be lawful for such person or persons to cause such property to be sold as is herein provided. [Cd. '81, § 1980; 1 H. C., § 1699.]

CHARGES AND LIENS: See Remington's Digest, Carr., §§ 44, 45. Rights of connecting carriers: *Moses v. Port Townsend etc. R. Co.*, 5 Wash. 595, 32 Pac. 488.

§ 45. Lien for Charges: *Moses v. Port Townsend etc. R. Co.*, 5 Wash. 595, 32

Pac. 488; *Koyukuk Mining Co. v. Van De Venter*, 30 Wash. 385, 70 Pac. 966; *Andrus v. Columbia & Okanogan Steamboat Co.*, 47 Wash. 333, 92 Pac. 128.

Maritime liens for advances. 70 L. R. A. 367, 414, 439.

§ 1192. Sale of Livestock, etc. for Charges.

If said property consists of livestock, the maintenance of which at the place where kept is wasteful and expensive in proportion to the value of the animals, or other of the perishable property liable, if kept, to destruction, waste, or great depreciation, the person or persons having such lien may sell the same upon giving ten days' notice. [Cd. '81, § 1981; 1 H. C., § 1700; see L. '63, p. 421, § 2.]

§ 1193. Sale of Other Property.

All other property upon which such charges may be unpaid, due, and a lien, after the same shall have remained in store uncalled for for a period of thirty days after such charges shall have become due, may be sold by the person or persons having a lien for the payment of such charges upon giving ten days' notice: Provided, that where the property can be conveniently divided into separate lots or parcels, no more lots or parcels shall be sold than shall be sufficient to pay the charges due on the day of sale, and the expenses of the sale. [Cd. '81, § 1982; 1 H. C., § 1701.]

§ 1194. Application of Proceeds of Sale.

The moneys arising from sales made under the provisions of this chapter shall first be applied to the payment of the costs and expenses of the sale, and then to the payment of the lawful charges of the person or persons having a lien thereon for advances, freight, transportation, wharfage, or storage, for whose benefit the sale shall have been made; the surplus, if any, shall be retained, subject to the future lawful charge of the person or persons for whose benefit the sale was made, upon the property of the same owner still remaining in store uncalled for, if any there be, and to the demand of the owner of the property who shall have paid such charges or otherwise satisfied such lien, and all moneys remaining uncalled for, for the period of three months, shall be paid to the county treasurer, and shall remain in his hands a special fund for the benefit of the lawful claimant thereof. [Cd. '81, § 1983; 1 H. C., § 1702.]

Cited in 30 Wash. 391.

Where a carrier has sold goods for a sum in excess of its lien for freight and wharfage charges, the court may properly order the excess turned over to the

county treasurer, under this section, subject to the order of the party entitled thereto: Koyukuk Mining Co. v. Van De Vanter, 30 Wash. 385, 70 Pac. 966.

§ 1195. Special Contract not Affected.

Nothing in this chapter contained shall be so construed as to alter or affect the terms of any special contract in writing, made by the parties, as to the advances, affreightment, wharfage, or storage; but when any such special contract shall have been made, its terms shall govern, irrespective of this chapter. [Cd. '81, § 1984; 1 H. C., § 1703.]

§ 1196. Notices, How Given.

All notices required under this chapter shall be given as is or may be by law provided in cases of sales of personal property upon execution. [Cd. '81, § 1985; 1 H. C., § 1704.]

CHAPTER XI.**LIENS FOR KEEPING LIVESTOCK.****§ 1197. Creation of Lien.**

Any farmer, ranchman, herder of cattle, tavern-keeper, livery and boarding-stable keeper or any other person, to whom any horses, mules, cattle or sheep shall be intrusted for the purpose of feeding, herding, pasturing, and training, caring for or ranching, shall have a lien upon said horses, mules, cattle or sheep for such amount that may be due for

said feeding, herding, pasturing, training, caring for, and ranching, and shall be authorized to retain possession of said horses, mules or cattle or sheep, until said amount is paid. [L. '09, p. 636, § 1. Cf. L. '91, p. 151, § 1; 1 H. C., § 1705.]

Cited in 10 Wash. 28; 12 Wash. 46; 36 Wash. 129; 59 Wash. 355, 356; 95 Wash. 640, 641.

This section was not intended to have any retroactive effect: *National City Bank v. Henderson*, 59 Wash. 354, 109 Pac. 1038.

Agister's Lien for Keeping Stock: See *Remington's Digest, Animals*, § 3; *Murray v. Guse*, 10 Wash. 25, 38 Pac. 753; *Hooker v. McAllister*, 12 Wash. 46, 40 Pac. 617;

National City Bank v. Henderson, 59 Wash. 354, 109 Pac. 1038; *Donofrio v. Watson Brothers*, 83 Wash. 41, 145 Pac. 75.

Lien on animals for cost of keeping: 6 L. R. A. 82; 17 L. R. A. 792.

Priority between agister's lien and chattel mortgage. 11 Ann. Cas. 1043; Ann. Cas. 1914B, 316; 17 L. R. A. 792.

§ 1198. Enforcement.

Any person having a lien under the provisions of the last preceding section may enforce the same by an action in any court of competent jurisdiction; and said property may be sold on execution for the purpose of satisfying the amount of such judgment and costs of sale, together with the proper costs of keeping the same up to the time of said sale. [L. '91, p. 151, § 2; 1 H. C., § 1706.]

The "last preceding section" applies to the act of 1891, page 151, § 1, which expressly excepted "stolen stock" from liens for keeping, and omitted the words "any other person." Otherwise it was the same as § 1197.

Cited in 36 Wash. 129.

§ 1199. Possession to Secure Lien—Sale—Notice.

Any person having a lien under the provisions of section 1197 for feeding, herding, pasturing, training, caring for, or ranching any horses, mules, cattle or sheep, shall retain such animal for a period of ten (10) days, at the expiration of which time, if the owner of such animal does not satisfy such lien, the sheriff or any constable may sell such animal at public auction after giving the owner ten days' notice of the time and place of such sale by delivering a copy of such notice to the owner, or in case personal service cannot be had, by publishing same in a newspaper of general circulation in said county where said feeding, herding, pasturing, training, caring for, and ranching was furnished; if there be no paper of general circulation in said county, then by posting notices of the time and place of such sale in three conspicuous places in said county, and after satisfying the lien and costs that may accrue, any residue remaining shall be paid to the owner of said animal or person who may be lawfully entitled to the same. [L. '09, p. 636, § 2.]

Cited in 59 Wash. 365; 95 Wash. 640.

§ 1200. No Waiver by Delivery—Action to Enforce.

Whenever any horses, mules, cattle or sheep shall be intrusted for the purpose of feeding, herding, pasturing, training, caring for, and ranching to any farmer, ranchman, herder of cattle, tavern-keeper, livery or boarding-stable keeper, continuously for some time, either definite or indefinite, the voluntary delivery of the same to the owner or his agent shall not waive or defeat the lien provided for in section 1197, and the

person having such lien may enforce his lien against said property in any court of competent jurisdiction at any time within ten (10) days after parting with the possession thereof: Provided, that such lien shall not attach to the interest nor affect the rights of a third person who may have acquired an interest in or title to an animal against which a lien is claimed, for value and without knowledge of the claimed lien, while such animal is not in possession of the claimant. [L. '09, p. 637, § 3.]

CHAPTER XII.

LIENS OF INNKEEPERS AND THEIR LIABILITY.

§ 1201. Lien upon Baggage, etc.

Hereafter all hotel-keepers, innkeepers, lodging-house keepers, and boarding-house keepers in this state shall have a lien upon the baggage, property, or other valuables of their guests, lodgers, or boarders brought into such hotel, inn, lodging-house, or boarding-house by such guests, lodgers, or boarders, for the proper charges due from such guests, lodgers, or boarders for their accommodation, board, or lodging, and such other extras as are furnished at their request, and shall have the right to retain in their possession such baggage, property, or other valuables until such charges are fully paid, and to sell such baggage, property, or other valuables for the payment of such charges in the manner provided in the next succeeding section of this chapter. [L. '90, p. 96, § 1; 1 H. C., § 2710.]

Cited in 38 Wash. 412.

Lien of Innkeepers: See Remington's Digest, Inn., § 4; Wertheimer etc. Co. v. Hotel Stevens Co., 38 Wash. 409, 89 Pac. 563, 107 Am. St. Rep. 864, 3 Ann. Cas. 625.

Lien of innkeeper upon property of guest. 21 L. R. A. 229.

Innkeeper's lien on property of third persons in possession of guests.

3 Ann. Cas. 626; 12 Ann. Cas. 404; L. R. A. 1915D, 1143.

Lien of boarding-house or lodging-house keeper on effects of boarder, lodger or guest. Ann. Cas. 1914D, 837.

Who is a boarding-house keeper within statute giving a lien. L. R. A. 1918D, 402.

§ 1202. Sale to Satisfy Lien—Notice.

Whenever any baggage, property, or other valuables which have been retained by any hotel-keeper, innkeeper, lodging-house keeper, or boarding-house keeper in his possession by virtue of the provision of the next preceding section of this chapter shall remain unredeemed for the period of three months after the same shall have been so retained, then it shall be lawful for such hotel-keeper, innkeeper, lodging-house keeper, or boarding-house keeper to sell such baggage, property, or other valuables at public auction, after giving the owner thereof ten days' notice of the time and place of such sale, through the postoffice, or by advertising in some newspaper published in the county where such sale is made, or by posting notices in three conspicuous places in such county, and out of the proceeds of such sale to pay all legal charges due from the owner of such baggage, property, or valuables, including proper charges for storage of the same, and the overplus, if any, shall be paid to the owner upon demand. [L. '90, p. 96, § 2; 1 H. C., § 2711.]

§ 1203. Responsibility Limited.

No innkeeper who constantly has in his inn an iron safe or suitable vault in good order, and fit for the safe custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones and bullion, and who keeps a copy of this section, printed by itself in large, plain Roman type, and framed, constantly and conspicuously suspended in the office, barroom, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary-sized plain Roman type, posted upon the inside of the entrance door of every public sleeping-room of his inn, shall be liable for the loss of any such article suffered by any guest, unless such guest has first offered to deliver such property lost by him to such innkeeper for custody in such iron safe or vault and such innkeeper has refused or neglected to receive and deposit such property in his safe or vault, and to give such guest a receipt therefor: Provided, that all doors to rooms furnished to guests shall be provided with slide-bolts inside of such rooms on all doors; otherwise he shall be liable; but every innkeeper shall be liable for any loss of the above enumerated articles by a guest in his inn, when caused by the theft or negligence of the innkeeper or any of his servants. [L. 90, p. 95, § 1; 1 H. C., § 2712.]

Cited in 53 Wash. 447, 450.

A hotel-keeper is not exempted from liability for the loss of property of guests under this section, where he failed to keep an iron safe or vault in good

order for the custody of valuables, and failed to post a copy of the statute in the sleeping-rooms, as required by the act: *Watt v. Kilbury*, 53 Wash. 446, 102 Pac. 403.

CHAPTER XIII.**LIENS FOR RENT.****§ 1203-1. Lien for Rent—Property Subject—Extent of Lien.**

Any person to whom rent may be due, his executors, administrators, or assigns shall have a lien for such rent which is paramount to, and has preference over, all other liens except liens for taxes, general and special liens of labor and mortgages or conditional bills of sale duly recorded prior to tenancy upon personal property of the tenant which has been used or kept on the rented premises, except property of third persons delivered to or left with the tenant for storage, repair, manufacture or sale, and such property exempt from execution by the laws of the state of Washington. Such liens shall not be for more than two months' rent due or to become due, nor for any rent or installment thereof which has been due for more than two months; that no writing or recording shall be necessary to create such lien; and if such property be removed from the rented premises and not returned to the owner, agent, executor, administrator, or assign said lien shall continue and be a superior lien on the property so removed for ten days from the date of its removal, and said lien may be enforced against the property wherever found. In the event the property contained in the rented premises be destroyed by fire or other elements, the lien shall extend to any money that may be received by the tenant as indemnity for the destruction of said property, nor shall the lien be lost by the sale of the said property, except merchandise sold in the usual course of trade or to purchasers without notice of the tenancy. The provisions of this act shall not apply to, nor shall it be en-

forced against, the property of tenants in dwelling-houses or apartments or any other place that is used exclusively as a home or residence of the tenant and his family. [L. '17, p. 769, § 1.]

§ 1203-2. Enforcement.

Said lien may be enforced in the same manner as the foreclosure of a chattel mortgage in the superior court of the county in which the property or any portion thereof is situated. [L. '17, p. 770, § 2.]

CHAPTER XIV.

PREFERENCE RIGHTS OF EMPLOYEES.

§ 1204. Priority of Wages, etc., in Insolvency.

In all assignments of property made by any person to trustees or assignees on account of the inability of the person at the time of the assignment to pay his debts, or in proceedings in insolvency the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such persons to the amount of one hundred dollars each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor. [L. '77, p. 233, § 34; Cd. '81, § 1972; 1 H. C., § 3122.]

Cited in 17 Wash. 186.

When a chattel mortgagee is not entitled to a lien as against claimants having a preference for labor performed within sixty days accorded them by this section: *Moore v. Terry*, 17 Wash. 185, 49 Pac. 234.

Who are laborers, employees or servants within meaning of statutes giving preference to wages. 18 L. R. A. 305.

Preference of wages over lien creditors of corporation in hand of receiver in absence of statutory provision therefor. 5 L. R. R. 690.

§ 1205. Preference on Death of Employer.

In case of the death of any employer, the wages of each miner, mechanic, salesman, clerk, servant, and laborer for services rendered within sixty days next preceding the death of the employer, not exceeding one hundred dollars, rank in priority next after the funeral expenses, expenses of the last sickness, the charges and expenses of administering upon the estate, and the allowance to the widow and infant children, and must be paid before other claims against the estate of the deceased person. [L. '77, p. 223, § 35; Cd. '81, § 1973; 1 H. C., § 3123.]

§ 1206. Notice and Presentment of Claims.

In cases of executions, attachments, and writs of similar nature issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, and laborers who have claims against the defendant for labor done, may give notice of their claims and the amount thereof, sworn to by the person making the claim to the creditor and the officer executing either of such writs at any time before the actual sale of property levied on, and unless such claim is disputed by the debtor or a creditor, such officer must pay to such person, out of the proceeds of the sale, the amount each is entitled to receive for services rendered within sixty days next preceding the levy of the writ, not exceeding one

hundred dollars. If any or all the claims so presented and claiming preference under this chapter are disputed by either the debtor or a creditor, the person presenting the same must commence an action within ten days from [for] the recovery thereof, and must prosecute his action with due diligence, or be forever barred from any claim of priority of payment thereof; and the officer shall retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim, until the determination of such action; and in case judgment be had for the claim or any part thereof, carrying costs, the costs taxable therein shall likewise be a preferred claim, with the same rank as the original claim. [L. '77, p. 223, § 36; Cd. '81, § 1974; 1 H. C., § 3124.]

Cited in 6 Wash. 621; 16 Wash. 413, 697; 97 Wash. 7.

Parties having claims for services, which, under this section, they are authorized to maintain against a judgment creditor who has levied upon the property of their employer, may properly join in the same action to enforce their claims: *Gleason v. Tacoma Hotel Co.*, 16 Wash. 412, 47 Pac. 894.

Where laborers had prior liens upon sawlogs, which were sold and sawed up and produced a fund which it was the duty of the purchaser to apply in satisfaction of the liens, a garnishment of the purchaser is ineffectual, even though the logs were in the purchaser's possession at the time the writ was served and answered, this section giving priority to the laborers' liens: *Du Bois Lumber Co. v. Dietderich*, 97 Wash. 1, 165 Pac. 884.

CHAPTER XV.

THE CONSTRUCTION OF STATUTES RELATING TO LIENS.

§ 1208. Construction of Lien Law.

In construing the provisions of the lien law, words used in the masculine gender include the feminine and neuter, the singular number includes the plural, and the plural the singular; the word "person" includes a corporation as well as a natural person, and the word "writing" includes printing. [L. '77, p. 224, § 37; Cd. '81, § 1979; 1 H. C., § 1707.]

§ 1209. Extent of Lien Law.

This act establishes the law of this state respecting the subject to which it relates, and its provisions and all proceedings under it are to be liberally construed with a view to effect its object. [L. '77, p. 224, § 39; Cd. '81, § 1979; 1 H. C., § 1980.]

"This act" in Laws of 1877, refers to liens of mechanics, loggers, and others, now covered in this title.

EVIDENCE.

TITLE IX.

EVIDENCE.

CHAPTER I.—THE COMPETENCY OF WITNESSES.

- | | |
|--|---------------------------------------|
| 1210. Who may testify. | 1212. Conviction of crime, effect of. |
| 1211. Not excluded on ground of interest | 1213. Who incompetent. |
| —Exception—Transaction with | 1214. Who disqualified. |
| person since deceased. | |

CHAPTER II.—THE MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES.

- | | |
|--|--|
| 1215. Witnesses—Compelling attendance. | 1221. Attachment for witness. |
| 1216. Subpoena duces tecum. | 1222. To whom directed, how executed. |
| 1217. Subpoena—Issuance. | 1223. Testimony of prisoner, how obtained. |
| 1218. Service, proof of. | 1224. Affidavit to procure order. |
| 1219. Person in court required to testify. | |
| 1220. Liability and penalty for failure to attend. | |

CHAPTER III.—THE EXAMINATION OF PARTIES.

- | | |
|---|--|
| 1225. Examination of adverse party as witness. | 1229. Testimony not conclusive. |
| 1226. Interrogatories to adversary. | 1230. Penalty for refusal to answer or give testimony. |
| 1227. Answers to interrogatories. | 1230-1. Physical examination in personal injury cases. |
| 1228. Examination on trial notwithstanding interrogatories. | |

CHAPTER IV.—DEPOSITIONS.

- | | |
|---|--|
| 1231. Cases in which deposition may be taken. | 1239. Before whom taken out of the state. |
| 1232. Time for taking. | 1240. Commission to take—How issued. |
| 1233. Before whom taken within state—Notice. | 1241. Notice to nonresident party. |
| 1234. Time for notice may be limited. | 1242. How taken and certified. |
| 1235. Witnesses subpoenaed and compelled to attend. | 1243. How returned. |
| 1236. Superior court may compel attendance. | 1244. Use of on trial—Objections. |
| 1237. Application for order. | 1245. Shall not be used, when. |
| 1238. Citation—Contempt. | 1246. Depositions taken in one cause may be used in another, when. |
| | 1247. Certified testimony of deceased or absent witness. |
| | 1248. When may be used on appeal. |

CHAPTER V.—PERPETUATION OF TESTIMONY.

- | | |
|---|--|
| 1249. Application for order to examine witnesses. | 1252. How taken and returned. |
| 1250. Hearing of application—Notice. | 1253. Return and filing—How used—Objections. |
| 1251. Order for examination—Commission. | |

CHAPTER VI.—DOCUMENTARY EVIDENCE.

- | | |
|--|---|
| 1254. Court records, etc., as evidence. | 1260. Certified copies of recorded instruments as evidence. |
| 1255. Faith given to judgments of other states. | 1260½. Ordinances as evidence. |
| 1256. Defenses to suits on foreign judgments. | 1261. Certified copy of tax deeds. |
| 1257. Public records as evidence. | 1262. Order for inspection and to take copy of writings, etc. |
| 1258. Seal of public officer, how affixed. | 1263. When writing may be read in evidence, etc. |
| 1259. Foreign statutes admissible in evidence, when. | |

CHAPTER VII.—OATHS AND AFFIRMATIONS.

- | | |
|--|---|
| 1264. Who authorized to take and administer oaths. | 1267. Form adapted to suit religious belief. |
| 1265. Oath, how administered. | 1268. Affirmation, form of. |
| 1266. Form varied to suit witnesses' opinion. | 1269. Affirmation equivalent to oath—Perjury. |

CHAPTER VIII.—THE RESTORATION OF LOST RECORDS.

- | | |
|---|---|
| 1270. Substitution of copy. | 1274. Lost records—Time extended for appeal, when. |
| 1271. Court records lost or destroyed—How replaced. | 1275. Costs. |
| 1272. Action to restore—Proceedings. | 1276. Restoration of lost or destroyed probate records. |
| 1273. Hearing on application—Evidence. | 1277. Costs, by whom paid. |

CHAPTER I.

THE COMPETENCY OF WITNESSES.

§ 1210. Who may Testify.

Every person of sound mind and suitable age and discretion, except as hereinafter provided, may be a witness in any action or proceeding. [L. '54, p. 186, § 289; Cd. '81, § 388; 2 H. C., § 1645.]

COMPETENCY—CAPACITY AND QUALIFICATIONS IN GENERAL: See Remington's Digest, Witn., §§ 10—24.

§ 10. **Knowledge or Means of Knowledge of Facts:** State v. Dolan, 17 Wash. 499, 50 Pac. 472; Bullock v. White Star Steamship Co., 30 Wash. 448, 70 Pac. 1106; Park v. Northport Smelting & Refining Co., 47 Wash. 597, 92 Pac. 442; Hertzog v. Star Logging Co., 73 Wash. 197, 131 Pac. 806; Lichtenberg v. Seattle, 94 Wash. 391, 162 Pac. 534.

See, also, Harris v. Saunders, 113 Wash. 482, 194 Pac. 533, 198 Pac. 393.

Obligation of Oath: State v. Gin Pon, 16 Wash. 425, 47 Pac. 961.

§ 21. **Parent and Child:** Birkel v. Chandler, 26 Wash. 241, 66 Pac. 406.

§ 22. **Judges Acting at Trial, as Witnesses:** Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117.

§ 23. **Justices of the Peace, as to Proceedings Before Them:** State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716.

§ 24. **Stenographers:** Kellogg v. Scheurman, 18 Wash. 293, 51 Pac. 344, 52 Pac. 237.

Objections to Competency—Waiver and Determination: See Remington's Digest, Witn., §§ 25, 26; Robinson v. Marino, 3 Wash. 434, 28 Pac. 752, 28 Am. St. Rep. 50.

§ 26. **Determination as to Competency:** Klehn v. Territory, 1 Wash. 584, 21 Pac. 31; Czarecki v. Seattle & S. F. Ry. & Nav. Co., 30 Wash. 288, 70 Pac. 750; State v. Melvern, 32 Wash. 7, 72 Pac. 489.

For text treatment of "Witnesses," see 28 R. C. L. 411.

Competency of Chinaman and Japanese as witnesses. 18 Ann. Cas. 563, 981.

Deaf mute as a witness. 9 A. L. R. 482.

Competency and propriety of judge testifying as witness in case on trial before him. Ann. Cas. 1913C, 254; 31 L. R. A. 465; L. R. A. 1915F, 766.

Competency of juror on former trial as witness. Ann. Cas. 1916C, 676.

Competency of private detective as witness. Ann. Cas. 1917A, 589.

§ 1211. Not Excluded on Ground of Interest — Exception — Transaction With Person Since Deceased.

No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility: Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative

of any deceased person, or as deriving right or title, by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years: Provided further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action. [Cf. L. '54, p. 186, § 290; L. '67, p. 88, § 1; L. '73, p. 106, § 382; Cd. '81, § 389; L. '90, p. 91, § 1; 2 H. C., § 1646.]

Cited in 2 Wash. 425; 6 Wash. 85; 12 Wash. 471; 13 Wash. 553; 14 Wash. 136; 17 Wash. 518; 24 Wash. 228, 672; 26 Wash. 49, 57; 27 Wash. 187; 29 Wash. 83; 30 Wash. 193; 31 Wash. 37; 34 Wash. 374; 42 Wash. 113; 43 Wash. 244; 45 Wash. 110, 111; 46 Wash. 251, 310; 47 Wash. 258; 48 Wash. 653; 49 Wash. 344; 50 Wash. 380; 54 Wash. 694; 61 Wash. 635; 64 Wash. 402; 67 Wash. 123; 68 Wash. 682; 69 Wash. 297; 74 Wash. 450; 80 Wash. 501; 84 Wash. 653; 85 Wash. 103; 88 Wash. 70, 137; 89 Wash. 630; 93 Wash. 69, 330; 94 Wash. 192; 97 Wash. 154; 98 Wash. 445, 593; 101 Wash. 616; 106 Wash. 390; 107 Wash. 527.

"Legal representatives" applies to heirs: *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812.

The words "legal representative" are not synonymous with personal representative: *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124.

TESTIMONY OF PARTIES OR PERSONS INTERESTED, FOR OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR INTEREST OF PERSONS DECEASED OR INCOMPETENT: See *Remington's Digest*, Witn., §§ 30—34.

§ 30. **Nature and Grounds of Exclusion in General:** *Wolferman v. Bell*, 6 Wash. 84, 32 Pac. 1017, 36 Am. St. Rep. 126; *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124.

§ 32. **Actions and Proceedings in Which Testimony is Excluded—Representative or Other Capacity, or Title or Interest of Party:** *Erickson v. Modern Woodmen*, 43 Wash. 242, 86 Pac. 584.

§ 33. — **Death of Party Pending Action—Testimony Taken Before Death:** *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697; *Beaston v. Portland Trust & Savings Bank*, 89 Wash. 627, 155 Pac. 162, Ann. Cas. 1917B, 488.

§ 34. — **Construction of Will:** *Spencer v. Terrel*, 17 Wash. 514, 50 Pac. 468.

Parties and Other Persons Whose Testimony is Excluded: See *Remington's Digest*, Witn., §§ 35—42. **Persons**

Interested in Event: *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812; *Alstad's Estate, In re*, 27 Wash. 175, 67 Pac. 593; *Kline v. Stein*, 30 Wash. 189, 70 Pac. 235; *McCoy v. Ayers*, 2 W. T. 307, 5 Pac. 843; *Thorn v. Joy*, 15 Wash. 83, 45 Pac. 642; *Sloan's Estate, In re*, 50 Wash. 86, 96 Pac. 684, 17 L. R. A. (N. S.) 960.

§ 36. — **Agent or Other Representative of Party or Person Interested:** *O'Toole v. Faulkner*, 34 Wash. 371, 75 Pac. 975; *Cunningham's Estate, In re*, 94 Wash. 191, 161 Pac. 1193.

§ 37. — **Member, Stockholder, or Officer of Corporation Party or Interested:** *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124; *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646; *Beaston v. Portland Trust & Savings Bank*, 89 Wash. 627, 155 Pac. 162, Ann. Cas. 1917B, 488.

§ 37-1. — **Grantor, Assignor, or Other Person from Whom Party Derives Title or Interest:** *Denny v. Schwabacher*, 54 Wash. 689, 104 Pac. 137, 132 Am. St. Rep. 1140.

§ 38. — **Surviving Party to Contract or Other Transaction or Cause of Action:** *Smith v. Taylor*, 2 Wash. 422, 27 Pac. 812; *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *Reynolds v. Reynolds*, 42 Wash. 107, 84 Pac. 579; *Shorett v. Knudsen*, 74 Wash. 448, 133 Pac. 1029.

§ 39. — **Surviving Partners:** *Alstad's Estate, In re*, 27 Wash. 175, 67 Pac. 593; *Shaw v. Lobe*, 58 Wash. 219, 108 Pac. 450, 29 L. R. A. (N. S.) 333.

§ 40. — **Parties to Bills and Notes:** *Bay View Brewing Co. v. Grubb*, 31 Wash. 34, 71 Pac. 553.

§ 41. — **Surviving Spouse:** *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822; *Dempsey v. Dempsey*, 61 Wash. 632, 112 Pac. 755; *Brown v. Davis*, 98 Wash. 442, 167 Pac. 1095.

§ 41-1. — **Husband or Wife of Party or Other Person Excluded from Testifying:** *Whitney v. Priest*, 26 Wash. 48, 66 Pac. 108; *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042.

See, also, *Hansen v. Hansen*, 110 Wash. 276, 188 Pac. 460.

§ 42. — **Mortgagor and Mortgagee:** Thorne v. Joy, 15 Wash. 83, 45 Pac. 642.

Parties as Against Whom Testimony is Excluded: See Remington's Digest, Witn., §§ 43, 43-1. Grantee, distributee or other person deriving title or interest from deceased person: Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819. Parties themselves incompetent to testify: Chlopeck v. Chlopeck, 47 Wash. 256, 91 Pac. 966.

Subject Matter of Testimony: See Remington's Digest, Witn., §§ 44—49. Transactions or communications between witness and person subsequently deceased: Kline v. Stein, 30 Wash. 189, 70 Pac. 235; Bay View Brewing Co. v. Grubb, 31 Wash. 34, 71 Pac. 553; O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078; Nelson v. Carlson, 48 Wash. 651, 94 Pac. 477; Preston v. Hill-Wilson Shingle Co., 50 Wash. 377, 97 Pac. 293; Bardsley v. Truax, 64 Wash. 400, 116 Pac. 1075; Kalinowski v. McNeny, 68 Wash. 681, 123 Pac. 1074; White v. Walker, 84 Wash. 652, 147 Pac. 409; Hart v. Boyle, 88 Wash. 125, 152 Pac. 1010.

See, also, Moylan v. Moylan, 49 Wash. 341, 95 Pac. 271; Brucker v. De Hart, 106 Wash. 386, 180 Pac. 397; Bushnell's Estate, In re, 107 Wash. 331, 182 Pac. 89; Engstrom v. Peterson, 107 Wash. 523, 182 Pac. 623.

§ 44-1. — **Evidence not Adverse to the Estate:** O'Connor v. Slatter, 46 Wash. 308, 89 Pac. 885; Cunningham's Estate, In re, 94 Wash. 191, 161 Pac. 1193.

This section does not disqualify a witness interested in the estate from testifying on behalf of the estate: Brucker v. De Hart, 106 Wash. 386, 180 Pac. 397.

§ 45. — **Transactions or Communications Between Person Other Than Witness and Person Subsequently Deceased:** Rauh v. Scholl, 19 Wash. 30, 52 Pac. 332; Kauffman v. Baillie, 46 Wash. 248, 89 Pac. 548; Nicholson v. Kilbury, 80 Wash. 500, 141 Pac. 1043.

See, also, Brucker v. De Hart, 106 Wash. 386, 180 Pac. 397; Bushnell's Estate, In re, 107 Wash. 331, 182 Pac. 89; Engstrom v. Peterson, 107 Wash. 523, 182 Pac. 623.

§ 46. — **Admissions or Other Statements by Person Subsequently Deceased:** Moore v. Palmer, 14 Wash. 134, 44 Pac. 142; Robertson v. O'Neill, 67 Wash. 121, 120 Pac. 884; Margett v. Wilson, 85 Wash. 98, 147 Pac. 628.

§ 47. — **Services and Value Thereof:** Ah How v. Furth, 13 Wash. 550, 43 Pac. 639; Marvin v. Yates, 26 Wash. 50, 66 Pac. 131.

§ 48. — **Books of Account and Receipts:** Ah How v. Furth, 13 Wash. 550, 43 Pac. 639; Smith v. Scott, 51 Wash. 330, 98 Pac. 763; Goldsworthy v. Oliver, 93 Wash. 67, 160 Pac. 4; Sanborn v. Dentler, 97 Wash. 149, 166 Pac. 62.

§ 48-1. **Effect of Admission of Testimony of Adverse Party:** O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078.

§ 49. **Waiver of Objections:** Newman v. Buzard, 24 Wash. 225, 64 Pac. 139; Robertson v. O'Neill, 67 Wash. 121, 120 Pac. 884.

Competency of coparty of decedent's representative to testify as to transactions with decedent. 17 **Ann. Cas.** 216.

Actions ex delicto as within rule excluding testimony of transactions with decedent. **Ann. Cas.** 1918B, 98; **L. R. A.** 1916D, 811.

Competency of interested witness to testify as to transactions with deceased in which he did not participate. 29 **L. R. A. (N. S.)** 1179; 42 **L. R. A. (N. S.)** 320.

Applicability of rule excluding testimony of interested person in controversy with decedent's estate to controversies over succession to estate. 51 **L. R. A. (N. S.)** 187.

Right of heir or next of kin to testify in favor of the estate. **L. R. A.** 1918C, 918.

Competency of officer, stockholder or agent of corporation to testify as to transactions or communications with decedent. 9 **Ann. Cas.** 181; 27 **L. R. A. (N. S.)** 816.

Waiver by personal representative of incompetency of witness to testify to transactions with decedent. **Ann. Cas.** 1913A, 682; **Ann. Cas.** 1918A, 471.

Death of adverse party as affecting evidence with respect to book account. 6 **A. L. R.** 756.

Death of obligee as affecting competency of obligor to testify in favor of co-obligor. 2 **A. L. R.** 1477.

§ 1212. Conviction of Crime, Effect of.

No person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but such conviction may be shown to affect his credibility: Provided, that any person who shall have been convicted of the crime of perjury shall not be a competent witness in any case, unless such conviction shall have been reversed, or unless he shall

have received a pardon. [L. '91, p. 33, § 1; 2 H. C., § 1647; see L. '54, p. 196, § 292; Cd. '81, § 390.]

Cited in 6 Wash. 569, 570; 15 Wash. 19; 22 Wash. 59; 32 Wash. 187; 33 Wash. 350; 37 Wash. 408—410; 55 Wash. 307; 105 Wash. 423.

Defendants in Criminal Prosecutions—In General: See Remington's Digest, Witn., §§ 27, 28; Edwards v. Territory, 1 W. T. 195; Edwards v. State, 2 Wash. 291, 26 Pac. 258.

Under this section, on a trial for perjury committed in a civil action, the accused has a right to show that the principal witnesses against him are interested in the civil action, which was still pending for trial, and would profit by his conviction: State v. Eaid, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946.

Infamy or Conviction of Crime: See Remington's Digest, Witn., § 14; State v. Harras, 22 Wash. 57, 60 Pac. 58; State v. Pearson, 37 Wash. 405, 79 Pac. 985; State v. Moser, 94 Wash. 465, 162 Pac. 582.

Accusation or Conviction of Crime in General: See Remington's Digest, Witn., § 104; State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523; State v. Ripley, 32 Wash. 182, 72 Pac. 1036; Marshall v. Dunn, 93 Wash. 156, 160 Pac. 298.

Cross-examination to Show Accusation or Conviction of Crime: See Remington's Digest, Witn., § 106; State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Champoux, 33 Wash. 339, 74 Pac. 557; State v. Eder, 36 Wash. 482, 78 Pac. 1023; State v. Stone, 66 Wash. 625, 120 Pac. 76; State v. Overland, 68 Wash. 566, 123 Pac. 1011.

Conviction of crime in one jurisdiction as disqualification of the witness in another jurisdiction. 5 Ann. Cas. 917; 19 Ann. Cas. 381; L. R. A. 1917A, 1138.

§ 1213. Who Incompetent.

The following persons shall not be competent to testify:—

1. Those who are of unsound mind, or intoxicated at the time of their production for examination; and
2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. [L. '54, p. 186, § 293; L. '63, p. 154, § 330; L. '73, p. 106, § 384; Cd. '81, § 391; 2 H. C., § 1648.]

Cited in 34 Wash. 203; 45 Wash. 439; 94 Wash. 272; 110 Wash. 449, 456.

Age and Maturity of Mind: See Remington's Digest, Witn., § 11; State v. Bailey, 31 Wash. 89, 71 Pac. 715; Hodd v. Tacoma, 45 Wash. 436, 88 Pac. 842; State v. Myrberg, 56 Wash. 384, 105 Pac. 622; Kalberg v. Bon Marche, 64 Wash. 452, 117 Pac. 227; State v. Smith, 95 Wash. 271, 163 Pac. 759.

See, also, Getty v. Hutton, 110 Wash. 124, 188 Pac. 10; Wilkerson v. McGinn,

110 Wash. 454, 188 Pac. 472; Macale v. Lynch, 110 Wash. 444, 188 Pac. 517.

Use of Drugs: See Remington's Digest, Witn., § 12; State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442.

Competency of infants as witnesses. 14 Ann. Cas. 3; Ann. Cas. 1916C, 424; 19 L. R. A. 605.

Competency of insane person as witness. Ann. Cas. 1913E, 323.

Morphinism as affecting competency of witness. 39 L. R. A. 265.

§ 1214. Who Disqualified.

The following persons shall not be examined as witnesses:—

1. A husband shall not be examined for or against his wife without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor shall either, during marriage or afterwards, without the consent of the other, be examined as to any communication made by one to the other during marriage. But this exception shall not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other;

2. An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment;

3. A clergyman or priest shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs;

4. A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him to prescribe for the patient;

5. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure. [Cf. L. '54, p. 187, § 294; L. '73, p. 107, § 385; L. '79, p. 118, § 1; Cd. '81, § 392; L. '86, p. 73, § 1; 2 H. C., § 1649.]

Cited in 20 Wash. 462; 21 Wash. 662; 24 Wash. 683; 27 Wash. 29, 573; 42 Wash. 600; 44 Wash. 486; 47 Wash. 520; 54 Wash. 3, 4; 56 Wash. 562, 563; 60 Wash. 398; 65 Wash. 442; 90 Wash. 237; 91 Wash. 22; 95 Wash. 452; 96 Wash. 176; 97 Wash. 683; 98 Wash. 503; 101 Wash. 677; 102 Wash. 37; 104 Wash. 454; 105 Wash. 477, 478, 481, 483; 110 Wash. 280; 113 Wash. 280.

COMPETENCY OF HUSBAND AND WIFE: See Remington's Digest, Witn., §§ 15—20.

§ 15. Incompetency for or Against Each Other in General: State v. Falsetta, 43 Wash. 159, 86 Pac. 168, 10 Ann. Cas. 177; Belknap v. Platter, 54 Wash. 1, 103 Pac. 432, 132 Am. St. Rep. 1097.

In an action by a husband to declare a trust in community lands, his wife is not a competent witness for defendant over plaintiff's objection, in view of this section: Hansen v. Hansen, 110 Wash. 276, 188 Pac. 460.

In supplemental proceedings, see Frankenthal v. Solomonson, 20 Wash. 460, 55 Pac. 754, 72 Am. St. Rep. 116, 44 L. R. A. 311.

§ 16. — Separate Interests: Frankenthal v. Solomonson, 20 Wash. 460, 55 Pac. 754, 72 Am. St. Rep. 116, 44 L. R. A. 311.

§ 17. — Adultery, Criminal Conversation and Alienation of Affections: Speck v. Gray, 14 Wash. 589, 45 Pac. 143; Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187; State v. Nelson, 39 Wash. 221, 81 Pac. 721; Lyen v. Lyen, 98 Wash. 498, 167 Pac. 1113.

§ 18. — Actions for Divorce: Lee v. Lee, 3 Wash. 236, 28 Pac. 355.

§ 18-1. — Prosecutions for Offenses by Husband or Wife Against the Other: State v. Winnett, 48 Wash. 93, 92 Pac. 904; State v. Kephart, 56 Wash. 561, 106 Pac. 165, 26 L. R. A. (N. S.) 1123;

State v. Beltner, 60 Wash. 397, 111 Pac. 344.

Bigamy is not an offense committed by one spouse against another; hence the first wife is not a competent witness in a prosecution against the husband: State v. Kniffen, 44 Wash. 485, 87 Pac. 837, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113.

§ 19. — Consent of Husband or Wife to Admission of Testimony by the Other: Columbia & P. S. R. Co. v. Hawthorne, 3 W. T. 353, 19 Pac. 25.

§ 20. — Effect of Divorce: State v. Nelson, 39 Wash. 221, 81 Pac. 721.

CONFIDENTIAL RELATIONS AND PRIVILEGED COMMUNICATIONS: See Remington's Digest, Witn., §§ 50, 51. Husband and wife—Subject matter of communications: Sackman v. Thomas, 24 Wash. 660, 64 Pac. 819; State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. Snyder, 84 Wash. 485, 147 Pac. 38.

See, also, Jones v. Jones, 96 Wash. 172, 164 Pac. 757.

— Effect of Divorce of Husband and Wife: State v. Nelson, 39 Wash. 221, 81 Pac. 721.

Communications to or Advice by Attorney or Counsel: See Remington's Digest, Witn., §§ 52—54. Relation of attorney and client: Hall & Paulson Furn. Co. v. Wilbur, 4 Wash. 644, 30 Pac. 665; Hartness v. Brown, 21 Wash. 655, 59 Pac. 491; State v. Miller, 78 Wash. 268, 138 Pac. 896; Beck's Estate, In re, 79 Wash. 331, 140 Pac. 340.

See, also, Halfman v. Halfman, 113 Wash. 320, 194 Pac. 371.

§ 53. — Subject Matter of Communications or Advice in General: Hartness v. Brown, 21 Wash. 655, 59 Pac. 491; Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393; Stanley v. Stanley, 27 Wash. 570, 68 Pac. 187; Stern v. Daniel, 47 Wash. 96, 91 Pac. 552; Maxwell v.

Harper, 51 Wash. 351, 98 Pac. 756; Collins v. Hoffman, 62 Wash. 278, 113 Pac. 625, Ann. Cas. 1913A, 1; State v. Miller, 80 Wash. 75, 141 Pac. 293, 1139; State v. Richards, 97 Wash. 587, 167 Pac. 47.

§ 54. — **Communications Through or in Presence or Hearing of Others:** State v. Falsetta, 43 Wash. 159, 86 Pac. 168, 10 Ann. Cas. 177.

Communications to or Information Acquired by Physician or Surgeon: See Remington's Digest, Witn., §§ 55, 56. **Professional Character of Employment or Service:** Lane v. Spokane Falls & N. R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; Dubcich v. Grand Lodge A. O. U. W., 33 Wash. 651, 74 Pac. 832; State v. Winnett, 48 Wash. 93, 92 Pac. 904; State v. Stapp, 65 Wash. 438, 118 Pac. 337; Wesseler v. Great Northern R. Co., 90 Wash. 234, 155 Pac. 1063, 157 Pac. 461; Strafford v. Northern Pac. R. Co., 95 Wash. 450, 164 Pac. 71.

See, also, State v. Miller, 105 Wash. 75, 178 Pac. 459.

§ 56. — **Waiver of Privilege:** Williams v. Spokane Falls & N. R. Co., 42 Wash. 597, 84 Pac. 1129; State v. Frye, 45 Wash. 645, 89 Pac. 170; Noelle v. Hoquiam Lumber & Shingle Co., 47 Wash. 519, 92 Pac. 372; Points v. Nier, 91 Wash. 20, 157 Pac. 1082, Ann. Cas. 1918A, 1046; Blackwell v. Seattle, 97 Wash. 679, 167 Pac. 53.

See, also, State v. Miller, 105 Wash. 475, 178 Pac. 459.

Privilege of communication made to public officers. 9 A. L. R. 1099.

Competency of spouse to testify to conversation or statement by other spouse in presence of third person. Ann. Cas. 1916B, 602.

Admissibility in criminal prosecution of declaration made by one spouse in presence of the other. 19 Ann. Cas. 528.

Competency and propriety of attorney as witness for client or adverse party. 13 Ann. Cas. 31.

Privileged character of communications made to minister of the gospel. 7 Ann. Cas. 109; 19 Ann. Cas. 644; L. R. A. 1917D, 278.

Necessity that information communicated to physician should be necessary to treatment in order to be privileged. 15 Ann. Cas. 582; Ann. Cas. 1916A, 403.

Hospital records as within rule of privileged communications between physician and patient. Ann. Cas. 1915D, 151; 14 L. R. A. (N. S.) 565.

Information acquired by autopsy made by physician as within rule of privileged communications. Ann. Cas. 1913C, 689; Ann. Cas. 1916D, 709; 38 L. R. A. (N. S.) 1186.

CHAPTER II.

THE MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES.

§ 1215. Witnesses—Compelling Attendance.

No person shall be obliged to attend as a witness before any court of record, judge, justice of the peace, commissioner, referee, or other officer, in any civil action or proceeding out of the county in which he resides, unless his residence be within twenty miles of such court, judge, justice of the peace, commissioner, referee, or other officer; and no person shall be obliged to attend as a witness in any civil action or proceeding in a justice's court, unless his residence be within twenty miles of such court, whether within the county or not. Nor shall any person be compelled to attend as a witness in any civil action or proceeding, unless the fees be paid or tendered to him which are allowed by law for one day's attendance as a witness; and for traveling to and returning from the place where he is required to attend, provided such fees be demanded by him at the time of service of the subpoena. [L. '54, p. 187, § 295; L. '63, p. 156, § 332; L. '69, p. 104, § 388; Cd. '81, § 393; L. '91, p. 33, § 2; 2 H. C., § 1650.]

See supra, § 497, fees of witnesses.

See supra, § 507, fees of witnesses to be paid in advance.

See supra, § 1049 et seq., contempts and their punishment.

See infra, § 1238, contempt of witness on taking deposition.

See infra, § 1892, contempt before justice of the peace.

Cited in 5 Wash. 805; 67 Wash. 372, 373; 110 Wash. 164.

Attendance of Witness: See Remington's Digest, Witn., §§ 1—3. Authority to compel attendance: *United States v. Small*, 3 W. T. 478, 17 Pac. 739; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *State ex rel. Hopkins v. Kennan*, 33 Wash. 247, 74 Pac. 381, 99 Am. St. Rep. 949.

§ 2. Place Where Attendance may be Required: *State ex rel. Timm v. Trounce*, 5 Wash. 804, 32 Pac. 750.

§ 3. Subpoena—Application and Proceedings: *State ex rel. Carraher v. Graves*, 13 Wash. 485, 43 Pac. 376; *State ex rel. Peterson v. Superior Court*, 67 Wash. 370, 121 Pac. 836.

§ 1216. Subpoena Duces Tecum.

The subpoena may require not only the personal attendance of the person to whom it is directed at a particular time and place to testify as a witness, but may also require him to bring with him any books, documents, or things under his control; but no public officer or person having the possession or control of public records or papers which by law are required to be kept in any particular office or place shall be compelled to produce the same in any court. [L. '54, p. 188, § 296; Cd. '81, § 394; 2 H. C., § 1651.]

Cited in 59 Wash. 656; 84 Wash. 486.

The violation of an order of the court to produce certain books belonging to a bank for which a receiver had been appointed is not subject to punishment for contempt, although committed by the president of the bank, where the affidavit used as a basis for the contempt proceedings fails to show that it was within the power of the party prosecuted to comply with the order: *State ex rel. Olson v. Allen*, 14 Wash. 684, 45 Pac. 644.

The fact that proof subsequently introduced upon the trial tends to show that one charged with contempt of court had books in his possession which he was ordered to produce, but that he violated the order, is immaterial when such fact is not sufficiently shown by the affidavit used as a basis for the proceeding: *Id.*

Failure to produce the document raises a presumption that they are what the adverse party claims them to be, and it is for the jury to determine whether the witness complied with the subpoena: *Thomas v. Fox*, 51 Wash. 250, 98 Pac. 663.

A witness subpoenaed duces tecum cannot refuse to produce books which are shown to be material, on the ground of their immateriality, if they are not confidential or of a privileged character: *State ex rel. Spokane & Eastern Trust*

Under this section, a person residing in another county cannot be adjudged guilty of contempt of court for refusing to obey the summons until it has first been made to appear that his residence is within twenty miles of such court: *State ex rel. Timm v. Trounce*, 5 Wash. 804, 32 Pac. 750.

It is not an abuse of discretion to refuse a new trial on account of the absence overseas of a witness, where it appears that the witness was prosecuting attorney of another county, who, under this section, could not be compelled to attend as a witness, and the case had been at issue for about two years and no move made to take depositions: *Eberhart v. Murphy*, 110 Wash. 158, 188 Pac. 17.

Co. v. Superior Court, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

A showing that books were necessary to enable a referee to make his findings of fact and report upon an accounting and that no other source was accessible, is sufficient to justify the issuance of a subpoena duces tecum: *State ex rel. Spokane & Eastern Trust Co. v. Superior Court*, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

A witness subpoenaed duces tecum cannot refuse to produce the documents on the ground of their inadmissibility or of their weight as evidence: *State ex rel. Spokane & Eastern Trust Co. v. Superior Court*, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

Noncompliance with a subpoena duces tecum cannot be excused on the ground of the inconvenience to the witness: *State ex rel. Spokane & Eastern Trust Co. v. Superior Court*, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

It is not a valid objection to a subpoena duces tecum to produce the books of a bank before a referee that they contain confidential communications with other parties which may be made public, since it is presumed that the referee will not permit any such improper use of the records: *State ex rel. Spokane & Eastern Trust Co. v. Superior Court*, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

Sufficiency of description of documents in subpoena duces tecum. 15
Ann. Cas. 643; 31 L. R. A. (N. S.)
335.

Inconvenience or expence as excuse for disobeying subpoena duces tecum. 9 A. L. R. 163.

§ 1217. Subpoena—Issuance.

The subpoena shall be issued as follows:

1. To require attendance before a court of record or at the trial of an issue therein, such subpoena may be issued in the name of the state of Washington and be under the seal of the court before which the attendance is required or in which the issue is pending: Provided, that such subpoena may be issued with like effect by the attorney of record of the party to the action in whose behalf the witness is required to appear, and the form of such subpoena in each case may be the same as when issued by the court except that it shall only be subscribed by the signature of such attorney;

2. To require attendance out of such court before a judge, justice of the peace, commissioner, referee or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state, it shall be issued by such judge, justice of the peace, commissioner, referee or other officer before whom the attendance is required;

3. To require attendance before a commissioner appointed to take testimony by a court of any other state, territory or county it may be issued by any judge or justice of the peace in places within their respective jurisdiction. [Cf. L. '54, p. 188, § 297; Cd. '81, § 395; 2 H. C., § 1652; L. '95, p. 189 § 1.]

§ 1218. Service, Proof of.

Such subpoena may be served by any suitable person over eighteen years of age, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode. When service is made by any other person than an officer authorized to serve process, proof of service shall be made by affidavit. [L. '54, p. 188, § 298; L. '53, p. 156, § 334; L. '69, p. 105, § 391; Cd. '81, § 396; 2 H. C., § 1653.]

§ 1219. Person in Court Required to Testify.

A person present in court, or before a judicial officer, may be required to testify in the same manner as if he were in attendance upon a subpoena issued by such court or officer. [L. '54, p. 188, 299; Cd. '81, § 397; 2 H. C., § 1654.]

§ 1220. Liability and Penalty for Failure to Attend.

If any person duly served with a subpoena, and obliged to attend as a witness, shall fail to do so, without any reasonable excuse, he shall be liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action. Such failure to attend as required by the subpoena shall also be considered a contempt, and, upon due proof, the witness may be punished by a fine not exceeding fifty dollars, and stand committed until said fine and costs are paid, or until discharged by due course of law. [L. '54, p. 188, §§ 300, 301; Cd. '81, §§ 398, 399; 2 H. C., § 1655.]

See notes to § 1215.

Cited in 13 Wash. 487.

§ 1221. Attachment for Witness.

The court, judge, justice of the peace, or other officer, in such case, may issue an attachment to bring such witness before them to answer for contempt, and also testify as witness in the cause in which he was subpoenaed. [L. '54, p. 188, § 302; Cd. '81, § 400; 2 H. C., § 1656.]

A judge of the superior court has no jurisdiction to compel by attachment the attendance of a nonresident witness, who is outside of the jurisdiction, for the purpose of taking his deposition, although a subpoena was served upon him while he was temporarily within the county: *State ex rel. Hopkins v. Kennan*, 33 Wash. 247, 74 Pac. 381, 99 Am. St. Rep. 949.

§ 1222. To Whom Directed, How Executed.

Such attachment may be directed to the sheriff or any constable of any county in which the witness may be found, and shall be executed in the same manner as a warrant; and the fees of the officer for issuing and serving the same shall be paid by the person against whom the same was issued, unless he show reasonable cause, to the satisfaction of the justice, for his omission to attend; in which case the party requiring such attachment shall pay all such costs. [L. '91, p. 33, § 3; 2 H. C., § 1657.]

§ 1223. Testimony of Prisoner, How Obtained.

If the witness be a prisoner confined in a jail or prison within this state, an order for his examination in prison, upon deposition, or for his temporary removal and production before a court or officer, for the purpose of being orally examined, may be issued. [L. '54, p. 189, § 303; Cd. '81, § 401; 2 H. C., § 1658.]

§ 1224. Affidavit to Procure Order.

Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality. [L. '54, p. 189, § 304; Cd. '81, § 402; 2 H. C., § 1659.]

CHAPTER III.**THE EXAMINATION OF PARTIES.****§ 1225. Examination of Adverse Party as Witness.**

A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of one of several adverse parties, and for that purpose may be compelled in the same manner and subject to the same rules of examination as any other witness to testify at the trial, or he may be examined on a commission. [L. '54, p. 189, § 305; Cd. '81, § 403; 2 H. C., § 1660.]

Cited in 10 Wash. 428; 11 Wash. 651; 20 Wash. 239; 21 Wash. 335.

Right to Impeach One's Own Witness: See Remington's Digest, Witn., § 98-1; *Thomas v. Fos*, 51 Wash. 250, 98 Pac. 663.

INTERROGATORIES AND EXAMINATION OF PARTIES AND OF OTHER PERSONS: See Remington's Digest, Discov., §§ 4-7.

§ 4. Actions and Proceedings in Which Examination is Authorized: *Le May v. Baxter*, 11 Wash. 649, 40 Pac. 122.

§ 5. Grounds and Purposes of Examination—Discovery of Evidence: *Du Clos v. Batcheller*, 17 Wash. 389, 49 Pac. 483; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34.

This section, and section 1229, *infra*, expressly authorize the examination of the

adverse party as a witness, and the rebuttal of his evidence by adverse testimony, although he was called as the party's own witness at the opening of the trial: *Thomas v. Fos*, 51 Wash. 250, 98 Pac. 663.

§ 6. **Application:** *Murrilla v. Guis*, 51 Wash. 93, 98 Pac. 100.

§ 7. **Order—Making and Requisites in General:** *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134.

§ 1226. Interrogatories to Adversary.

Instead of the examination being had at the trial, as provided by the last section, the plaintiff, at the time of filing his complaint or afterwards, and the defendant, at the time of filing his answer or afterwards, may file in the clerk's office interrogatories for the discovery of facts and documents material to the support or defense of the action, to be answered on oath by the adverse party. [L. '54, p. 189, § 306; Cd. '81, § 404; 2 H. C., § 1661.]

Cited in 14 Wash. 135; 17 Wash. 391; 35 Wash. 245—247; 44 Wash. 31, 37; 80 Wash. 215; 81 Wash. 31; 106 Wash. 694.

Right to new trial, as affected by failure to propound interrogatories under sections 1226, 1227, or to have the complaint made more specific in that respect, such neglect amounting to a lack of due diligence: *Potts v. Potts*, 81 Wash. 27, 142 Pac. 448.

Doubted, whether the production of documentary evidence can be enforced by interrogatories under this section, in view of section 1262, *infra*: *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202.

A complaint upon a mutual open account, containing an itemized statement, need not be made more definite and certain where further information so far as permissible was obtainable by interrogatories to the adversary, under this

section: *Connecticut Investment Co. v. Yokom*, 106 Wash. 693, 180 Pac. 926.

Interrogatories—Objections and Exceptions: See *Remington's Digest*, Discov., § 8; *Du Clos v. Batcheller*, 17 Wash. 389, 49 Pac. 483; *Brooke v. Boyd*, 80 Wash. 213, 141 Pac. 357, Ann. Cas. 1916B, 359; *Tacoma & Eastern Lumber Co. v. Field & Co.*, 100 Wash. 79, 170 Pac. 360.

Doubted whether the production of documents can be enforced under this section, in view of section 1262 making provision for their inspection: *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202.

Waiver of right to demand interrogatories: See *Murrilla v. Guis*, 51 Wash. 93, 98 Pac. 100.

Right under statute to an order for the examination of an adverse party to enable one to frame his pleadings. *L. R. A.* 1918C, 593.

§ 1227. Answers to Interrogatories.

Such interrogatories shall be served in the manner provided by law for the service of summons, or by service upon the attorney of the party to be interrogated, and the answers thereto shall be served and filed within twenty days after such service unless for cause shown a further time be allowed by the court. A private corporation may be interrogated in the same manner as individuals, and it shall not be excused for a failure to answer any proper interrogatory unless it shall show that no one in its employ or connected with, or interested in it, can give the desired answer or information. [Cf. L. '54, p. 189, § 307; Cd. '81, § 405; 2 H. C., § 1662; L. '97, p. 288, § 1.]

Cited in 81 Wash. 31.

Answers to Interrogatories—Defects and Objections: See *Remington's Digest*, Discov., § 9; *Moore v. Palmer*, 14 Wash. 134, 44 Pac. 142; *Lowry v. Moore*, 16

Wash. 476, 48 Pac. 238, 58 Am. St. Rep. 49; *Knapp v. Order of Pendo*, 36 Wash. 601, 79 Pac. 209; *Pearce v. Greek Boys Min. Co.*, 48 Wash. 38, 92 Pac. 773.

§ 1228. Examination on Trial Notwithstanding Interrogatories.

A party to an action or proceeding, having filed interrogatories to be answered by the adverse party, as prescribed by the last two sections,

shall not thereby be precluded from examining such adverse party as a witness at the trial, nor from taking his deposition to be read at the trial. [Cf. L. '54, p. 189, § 308; Cd. '81, § 406; L. '91, p. 34, § 4; 2 H. C., § 1663.]

§ 1229. Testimony not Conclusive.

The testimony of a party, upon examination at the trial, or by deposition, or upon interrogatories filed, may be rebutted by adverse testimony. [Cf. L. '54, p. 189, § 309; Cd. '81, § 407; L. '91, p. 34, § 5; 2 H. C., § 1664.]

Cited in 14 Wash. 135; 30 Wash. 354; 75 Wash. 388.

Use of Evidence Obtained: See Remington's Digest, Discov., § 12; Denny v. Sayward, 10 Wash. 422, 39 Pac. 119; Island County v. Babcock, 20 Wash. 238, 55 Pac.

114; Moore v. Palmer, 14 Wash. 134, 44 Pac. 142; Allen v. Spokane Falls & N. R. Co., 21 Wash. 324, 58 Pac. 244; Sawdey v. Spokane Falls & N. R. Co., 30 Wash. 349, 70 Pac. 972, 94 Am. St. Rep. 880.

§ 1230. Penalty for Refusal to Answer or Give Testimony.

If a party refuse to attend and testify at the trial, or to give his deposition, or to answer any interrogatories filed, his complaint, answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt: Provided, that the preceding sections shall not be construed so as to compel any person to answer any question where such answer may tend to criminate himself. [Cf. L. '54, p. 190, § 310; Cd. '81, § 408; L. '91, p. 34, § 6; 2 H. C., § 1665.]

Cited in 4 Wash. 326; 6 Wash. 553; 44 Wash. 31, 32, 42.

Failure to Answer Interrogatories: See Remington's Digest, Discov., § 10; Le May v. Baxter, 11 Wash. 649, 40 Pac. 122; Livesley v. O'Brien, 6 Wash. 553, 34 Pac. 134; Waite v. Wingate, 4 Wash. 324, 30 Pac. 81; Fischer v. Woodruff, 25 Wash. 67, 64 Pac. 923, 87 Am. St. Rep. 742; Knapp v. Order of Pendo, 38 Wash. 601, 79 Pac. 209; Fidelity Nat. Bank v. Adams, 38 Wash. 75, 80 Pac. 284; Lawson v. Black Diamond Coal Min. Co., 44 Wash. 26, 86 Pac. 1120; Haas v. Washington Water Power Co., 93 Wash. 291, 160 Pac. 954.

Default is properly taken against plaintiffs who refuse to answer interrogatories submitted by defendants calling

for facts material to the defense: Saar v. Weeks, 105 Wash. 628, 178 Pac. 819.

The only judgment authorized is one of dismissal of plaintiff's action, where no default is taken for his failure to reply to an affirmative defense, and no proof is introduced in support of the matters alleged in such defense: Waite v. Wingate, 4 Wash. 324, 30 Pac. 81.

This section authorizes courts to grant default judgments upon the failure of a party to answer interrogatories filed, where the interrogatories go to all the issues in the case, and where the refusal to answer may be taken as an admission of the facts at issue, and is not invalid and unconstitutional: Capps v. Frederick, 44 Wash. 38, 86 Pac. 1128.

§ 1230-1. Physical Examination in Personal Injury Cases.

On or before the trial of any action brought to recover damages for injury to the person, the court before whom such action is pending may from time to time, on application of any party therein, order and direct an examination of the person injured as to the injury complained of by a competent physician or physicians, surgeon or surgeons, in order to qualify the person or persons making such examination to testify in the said cause as to the nature, extent and probable duration of the injury complained of: and the court may in such order direct and determine the time and place of such examination: Provided, this section shall not be construed to prevent any other person or physician from being called and examined as a witness as heretofore. [L. '15, p. 236, § 1.]

Cited in 94 Wash. 528; 106 Wash. 610.

Physical Examination: See Remington's Digest, Discov., § 11; Lane v. Spokane Falls & Northern R. Co., 21 Wash. 119, 57 Pac. 367, 75 Am. St. Rep. 821, 46 L. R. A. 153; Smith v. Spokane, 16 Wash. 403, 47 Pac. 888; Myrberg v. Baltimore etc. R. Co., 25 Wash. 364, 65 Pac. 539; Helbig v. Grays Harbor Elec. Co., 37 Wash. 130, 79 Pac. 612; Dunkin v. Hoquiam, 56 Wash. 47, 105 Pac. 149.

In an action for personal injuries, it is not error to refuse a physical examination of the plaintiff, before any issue had been framed as to the extent of the injuries or any showing made as to the

necessity therefor, in view of this section, which is not mandatory: Titus v. Montesano, 106 Wash. 608, 181 Pac. 43.

Power of court to compel submission to physical examination. 1 **Ann. Cas.** 266; 11 **Ann. Cas.** 844; **Ann. Cas.** 1915D, 767; **Ann. Cas.** 1917D, 351.

Duty of injured employee seeking recovery under Workmen's Compensation Act to submit to examination. 6 **A. L. R.** 1270.

Second examination of injured workman as allowable under Workmen's Compensation Act. **Ann. Cas.** 1915C, 918.

CHAPTER IV.

DEPOSITIONS.

§ 1231. Cases in Which Deposition may be Taken.

The testimony of a witness may be taken by deposition, to be read in evidence in an action, suit, or proceeding commenced and pending in any court in this state, in the following cases:—

1. When the witness resides out of the county, and more than twenty miles from the place of trial;
2. When the witness is about to leave the county, and go more than twenty miles from the place of trial, and there is a probability that he will continue absent when the testimony is required;
3. When the witness is sick, infirm, or aged, so as to make it probable that he will not be able to attend at the trial;
4. When the witness resides out of the state. [L. '54, p. 190, § 313; L. '69, p. 108, § 404; L. '77, p. 89, § 411; Cd. '81, § 409; 2 H. C., § 1666.]

Cited in 14 Wash. 458; 54 Wash. 21; 85 Wash. 184; 111 Wash. 69, 70, 71.

Actions and Proceedings in Which Depositions may be Taken—Criminal Prosecutions: See Remington's Digest, Depositions, § 1; State v. Humason, 5 Wash. 499, 32 Pac. 111; State v. Paggett, 8 Wash. 579, 36 Pac. 487; State v. Hunter, 18 Wash. 670, 52 Pac. 247.

See, also, State ex rel. Rothwell & Co.

v. Superior Court, 111 Wash. 63, 189 Pac. 556.

Jurisdiction of Probate Court to Issue Commissions: Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

For text treatment of "Depositions," see 8 **R. C. L.** 1129.

Power of court to issue or to honor letters rogatory. 9 **A. L. R.** 966.

§ 1232. Time for Taking.

Either party may commence taking testimony by depositions at any time after service of summons upon the defendants. [L. '77, p. 90, § 412; Cd. '81, § 410; 2 H. C., § 1667.]

Cited in 110 Wash. 165; 111 Wash. 69, 71.

§ 1233. Before Whom Taken Within States—Notice.

Either party may have the deposition of a witness taken in this state before any judge of the superior court, justice of the peace, clerk of the supreme or superior court[s], mayor of a city or notary public, by serving on the adverse party or his attorney previous notice of the time and place of examination. The notice shall be served such time before the time when

the deposition is to be taken as to allow the adverse party sufficient time by the usual route of travel to attend, and three days for preparation, exclusive of the day of service, and the examination may, if so stated in the notice, be adjourned from day to day. The notice shall specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, and the time and place of taking the deposition. It shall be served upon the adverse party, his agent, or attorney of record, or be left at his usual place of abode. [L. '54, p. 190, § 314; Cd. '81, § 411; L. '88, p. 29, § 1; L. '91, p. 34, § 7; 2 H. C., § 1668.]

Cited in 54 Wash. 20.

Notice and Time of Taking: See Remington's Digest, Depositions, § 5; Phelps v. Steamship City of Panama, 1 W. T. 518; Donaldson v. Winningham, 54 Wash. 19, 102 Pac. 879; Swanson v. Hood, 99 Wash. 506, 170 Pac. 135.

See, also, State ex rel. Rothwell & Co. v. Superior Court, 111 Wash. 63, 189 Pac. 556.

Necessity and sufficiency of naming witness in notice of taking deposition. **Ann. Cas.** 1918A, 950.

§ 1234. Time for Notice may be Limited.

The court, or a judge thereof, or in an action or proceedings before a justice of the peace, the justice, may, upon sufficient cause being shown by affidavit, prescribe a shorter time for notice than that specified in the last preceding section. A copy of the order shortening the time must be served with the notice. [L. '91, p. 35, § 8; 2 H. C., § 1669.]

§ 1235. Witnesses Subpoenaed and Compelled to Attend.

Any witness may be subpoenaed and compelled, by any officer authorized to take depositions, to appear and give his deposition at any place within twenty miles of the abode of such witness, in like manner as he may be subpoenaed and compelled to attend as a witness in any court, and he shall suffer the same penalties for a failure to attend as are prescribed in section 1220. [Cf. L. '54, p. 192, § 321; Cd. '81, § 422; L. '91, p. 35, § 9; 2 H. C., § 1670.]

Cited in 59 Wash. 657.

Production of Documents: See Remington's Digest, Depositions, § 5-1; Bolster,

In re, 59 Wash. 655, 110 Pac. 547, 29 L. R. A. (N. S.) 716.

§ 1236. Superior Court may Compel Attendance.

The superior court shall have power to compel the attendance of witnesses, within this state, before notaries public, justices of the peace or any other person authorized by the laws of this state to take depositions in causes pending in any court of the state, or in any court of any other state, or in any court of the United States, or in any court of a foreign country. [L. '01, p. 23, § 1.]

Cited in 59 Wash. 657.

§ 1237. Application for Order.

The officer before whom the deposition is to be taken in case of the refusal of any witness to attend or testify shall report to the superior court in and for the county in which the witness resides, or is found, by petition, that due notice has been given of the time and place of taking the depositions and that the witness has been summoned in the same manner that witnesses are now summoned to appear and testify in the superior court

of this state; and the fees and mileage of the witness has been paid, or tendered to the witness, for his attendance and testimony, and that the witness has failed and refused to attend or testify before such officer, in the cause mentioned in the notice and the subpoena; and ask an order of the court compelling the witness to attend and testify before such officer. [L. '01, p. 23, § 2.]

Cited in 59 Wash. 657.

§ 1238. Citation—Contempt.

The court upon the petition of the officers, and the payment of the regular docket fee of four dollars (\$4) shall enter an order directing the witness to appear before the officer making the report, at a time and place to be fixed by the court in such order, and then and there give his testimony in such cause. A copy of which order shall be served upon the witness in the same manner that summons and complaints are now served; and on failure or refusal of the witness to obey such order such witness shall be dealt with as for contempt. [L. '01, p. 24, § 3.]

§ 1239. Before Whom Taken Out of the State.

Depositions may be taken out of the state by a judge, justice, or chancellor or clerk of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any city or town, or any person authorized by a special commission from any court [of record] of this state. [Cf. L. '54, p. 193, § 322; L. '77, p. 90, § 414; Cd. '81, § 412; 2 H. C., § 1671.]

Cited in 111 Wash. 69.

§ 1240. Commission to Take—How Issued.

Any superior court in this state, or any judge thereof, is authorized to grant a commission to take depositions within or without this state. The commission must be issued to a person or persons therein named, by the clerk, under the seal of the court granting the same, and depositions under it may be taken upon written interrogatories or upon oral questions or partly upon oral and partly upon written interrogatories. Before any such commission shall be granted, the person intending to apply therefor shall serve upon the adverse party a notice of his intention to make such application, stating the time when and the place where such application will be made, which notice shall be served in the same manner and for the same time as provided in section 1233, unless the court or judge, for sufficient cause shown by affidavit, prescribe a shorter time. At the time the application is presented, the court or judge shall settle the interrogatories, if any have been served and the parties have not settled the same. The clerk, upon issuing the commission, shall attach the interrogatories thereto, if any have been agreed upon or settled by the court, and immediately forward the same to the commissioner. At least five days' notice must be given to the party or witness to be examined out of the state, in case such examination shall be had upon oral interrogatories, and the person before whom the deposition of the witness shall be taken shall have the same power to compel the attendance of such parties or witnesses as any person authorized to take such deposition within this state. [Cf. L. '54, p. 193, § 323;

L. '73, p. 114, §§ 412, 413; L. '77, p. 90, § 415; Cd. '81, §§ 413, 414; L. '91, p. 35, § 10; 2 H. C., § 1672; L. '97, p. 206, § 1.]

Cited in 96 Wash. 3; 111 Wash. 69.

Interrogatories: See Remington's Digest, Depositions, § 3; Hobart v. Jones, 5 Wash. 385, 31 Pac. 879; State ex rel.

Geissler v. Truax, 96 Wash. 1, 164 Pac. 597; Terrill v. Fotheringham, 103 Wash. 34, 173 Pac. 748.

§ 1241. Notice to Nonresident Party.

When the party against whom the deposition is to be read is absent from or a nonresident of the state, and has no agent or attorney of record therein, he may be notified of the taking of the deposition [or] of the application for a commission, by publication. The publication must be made three consecutive weeks, in some newspaper printed in the county where the action or proceeding is pending, if there be any printed in such county, and if not, in some newspaper printed in this state, of general circulation in that county. The publication must contain all that is required in the written or printed notice, and may be proved in the manner prescribed in case of the publication of summons. [Cf. Cd. '81, § 415; L. '91, p. 35, § 11; 2 H. C., § 1673.]

§ 1242. How Taken and Certified.

The deposition shall be written by the officer taking the same, or by the witness, or by some disinterested person, in the presence and under the direction of such officer. When completed, it shall be carefully read to or by the witness, corrected if desired, and subscribed by him. If taken upon notice, it shall be certified by the officer substantially as follows:—

State of Washington, }
County of —, } ss.

I, A B, justice of the peace in and for said county (or judge, clerk, etc., as the case may be), do hereby certify that the above deposition was taken before me, and reduced to writing by myself (or witness, as the case may be), at —, in said county, on the — day of —, 18—, at — o'clock, in pursuance of notice hereto annexed; that the above-named witness, before examination, was sworn (or affirmed) to testify the truth, the whole truth, and nothing but the truth, and that the said deposition was carefully read to (or by) said witness, and then subscribed by him.

A B, Justice of the Peace.

Dated at — the — day of —, 18—.

If the deposition be taken upon a commission, the commission [er] shall testify [certify] it in substantially the same manner, and annex to it the commission and interrogatories. [Cf. L. '54, p. 191, § 315; Cd. '81, § 416; L. '91, p. 36, § 12; 2 H. C., § 1674.]

Cited in 70 Wash. 691; 75 Wash. 481.

Examination of Witness—Reduction to Writing: See Remington's Digest, Depositions, § 5-2; Armstrong v. Yakima Hotel Co., 75 Wash. 477, 135 Pac. 233.

Making and Requisites of Return or Certificate: See Remington's Digest, Deposi-

tions, §§ 6, 7; Hobart v. Jones, 5 Wash. 385, 31 Pac. 879; Nasser v. Gaston, 70 Wash. 685, 127 Pac. 470; Phelps v. Steamship City of Panama, 1 W. T. 518.

Suppression: See Remington's Digest, Depositions, § 7-1; Nasser v. Gaston, 70 Wash. 685, 127 Pac. 470.

§ 1243. How Returned.

The deposition, whether taken upon notice or upon a commission, shall be inclosed in a sealed envelope, by the officer taking the same, and directed to the clerk of the court, arbitrators, referee, or justice of the peace before whom the action is pending, or to such persons as the parties, in writing, may agree upon, and either delivered to the clerk of the court or other person, or transmitted through the mail or by some private person. [Cf. L. '54, p. 191, § 316; Cd. '81, § 417; L. '91, p. 36, § 13; 2 H. C., § 1675.]

Cited in 70 Wash. 691.

Opening and Publication: See Remington's Digest, Depositions, § 8; Phelps v. Steamship City of Panama, 1 W. T. 518;

Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872.

Retaking: See Remington's Digest, Depositions, § 8-1; Donaldson v. Winningham, 62 Wash. 212, 113 Pac. 285.

§ 1244. Use of on Trial—Objections.

Such deposition may be used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions to the competency or credibility of the witness, or the manner of taking the deposition. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was taken at the time of the examination. It shall be the duty of the person taking the deposition to propound to the witness every question proposed by either party, and to note all objections to the form of any interrogatory, and when any interrogatory is objected to on account of form, unless the form is amended and the objection waived, he shall write after the question, and before the answer, the words "objected to"; and when any witness declines to answer a question on the ground that it will [tend to] criminate himself, that fact shall also be noted after the question, if written down. The deposition may be taken in the form of a narrative, or by question and answer, or partly in either form, as either party present at the examination shall require. When taken by question and answer, the officer shall first write down the question and then the answer, as nearly as may be, in the language of the witness; but when the deposition is read to the witness previous to signing it, he shall be permitted to amend his answer to any question, or any part of his deposition; such amendment, however, unless both parties shall otherwise agree, shall not be made by way of interlining or erasing, but shall be added at the end of the deposition under the title, "amendment by the witness," and such amendment shall intelligibly refer to the part so amended. [L. '54, p. 191, § 317; Cd. '81, § 418; 2 H. C., § 1676.]

OBJECTIONS: See Remington's Digest, Depositions, §§ 14—16.

§ 14. In General: Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788; Chicago, M. & St. P. R. Co. v. Alexander, 47 Wash. 131, 91 Pac. 626; Nasser v. Gaston, 70 Wash. 685, 127 Pac. 470; State Bank of Clarkston v. Morrison, 85 Wash. 182, 147 Pac. 875.

§ 15. — Answers: Price v. Wenatchee Valley Orchards Co., 81 Wash. 83, 142 Pac. 434; Independent Order of Foresters v. Bonner, 84 Wash. 13, 145 Pac. 987.

§ 16. — Right to Object: Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788; Sanborn v. Dentler, 97 Wash. 149, 166 Pac. 62.

Use of Depositions: See Remington's Digest, Depositions, §§ 9—13. In general: McGaw v. Franklin, 2 Wash. 17, 25 Pac. 911, 26 Pac. 810; Brown v. Gillett, 33 Wash. 264, 74 Pac. 386.

§ 10. Admissibility in Evidence: Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788.

§ 11. — Continued Existence of Grounds for Taking: Hennessy v.

Niagara Fire Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.

§ 12. — **Amendment of Pleading After Taking Deposition:** Neis v. Farquharson, 9 Wash. 508, 37 Pac. 697; Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872; Miner v. Paulson, 60 Wash. 150, 110 Pac. 994.

§ 13. **Parties Entitled to Use Deposition:** Von Tobel v. Stetson & Post Mill Co., 32 Wash. 683, 73 Pac. 788.

Withdrawal of deposition from files

§ 1245. Shall not be Used, When.

If it appear at the trial that the reason for taking the deposition no longer exist, the deposition shall not be read in evidence, unless the party offering it show that another of the causes specified by section 1231 then exists, or that the witness is dead, or cannot safely attend at the trial on account of sickness, age, or other bodily infirmity. [Cf. L. '54, p. 192, § 318; Cd. '81, § 419; L. '91, p. 36, § 14; 2 H. C., § 1677.]

Cited in 8 Wash. 93; 49 Wash. 648.

Under this section, it will be presumed that the reason continues to exist until the contrary is shown by the adverse party: Heinzerling v. Agen, 49 Wash. 647, 96 Pac. 223.

The death of a party to an action and substitution of his legal representative will not render inadmissible the deposition of an adverse party when the deposition was competent at the time it was

as affecting its admissibility in evidence. **Ann. Cas.** 1914C, 1280.

Waiver by cross-examination of objection to competency of witness whose testimony is taken by deposition. 33 **L. R. A. (N. S.)** 107.

Admissibility of deposition in evidence against party taking it. **Ann. Cas.** 1913B, 1169; **Ann. Cas.** 1916E, 968.

Right to raise on subsequent trial objections to deposition not made on first trial. **Ann. Cas.** 1913B, 1057.

taken: Neis v. Farquharson, 9 Wash. 508, 37 Pac. 697.

Death of deponent as bringing transaction within statute against admission of evidence of transaction with decedent. 21 **Ann. Cas.** 1265; **Ann. Cas.** 1917B, 490.

Admissibility after death of adversary of deposition of party taken before former's death and relating to a personal transaction with him. **L. R. A.** 1915F, 771.

§ 1246. Depositions Taken in One Cause may be Used in Another, When.

When the plaintiff in any action shall discontinue it, or when it shall be dismissed for any cause, and another action shall afterward be commenced for the same cause between the same parties, or their respective representatives, all depositions lawfully taken in the first action may be used in the other, in the same manner and subject to the same conditions and objections as if originally taken for such other action: Provided, that the deposition shall have been duly filed in the court where the first action was pending, and shall have remained in the custody of the court from the termination of the first action until the commencement of the other. [L. '54, p. 192, § 319; Cd. '81, § 420; H. C., § 1678.]

Admissibility of deposition given in action for personal injury in another action growing out of the

same injury or accident, in which the deponent is not available. **L. R. A.** 1916A, 990.

§ 1247. Certified Testimony of Deceased or Absent Witness.

The testimony of any witness, deceased, or out of the state, or for any other sufficient cause unable to appear and testify, given in a former action or proceeding, or in a former trial of the same cause or proceeding when reported by a stenographer, or reduced to writing, and certified by the trial judge, upon three days' notice to the opposite party or parties, together with service of a copy of the testimony proposed to be used may be given in evidence in the trial of any civil action or proceeding, where

it is between the same parties and relates to the same matter. [L. '05, p. 50, § 1.]

Cited in 54 Wash. 260; 72 Wash. 291; 87 Wash. 135; 90 Wash. 597, 598; 91 Wash. 142.

Under this section, both direct and cross examinations are admissible at a subsequent trial, if not subject to any objection which was properly made and improperly overruled on the first trial in favor of the same party making the same objection: *Scribner v. Palmer*, 90 Wash. 595, 156 Pac. 531.

This section does not render certified copy admissible, where the deposition of the witness was duly taken out of the state for use at the trial and had been published without objection; the intent of the statute being to require reasonable diligence to otherwise procure the testimony of the witness: *Kennedy v. Canadian Pac. R. Co.*, 87 Wash. 134, 151 Pac. 252.

Under this section it is not necessary that notice be given of an intention to recertify testimony that was certified by the trial judge to be used on an appeal: *Knutson v. Moe Brothers*, 72 Wash. 290, 130 Pac. 347.

The stenographer's evidence as to the testimony of an absent witness, given at a former trial, is inadmissible where the witness did not refresh her memory from her shorthand notes, but read directly from a transcript of the notes made by herself or dictated to a phonograph: *Duffy v. Blake*, 91 Wash. 140, 157 Pac. 480.

Evidence given at a former trial in an action upon a note by a holder in due course is not admissible in a subsequent action by the maker against the payee for fraud in its procurement, under this section: *Duffy v. Blake*, 91 Wash. 140, 157 Pac. 480.

§ 1248. When may be Used on Appeal.

When any action shall have been appealed from one court to another, and is to be tried anew in the appellate court, all depositions lawfully taken to be used in the court from which the appeal was taken may be used in the appellate court in the same manner and subject to such exceptions for informality or irregularity, and none other, as were taken in writing to such depositions in the court below; and when an action is removed from one court to another by change of venue, all depositions previously taken in the action must be certified to the court to which the action is removed, and may be used in that court in the same manner and subject to the same exceptions as if originally taken for use therein. [Cf. L. '54, p. 192, § 320; Cd. '81, § 421; L. '91, p. 37, § 15; 2 H. C., § 1679.]

CHAPTER V.

PERPETUATION OF TESTIMONY.

§ 1249. Application for Order to Examine Witnesses.

When any person shall be desirous to perpetuate the testimony of any witness he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest in or to the subject concerning which he desires to perpetuate the evidence, and the names of all the persons interested or supposed to be interested therein, and also the name of the witness proposed to be examined, which statement shall be under oath, and filed in the superior court. If the subject of the proposed deposition relate to real property within this state, the statement shall be filed in the county where the lands, or any part thereof, lie; in other cases, in the county where the parties interested, or some of them, reside. Upon such statement, an application may be made to such court, or judge thereof,

to allow the examination of such witness. [Cf. L. '54, p. 193, § 327; L. '77, p. 93, § 425; Cd. '81, § 423; L. '91, p. 37, § 17; 2 H. C., § 1688.]

Cited in 37 Wash. 84.

Jurisdiction of equity to entertain

bill to perpetuate testimony. 25
L. B. A. (N. S.) 673.

§ 1250. Hearing of Application—Notice.

The court or judge shall appoint a time and place for hearing such application, and shall order notice thereof and of the statement to be served on all persons mentioned therein as adversely interested in the matter; the notice shall be served personally on all those living in the state at least twenty days before the time of hearing the application; upon those who are not residents of the state, it shall be served by publication or otherwise, in the same manner as a notice is served upon a nonresident. [L. '54, p. 194, § 328; L. '77, p. 93, § 426; Cd. '81, § 424; 2 H. C., § 1689.]

§ 1251. Order for Examination—Commission.

If upon hearing of the parties, or of the applicant alone, should no adverse party appear, the court or judge shall be satisfied that there is sufficient cause for taking the deposition, an order shall be made allowing the examination of the witness; and such court or judge may direct a commission to issue therefor in like manner as a commission to take the testimony of witnesses in actions or proceedings pending in such court. [Cf. L. '54, p. 194, § 329; Cd. '81, § 425; L. '91, p. 37, § 18; 2 H. C., § 1690.]

§ 1252. How Taken and Returned.

The deposition of such witness, whether residing in this state or not, shall be taken upon written interrogatories filed by the applicant and cross-interrogatories filed by any party adversely interested, if he shall think fit, and it shall be taken and returned substantially in the same manner as if taken upon commission to be used in any cause pending in the same court. [L. '54, p. 194, § 330; Cd. '81, § 426; 2 H. C., § 1691.]

§ 1253. Return and Filing—How Used—Objections.

The deposition, when returned, shall be filed in the office of the clerk of the court by whom the commission was issued; and if a trial be had between the person at whose request the deposition was taken and the person named in the statement, or any of them, or their successors in interest, upon proof of the death or insanity of the witness, or his inability to attend the trial by reason of age, sickness or settled infirmity, the deposition, or a certified copy thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examination, no objections to the form of the interrogatory shall be made at the trial, unless the same were taken at the time of the examination. [L. '54, p. 194, § 331; Cd. '81, § 427; 2 H. C., § 1692.]

CHAPTER VI.

DOCUMENTARY EVIDENCE.

§ 1254. Court Records, etc., as Evidence.

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed. [L. '54, p. 195, § 334; Cd. '81, § 430; 2 H. C., § 1680.]

Cited in 2 Wash. 518; 3 Wash. 169; 44 Wash. 487; 84 Wash. 162.

Judicial Acts and Records: See Remington's Digest, Evid., § 110.

In an action on a foreign judgment, the judgment-roll is admissible in evidence, although it appears therefrom that subsequent to the entry of judgment the return was amended so as to show that defendant had been duly served, but without personal notice to the defendant of the proposed amendment, where the judgment was by default, and the statute of the state in which judgment was had did not require personal notice in such cases: *Cunningham v. Spokane Hydraulic Min. Co.*, 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

An answer stricken out on motion of a defendant is not competent as an admission to prove any of the facts stated therein, as the same is *functus officio*, and its admissions are not binding on the defendant: *Wiley v. Northern Pac. R. Co.*, 60 Wash. 597, 111 Pac. 801.

Authenticated Copies of Judicial Records and Proceedings: See Remington's Digest, Evid., § 115.

A certified record of probate proceedings in another county is admissible in

an action by the executors of the estate in an action to recover possession of property: *Gilmore v. Baker Co.*, 12 Wash. 468, 41 Pac. 124.

In an action for a malicious prosecution of a charge before a justice of the peace, where a change of venue was had to the next nearest justice, the transcript of the docket, showing plaintiff's discharge, is properly admitted in evidence where sufficient appears to show that such justice had acquired jurisdiction of the case: *Kerstetter v. Thomas*, 36 Wash. 620, 79 Pac. 290.

Upon an issue as to the reasonableness of attorney's fees rendered in an estate, a copy of the administrator's final account is competent to prove the amount of the estate: *Griggs v. Wayne*, 100 Wash. 459, 171 Pac. 230.

Upon a prosecution for being an habitual criminal, proof of an original conviction of robbery in another state by a certified copy of the record thereof is expressly authorized by this section: *State v. Rowan*, 84 Wash. 158, 146 Pac. 374.

Full faith and credit clause of federal constitution as applicable to state courts of inferior jurisdiction. 21 *Ann. Cas.* 1153.

§ 1255. Faith Given to Judgments of Other States.

Judgment for debt rendered in any other state or any territory against any person or persons residents of this state at the time of the rendition of such judgment shall not be of any higher character as evidence of indebtedness than the original claim or demand upon which such judgment is rendered, unless such judgment shall be rendered upon personal service of summons, notice, or other due process against the defendant therein. [Cf. L. '66, p. 88, § 1; Cd. '81, § 739; L. '91, p. 70, § 1; 2 H. C., § 804.]

Cited in 90 Wash. 338.

Conclusiveness of Foreign Divorces: See notes to § 989, *supra*; Remington's Digest, Divorce, §§ 110—113, and cases cited.

Conclusiveness of Judgments of Other States: See Remington's Digest, Judgm., §§ 254—258.

Adjudications Operative in Other States: *Maney, In re*, 20 Wash. 509, 55 Pac. 930, 72 Am. St. Rep. 130; *Cowen v. Culp*, 97 Wash. 480, 166 Pac. 789.

§ 255. **Right to Inquire into Jurisdiction in General:** *Ritchie v. Carpenter*, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep.

877; *Cunningham v. Spokane Hydraulic Min. Co.*, 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113; *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862.

§ 257. **Merger and Bar of Causes of Action:** *Howard v. McNaught*, 9 Wash. 355, 37 Pac. 455, 43 Am. St. Rep. 837.

§ 258. **Conclusiveness of Adjudication:** *Whitman v. Mast, Buford etc. Co.*, 11 Wash. 318, 39 Pac. 649, 48 Am. St. Rep. 874; *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 83 Am. St. Rep. 806, 54 L. R. A. 204; *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556, 107 Am. St. Rep. 859; *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8.

This section merely intended to make a distinction between judgments in personam and in rem; and does not militate against the giving of full faith and credit to a judgment of a sister state rendered upon a warrant of attorney to confess judgment, as the same is a judgment in personam: *Miller v. Miller*, 90 Wash. 333, 156 Pac. 8.

Validity and effect in one state of judgment rendered in another state on warrant of attorney. 20 Ann. Cas. 262; 3 L. R. A. (N. S.) 449.

Judgment declaring contract void as champertous as entitled to full faith and credit in another state. Ann. Cas. 1914B, 1144.

§ 1256. Defenses to Suits on Foreign Judgments.

The same defense to suits on judgments rendered without such personal service may be made by the judgment debtor which might have been set up in the original proceeding. [L. '66, p. 88, § 2; Cd. '81, § 740; 2 H. C., § 805.]

§ 1257. Public Records as Evidence.

Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state, when duly certified by the respective officers having by law the custody thereof, under their respective seals, where such officers have official seals, shall be admitted in evidence in the courts of this state. [Cf. L. '54, p. 195, § 336; Cd. '81, § 432; L. '91, p. 37, § 16; 2 H. C., § 1681.]

Cited in 38 Wash. 634.

Public Documents and Publications: See Remington's Digest, Evid., §§ 109—113. In general: *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55; *Palmer v. Peterson*, 56 Wash. 74, 105 Pac. 179.

§ 111. **Records of Official Acts and Proceedings:** *Anderson v. Hilker*, 38 Wash. 632, 80 Pac. 848; *Peterson v. Arland*, 79 Wash. 679, 141 Pac. 63.

§ 112. **Official Reports and Returns:** *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524.

§ 113. **Records of Conveyances and Other Private Writings:** *Greene v. Finnell*, 22 Wash. 186, 60 Pac. 144.

Admissibility in evidence of foreign official record. 19 Ann. Cas. 1219; 5 L. R. A. (N. S.) 938.

§ 1258. Seal of Public Officer, How Affixed.

A seal of court or public office, when required to any writ, process, or proceeding to authenticate a copy of any record or document, may be affixed by making an impression directly on the paper, which shall be as valid as if made upon a wafer or on wax. [L. '54, p. 196, § 338; Cd. '81, § 434; 2 H. C., § 1683.]

Cited in 40 Wash. 631.

§ 1259. Foreign Statutes Admissible in Evidence, When.

Printed copies of the statute laws of any state, territory, or foreign government, if purporting to have been published under the authority of the respective governments, or if commonly admitted and read as evidence in their courts, shall be admitted in all courts in this state, and on all

other occasions, as presumptive evidence of such laws. [L. '54, p. 196, § 339; Cd. '81, § 435; 2 H. C., § 1684.]

Evidence as to Statutes of Other States: See Remington's Digest, Statut., § 96; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862; Gunderson v. Gunderson, 25 Wash. 459, 65 Pac. 791; Daniel v. Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884; Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736; Clark v. Eltinge, 38 Wash. 376, 80 Pac. 556, 107 Am. St.

Rep. 858; Fletcher v. Murray Commercial Co., 72 Wash. 525, 130 Pac. 1140; State v. Collins, 69 Wash. 268, 124 Pac. 903; Lipset v. Dettering, 94 Wash. 629, 162 Pac. 1007.

Printed copy of foreign statute as admissible to prove law of another jurisdiction. *Ann. Cas.* 1916D, 853.

§ 1260. Certified Copies of Recorded Instruments as Evidence.

Whenever any deed, conveyance, bond, mortgage, or other writing shall have been recorded or filed in pursuance of law, copies of record of such deed, conveyance, bond, or other writing, duly certified by the officer having the lawful custody thereof, with the seal of the office annexed, if there be such seal, if there be no such seal, then with the official certificate of such officer, shall be received in evidence to all intents and purposes as the originals themselves. [Cf. L. '54, p. 195, § 335; L. '77, p. 95, § 433; Cd. '81, § 431; 2 H. C., § 1685.]

See *infra*, § 1384 record of wills as evidence.

See *infra*, § 1428, copies of letters of administration as evidence.

See *infra*, § 3808, articles of incorporation as evidence.

See *infra*, § 11347, instruments transmitted by telegraph, effect of.

See *infra*, § 11349 et seq., telegraphic copies as evidence.

Cited in 8 Wash. 5; 16 Wash. 374; 26 Wash. 438.

EXEMPLIFICATIONS, TRANSCRIPTS AND CERTIFIED COPIES: See Remington's Digest, Evid., §§ 114—123.

§ 114. **Original Papers:** Peters v. Gay, 9 Wash. 383, 37 Pac. 325; Smith v. Versey, 30 Wash. 18, 70 Pac. 94; State ex rel. Havercamp v. Superior Court, 101 Wash. 260, 172 Pac. 254.

§ 116. **Official Records and Proceedings in General:** National Bank of Commerce v. Galland, 14 Wash. 502, 45 Pac. 35; Knapp, Burrell & Co. v. Strand, 4 Wash. 686, 30 Pac. 1063; Spokane & Idaho Lumber Co. v. Loy, 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119.

§ 117. **Records and Proceedings in Land Office:** Ward v. Moorey, 1 W. T. 104; Sayward v. Gardner, 5 Wash. 247, 31 Pac. 761, 33 Pac. 389.

§ 118. **Records of Conveyances and Other Private Writings:** Jackson v. Tatebo, 3 Wash. 456, 28 Pac. 916; Garneau v. Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

A certified copy of the record of a mortgage is admissible in evidence, and is sufficient proof of the execution of the mortgage, when the certificate of acknowledgment to the mortgage is regular in form and states that the instrument had been duly executed by the mortgagor: Howard v. Gemming, 10 Wash. 30, 38 Pac. 766.

A certified copy of the record of a mortgage is admissible and entitled to the same weight as the original, under this section: Goon Gan v. Richardson, 16 Wash. 373, 47 Pac. 762.

This section does not permit public records to be proved by the certificate of any other person than the officer having such record in his possession: Roberts v. Center, 26 Wash. 435, 67 Pac. 151.

§ 119. **Municipal Records:** New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236; Bringgold v. Spokane, 27 Wash. 202, 67 Pac. 612.

§ 120. **Requisites of Exemplification or Certificate:** Bignold v. Carr, 24 Wash. 413, 64 Pac. 519.

§ 121. — **Seal of Court or Officer:** Ward v. Moorey, 1 W. T. 104.

§ 122. **Acts, Records and Judicial Proceedings of Other States—In General:** McCoy v. Ayres, 2 W. T. 203, 2 Pac. 273; Waldo v. Milroy, 19 Wash. 156, 52 Pac. 1012; James v. James, 35 Wash. 650, 77 Pac. 1080.

§ 123. — **Requisites of Exemplification or Certificate:** Ritchie v. Carpenter, 2 Wash. 512, 28 Pac. 380, 26 Am. St. Rep. 877; State v. Kniffen, 44 Wash. 485, 87 Pac. 837, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113.

Proper form of certification that paper or document is true copy. *Ann. Cas.* 1912C, 942.

§ 1260½. Ordinances as Evidence.

All ordinances passed by any city council or board of trustees or other municipal corporation within the state of Washington shall be recorded in a book to be kept for that purpose by the city clerk, or clerk of such board of trustees or municipal corporation of such city, and when so recorded the record thereof so made shall be received in any court of this state as prima facie evidence of the due passage of such ordinances as recorded, and this chapter shall apply as well to all ordinances heretofore as hereafter so passed and recorded. And when the ordinances of any city or town are printed by authority of such municipal corporation, the printed copies thereof shall be received as prima facie evidence that such ordinances as printed and published were duly passed. [Cd. '81, § 2062; 1 H. C., § 766.]

Presumptions and Evidence: See Remington's Digest, Mun. Corp., § 53; Seattle v. Doran, 5 Wash. 482, 32 Pac. 105, 1002; Seattle v. Pearson, 15 Wash. 575, 46 Pac. 1053; New Whatcom v. Bellingham Bay Imp. Co., 16 Wash. 131, 47 Pac. 236; Seattle v. Turner, 29 Wash. 515, 69 Pac. 1083; Buck v. Monroe, 85 Wash. 1, 147 Pac. 432.

Under this section a certified copy of the record of an ordinance is prima facie

proof of its due passage, establishing the existence of the ordinance until the presumption is overcome: Gove v. Tacoma, 34 Wash. 434, 76 Pac. 73.

Judicial notice of municipal ordinances. 5 Ann. Cas. 614; Ann. Cas. 1914C, 1232; 4 L. R. A. 41.

Admissibility of parol evidence to prove municipal ordinance. Ann. Cas. 1915A, 709.

§ 1261. Certified Copy of Tax Deeds.

Whenever it shall be necessary in any action in any court of law or equity, wherein the title to any real estate is in controversy, to prove the conveyance to any county of such real estate in pursuance of a foreclosure of a tax certificate and sale thereunder, a copy of the tax deed issued to the county containing a description of such real estate, exclusive of the description of all other real estate therein described, certified by the county auditor of the county wherein the real estate is situated, to be such, shall be admitted in evidence by the court, and shall be proof of the conveyance of the real estate in controversy to such county, to the same extent as would a certified copy of the entire record of such tax deed. [L. '05, p. 266, § 1.]

§ 1262. Order for Inspection and to Take Copy of Writings, etc.

Any court, or judge thereof, in which an action is pending may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under his control, containing evidence relating to the merits of the action or defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be, and the court may also punish the party refusing as for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents where he is examined as a witness. [L. '54, p. 195, § 332; Cd. '81, § 428; 2 H. C., § 1686.]

Cited in 35 Wash. 246, 247; 44 Wash. 36, 37; 56 Wash. 650, 651; 88 Wash. 605; 102 Wash. 136.

Certiorari does not lie to review an order for the inspection of papers, made under this section, since there is an adequate remedy by appeal from the final judgment: *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 106 Pac. 150, 28 L. R. A. (N. S.) 516.

An order for the inspection of papers under this section is not a final order from which an appeal can be taken directly: *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 106 Pac. 150, 28 L. R. A. (N. S.) 516.

This section does not warrant striking the answer and entering a default judgment for failure to produce and attach to the answer certain correspondence called for by the plaintiff: *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120.

PRODUCTION AND INSPECTION OF WRITINGS: See *Remington's Digest*, *Discov.*, §§ 14, 15.

§ 14. **Writings and Matters Subject to Inspection—Confidential and Privileged**

§ 1263. When Writing may be Read in Evidence, etc.

If either party, at any time before trial, allow the other an inspection of any writing material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read without proof of its genuineness or execution, unless denied by affidavit before commencement of the trial. If such denial be made of any writing not mentioned in the pleadings, the court may give time to either party to procure evidence, when necessary for the furtherance of justice. [L. '54, p. 195, § 333; Cd. '81, § 429; 2 H. C., § 1687.]

Cited in 35 Wash. 619.

PRODUCTION, AUTHENTICATION AND EFFECT: See *Remington's Digest*, *Evid.*, § 135—136.

§ 135. **Production of Records, Exemplifications or Official Copies:** *Seattle v. Parker*, 13 Wash. 450, 43 Pac. 269; *Mason v. McGee*, 15 Wash. 272, 46 Pac. 237; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

It is not error to admit in evidence papers and documents which respondent had the right, upon demand, to have produced by the appellant, regardless of whether or not they were wrongfully taken or obtained: *Johnson v. Pearson*, 109 Wash. 147, 186 Pac. 667.

§ 135-1. **Compelling Production by Adverse Party:** *Interstate Engineering Co. v. Archer*, 64 Wash. 629, 117 Pac. 470; *Bank of Commerce v. Newberry*, 71 Wash. 422, 128 Pac. 1064.

Communications: *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202; *State ex rel. Seattle General Contract Co. v. Superior Court*, 56 Wash. 649, 106 Pac. 150, 28 L. R. A. (N. S.) 516.

§ 15. — **Relevancy, Materiality and Competency in General:** *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120.

It is not error to refuse to allow plaintiffs an inspection of writings, where defendants struck out all reference thereto, and plaintiffs set out the agreement verbatim in their reply: *Saar v. Weeks*, 105 Wash. 628, 178 Pac. 819.

Transcript of court proceedings as privileged from inspection. *Ann. Cas.* 1916C, 876.

Court's power to compel inspection of books and papers of foreign corporation. 19 *Ann. Cas.* 89.

Duty to produce books or papers, pursuant to order of court as affected by their location or control or by considerations of convenience or inconvenience. *L. R. A.* 1915B, 890.

Power of commission to compel production of papers and records for inspection. *L. R. A.* 1917F, 1202.

§ 136. **Preliminary Evidence for Authentication—Necessity in General:** *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132, 5 *Ann. Cas.* 716; *Keim v. Rankin*, 40 Wash. 111, 82 Pac. 169; *Palmer v. Parker*, 91 Wash. 683, 158 Pac. 1017.

Failure to Comply With Order: See *Remington's Digest*, *Discov.*, § 16: *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052; *Lawson v. Black Diamond Coal Min. Co.*, 44 Wash. 26, 86 Pac. 1120; *Thomas v. Fos*, 51 Wash. 250, 98 Pac. 663.

ADMISSIBILITY OF PRIVATE WRITINGS AND PUBLICATIONS—CONVEYANCES, CONTRACTS, ETC.: See *Remington's Digest*, *Evidence*, §§ 124—134, and cases cited.

See, also, § 127. Private books of account: *Foy v. Pacific Power & Light Co.*, 110 Wash. 248, 188 Pac. 514; *Burnham v.*

Rowley, 111 Wash. 656, 191 Pac. 811; Seal v. Long, 112 Wash. 370, 192 Pac. 896. Sound Tr. L. & P. Co., 113 Wash. 520, 194 Pac. 781.

§ 130. Letters—Hearsay: Peterson v. Mohammed, 113 Wash. 117, 193 Pac. 215.

§ 132. Photographs—changes in condition since taking—Admissibility: McCree v. Fournier, 113 Wash. 351, 194 Pac. 398; Oriental Express Co. v. Puget

Effect of calling for and inspecting document to make it admissible in evidence. 33 L. R. A. (N. S.) 552.

Right of party producing documents upon notice to use and control their use as evidence. 15 L. R. A. 138.

CHAPTER VII.

OATHS AND AFFIRMATIONS.

§ 1264. Who Authorized to Take and Administer Oaths.

Every court, judge, clerk of a court, justice of the peace, or notary public is authorized to take testimony in any action, suit, or proceeding, and such other persons in particular cases as authorized by law. Every such court or officer is authorized to administer oaths and affirmations generally, and every such other persons in such particular case as authorized. [L. '69, p. 378, § 1; 2 H. C., § 1693.]

§ 1265. Oath, How Administered.

An oath may be administered as follows: The person who swears holds up his hand, while the person administering the oath thus addresses him: "You do solemnly swear that the evidence you shall give in the issue (or matter) now pending between — and — shall be the truth, the whole truth, and nothing but the truth, so help you God." If the oath be administered to any other than a witness giving testimony, the form may be changed to: "You do solemnly swear you will true answers make to such questions as you may be asked," etc. [L. '69, p. 378, § 2; 2 H. C., § 1694.]

Failure to comply with exact form of oath prescribed by law as affecting binding character of oath. 5 Ann. Cas. 723.

Validity of oath taken over telephone. Ann. Cas. 1917B, 905; 30 L. R. A. (N. S.) 358; 12 A. L. R. 538.

§ 1266. Form Varied to Suit Witnesses' Opinion.

Whenever the court or officer before which a person is offered as a witness is satisfied that he has a peculiar mode of swearing connected with or in addition to the usual form of administration, which in witness' opinion, is more solemn or obligatory, the court or officer may, in its discretion, adopt that mode. [L. '69, p. 379, § 3; 2 H. C., § 1695.]

§ 1267. Form Adapted to Suit Religious Belief.

When a person is sworn who believes in any other than the Christian religion, he may be sworn according to the [peculiar] ceremonies of his religion, if there be any such. [L. '69, p. 379, § 4; 2 H. C., § 1696.]

Where an oath has been administered to a Chinese witness according to the custom and religion of his country, the subsequent administration to him of an oath

in the form prescribed by statute is not prejudicial error: State v. Gin Pon, 16 Wash. 425, 47 Pac. 961.

§ 1268. Affirmation, Form of.

Any person who has conscientious scruples against taking an oath may make his solemn affirmation, by assenting, when addressed, in the follow-

ing manner: "You do solemnly affirm that," etc., as in section 1265. [L. '69, p. 379, § 5; 2 H. C., § 1697.]

§ 1269. Affirmation Equivalent to Oath—Perjury.

Whenever an oath is required, an affirmation as prescribed in the last section is to be deemed equivalent thereto, and a false affirmation is to be deemed perjury equally with a false oath. [L. '69, p. 379, § 6; 2 H. C., § 1698.]

CHAPTER VIII.

THE RESTORATION OF LOST RECORDS.

§ 1270. Substitution of Copy.

Whenever a pleading, process, return, verdict, bill of exceptions, order, entry, stipulation, or other act, file, or proceeding in any action or proceeding pending in any court of this state shall have been lost or destroyed by fire or otherwise, or is withheld by any person, such court may, upon the application of any party to such action or proceeding, order a copy or substantial copy thereof to be substituted. [L. '90, p. 337, § 1; 2 H. C., § 1699.]

Cited in 87 Wash. 592.

Where an information is lost, the substitution of a new information at the trial, which is given a new number, is not an institution of a new prosecution: *State v. McFadden*, 42 Wash. 1, 84 Pac. 401.

If instructions, certified by the clerk as part of the record and purporting to be

"instructions of the court," were not in fact the instructions by the court, which were lost, respondent's remedy is not by a motion to strike, but by showing the facts by supplemental record, and bringing up a copy of the lost record, which may be substituted below pursuant to this section: *State v. Schuman*, 87 Wash. 590, 152 Pac. 3.

§ 1271. Court Records Lost or Destroyed—How Replaced.

Whenever the record required by law of the proceedings, judgment, or decree in any action or other proceeding of any court in this state in which a final judgment has been rendered, or any part thereof, is lost or destroyed by fire or otherwise, such court may, upon the application of any party interested therein, grant an order authorizing such record or parts thereof to be supplied or replaced,—

1. By a certified copy of such original record or part thereof, when the same can be obtained;

2. By a duly certified copy of the record in the supreme court of such original record of any action or proceeding that may have been removed to the supreme court, and remain recorded or filed in said supreme court;

3. By the original pleadings, entries, papers, and files in such action or proceeding, when the same can be obtained;

4. By an agreement in writing, signed by all the parties to such action or proceeding, their representatives or attorneys, that a substituted copy of such original record is substantially correct. [L. '90, p. 338, § 2; 2 H. C., § 1700.]

Cited in 88 Wash. 550, 551.

Under this section a copy of a recorded deed, certified by the recording officer over the seal of his office, is admissible in evidence without proof of the genuine-

ness of the signatures to the original deed: *Chrast v. O'Connor*, 41 Wash. 360, 83 Pac. 238.

A certified copy of a recorded instrument is admissible in evidence as an

admission: *Pearce v. Greek Boys' Min. Co.*, 48 Wash. 38, 92 Pac. 773. lost records in a justice's court: *State ex rel. Brockway v. Whitehead*, 88 Wash. 549, 153 Pac. 349.

This section authorizes a restoration of

§ 1272. Action to Restore—Proceedings.

Whenever the record required by law, or any part thereof, or the proceeding or judgment or decree in any action or other proceeding of any court in this state in which the final judgment has been rendered is lost or destroyed by fire or otherwise, and such loss cannot be supplied or replaced as provided in the last preceding section, any person or party interested therein may make a written application to the court to which said record belongs, setting forth the substance of the record so lost or destroyed, which application shall be verified in the manner provided for the verification of pleadings in a civil action, and thereupon summons shall issue, and actual service, or service by publication, shall be made upon all persons interested in or affected by said original judgment or final entry, in the manner provided by law for the commencement of civil actions, provided the parties may waive the issuing or service of summons, and enter their appearance to such application; and upon the hearing of such application, without further pleadings, if the court finds that such record has been lost or destroyed, and that it is enabled, by the evidence produced, to find the substance, or effect thereof, material to the preservation of the rights of the parties thereto, it shall make an order allowing a record, which record shall recite the substance and effect of said lost or destroyed record, or part thereof, and the same shall thereupon be recorded in said court, and shall have the same effect as the original record would have if the same had not been lost or destroyed, so far as it concerns the rights of the parties so making the application, or persons or parties so served with summons, or entering their appearance, or persons claiming under them by a title acquired subsequently to the filing of the application. [L. '90, p. 338, § 3; 2 H. C., § 1701.]

§ 1273. Hearing on Application—Evidence.

Upon the hearing of the application provided in the last preceding section, the court may admit in evidence oral testimony, and any complete or partial abstract of such record, docket entries, or indices, and any other written evidence of the contents or effect of such records and published reports concerning such actions, or proceedings, when the court is of opinion that such abstracts, writings, and publications were fairly and honestly made before the loss of such records occurred. [L. '90, p. 339. § 4; 2 H. C., § 1702.]

Parol proof of contents of lost or destroyed judicial records. *Ann. Cas.* 1916D, 248.

Degree of proof requisite to establish

fact and contents of lost instrument which is to constitute muniment of title. *L. B. A.* 1918B, 879.

§ 1274. Lost Records—Time Extended for Appeal, When.

Whenever a lost or destroyed judgment or order is one to which either party has a right to a proceeding in error or of appeal, the time intervening between the filing of the application mentioned in section 1272 and the final order of the court thereon shall be excluded in computing the

time within which such proceeding or appeal may be taken as provided by law. [L. '90, p. 339, § 5; 2 H. C., § 1703.]

§ 1275. Costs.

The costs to be taxed upon an application to restore a lost or destroyed record shall be the same as are provided for like service in civil actions, and may be adjudged against either or any party to such proceeding or application, or may, in the discretion of the court, be apportioned between such parties. [L. '90, p. 339, § 6; 2 H. C., § 1704.]

§ 1276. Restoration of Lost or Destroyed Probate Records.

In case of the loss or destruction by fire or otherwise of the records, or any part thereof, of any probate court, or superior court having probate jurisdiction, the superior court may proceed, upon its own motion, or upon application in writing of any party in interest, to restore the records, papers, and proceedings of either of said courts relating to the estates of deceased persons, including recorded wills, wills probated or filed for probate in such courts, all marriage records, and all other records and proceedings, and for the purpose of restoring said records, wills, papers, or proceedings, or any part thereof, may cause citations or other process to be issued to any and all parties to be designated by him, and may compel the attendance in court of any and all witnesses whose testimony may be necessary to the establishment of any such record or part thereof and the production of any and all written or documentary evidence which may be by him deemed necessary in determining the true import and effect of the original record, will, paper, or other document belonging to the files of said court; and may make such orders and decrees establishing such original record, will, paper, document, or proceeding, or the substance thereof, as to him shall seem just and proper. [L. '90, p. 340, § 7; 2 H. C., § 1705.]

§ 1277. Costs, by Whom Paid.

The costs incurred in the superior courts in proceedings under this chapter shall be paid by the party or parties interested in such proceedings, or in whose behalf such proceedings are instituted. [L. '90, p. 340, § 8; 2 H. C., § 1706.]

Sections 1278 to 1340, both inclusive, of Rem. & Bal. Code, being part of the old Probate Code, are repealed by L. '17, p. 707, § 223.

PROBATE LAW AND PROCEDURE.

TITLE X.

PROBATE LAW AND PROCEDURE.

CHAPTER I.—DESCENT.

- | | |
|---|--|
| 1341. Descent of real property—Rule of. | 1354. Words "issue" and "real estate" defined. |
| 1342. Descent of community property. | 1355. Right of representation—Posthumous children, inheritance by. |
| 1343. Tenancy in dower and by curtesy abolished. | 1356. Escheats for want of heirs. |
| 1344. Survivorship between joint tenants abolished. | 1356-1. Inheritance from step-parent. |
| 1345. Illegitimate child, rights of. | 1356-2. Retroactive effect of preceding section. |
| 1346. Property of illegitimate child, descent of. | 1356-3. Escheats in default of legal heirs. |
| 1347. Degree of kindred, how computed. | 1357. Administration of escheated estates. |
| 1348. Advancement, how considered. | 1358. Personal property to be sold. |
| 1349. Effect of advancements on distributive shares. | 1359. Tax commission—Powers in relation to escheats. |
| 1350. Advancement of realty, effect on distributive shares. | 1360. Account of administrator—Lists of property. |
| 1351. Advancement, what is. | 1361. Record of escheats. |
| 1352. Value of estate advanced. | 1362. Escheats to permanent school fund. |
| 1353. Death of descendant to whom advancement made. | 1363. Attorney general—Duty as to escheats. |

CHAPTER II.—DISTRIBUTION.

- | | |
|--|---------------------------------------|
| 1364. Distribution of separate personal estate. | 1367. Titles of heirs confirmed. |
| 1365. Effect of advancement where widow and issue survive. | 1368. Debts. |
| 1366. Real property vests in whom—Rights of heirs in. | 1369. "Heirs," meaning of. |
| | 1370. Community interests. |
| | 1370a. Liability of existing estates. |

CHAPTER III.—PROBATE CODE.

I.

JURISDICTION AND POWERS OF THE COURT.

- | | |
|---------------------|--|
| 1371. Jurisdiction. | 1372. Books of record to be kept by clerk. |
|---------------------|--|

II.

NOTICES AND CITATIONS.

- | | |
|---------------------------------|------------------------|
| 1373. Notices—Manner of giving. | 1375. Time of service. |
| 1374. Service of notice. | |

III.

VENUE.

- | | |
|----------------------------------|----------------------------------|
| 1376. Venue. | 1378. Retention of jurisdiction. |
| 1377. Conflicting jurisdictions. | |

IV.

CUSTODY, PROOF AND PROBATE OF WILLS.

- | | |
|--|--|
| 1379. Delivery of will by custodian—Penalty. | 1382. Proof in case of death or insanity of witness. |
| 1380. Application for probate—Hearing—Order. | 1383. Filing and recording wills. |
| 1381. Commission to take testimony of attesting witnesses. | 1384. Record as evidence. |

PROBATE LAW AND PROCEDURE.

V.

WILL CONTESTS.

- | | |
|---|------------------------------|
| 1385. Contests—Time of filing—Issues triable. | 1387. Burden of proof. |
| 1386. Citation on contest. | 1388. Revocation of probate. |
| | 1389. Costs. |

VI.

LOST OR DESTROYED WILLS.

- | | |
|---|--|
| 1390. Taking proof—Lost wills—Judgment—Recording. | 1391. Acting administrators—Tendency of proceedings. |
|---|--|

VII.

FOREIGN WILLS.

- | | |
|---|---|
| 1392. Foreign wills—Admission to probate in this state. | 1393. Application of laws to foreign wills. |
|---|---|

VIII.

WILLS.

- | | |
|---|--|
| 1394. Who may make will. | 1405. Revival of prior will by revocation of subsequent. |
| 1395. How executed—Foreign wills excepted. | 1406. Nuncupative wills. |
| 1396. Interests on devises. | 1407. Proof of nuncupative will. |
| 1397. Testator's signature by subscribing witness. | 1408. Devises, etc., to subscribing witnesses. |
| 1398. Revocation, how effected. | 1409. Devise of land, what passes. |
| 1399. Subsequent marriage of testator—Divorce. | 1410. Estates for life—Remainders. |
| 1400. Agreements to convey not to effect revocation. | 1411. After-acquired estates. |
| 1401. Charges or encumbrances not to effect revocation. | 1412. Contribution among legatees and heirs. |
| 1402. Intestacy as to children not named. | 1413. Enforcement by court. |
| 1403. Advancements. | 1414. Codicils included in term "will." |
| 1404. Death of devisee before testator. | 1415. Intent of testator controlling. |
| | 1416. Words importing number and sex. |

IX.

LETTERS TESTAMENTARY AND OF ADMINISTRATION.

- | | |
|--|--|
| 1417. Letters to executors—Refusal to serve. | 1434. Special notice to heirs, legatees or devisees. |
| 1418. Objections to executors named. | 1435. Form of letters of administration. |
| 1419. Community property, how administered. | 1436. Oath. |
| 1420. Minority or absence of executor—Removal of disqualification. | 1437. Bond—Increase or reduction. |
| 1421. Revocation of letters by discovery of will. | 1438. Sureties—Citation and examination—Costs. |
| 1422. Annulment of letters. | 1439. Waiver of bond by will. |
| 1423. Effect of death of executor. | 1440. Additional bond. |
| 1424. Powers of executor—Associates disqualified. | 1441. Sureties—Persons excluded. |
| 1425. Administrators with will annexed—Authority. | 1442. Record of bonds. |
| 1426. Execution of letters. | 1443. Defective bonds—Successive recoveries. |
| 1427. Record and certification of letters. | 1444. Revocation of letters—Citation and hearing. |
| 1428. Copies as evidence. | 1445. Hearings in chambers. |
| 1429. Form of letters testamentary. | 1446. Powers of remaining executors. |
| 1430. Form with will annexed. | 1447. Administrator de bonis non. |
| 1431. Persons entitled to letters. | 1448. Accounting on death or resignation. |
| 1432. Application for letters. | 1449. Delinquent executors—Proceedings against. |
| 1433. Notice of hearing. | 1450. Limitation on action against sureties. |

PROBATE LAW AND PROCEDURE.

X.

SPECIAL ADMINISTRATORS.

- | | |
|---|--|
| 1451. Appointment of special administrator. | 1454. Succession by executor or administrator. |
| 1452. Bond. | 1455. Nonliability to creditors. |
| 1453. Powers and duties. | 1456. Rendition of account. |

XI.

QUALIFICATIONS OF EXECUTORS AND ADMINISTRATORS.

1457. Qualifications—Persons disqualified.

XII.

PARTNERSHIPS.

- | | |
|--|-------------------------------------|
| 1458. Partnership property—Inventory—Rights of surviving partner. | 1460. Survivor to operate business. |
| 1459. Purchase of interest by survivor—Protection against liabilities. | 1461. Survivor failing to act. |

XIII.

SETTLEMENT OF ESTATES WITHOUT ADMINISTRATION.

- | | |
|---|--|
| 1462. Settlement without court intervention—Order of distribution—Mismanagement—Citation. | 1463. Powers of nonintervention executors. |
| | 1464. Right to possession and management. |

XIV.

THE INVENTORY AND EFFECTS OF DECEASED PERSONS.

- | | |
|--|--|
| 1465. Inventory of estate—Appraisement. | 1469. Failure to return inventory—Revocation of letters. |
| 1466. Oath and duties of appraisers. | 1470. Additional inventory—Further assets. |
| 1467. Claims against personal representatives. | 1471. Liability for embezzlement. |
| 1468. Discharge of testator's debt—A specific bequest. | 1472. Concealed or embezzled property—Proceedings for discovery. |

XV.

PROVISIONS FOR THE SUPPORT OF THE FAMILY.

- | | |
|---|--|
| 1473. Provisions in lieu of homestead and exemptions. | 1475. Provision for minor children. |
| 1474. Homestead awarded — Additional provisions. | 1476. Further allowance for maintenance. |

XVI.

CLAIMS AGAINST ESTATE.

- | | |
|---|--|
| 1477. Notice to creditors—Limitations. | 1485. Limitation tolled by vacancy. |
| 1478. Affidavit of claimant. | 1486. Actions pending at death—Substitution. |
| 1479. Allowance and rejection of claims—Failure to act. | 1487. Partial allowance of claim. |
| 1480. Effect of allowance of claim. | 1488. Judgment against executor—Effect. |
| 1481. Judge as creditor of estate. | 1489. Judgment against decedent—Presentation—Lien. |
| 1482. Suit on rejected claims. | 1490. Claims of personal representatives. |
| 1483. Outlawed claims. | 1491. Resignation or removal—Notice. |
| 1484. Necessity of presentation. | |

XVII.

SALES AND MORTGAGES BY EXECUTORS AND ADMINISTRATORS.

- | | |
|---|---|
| 1492. Authority for sale or mortgage. | 1495. Order directing mortgage—Irregularities—Effect. |
| 1493. Personal property sale—Mortgage or pledge of. | 1496. Order directing sale. |
| 1494. Real property—Sale of mortgage—Petition—Notice—Hearing. | 1497. Sales at public auction—Notice. |
| | 1498. Postponement of sale—Notice. |

PROBATE LAW AND PROCEDURE.

- | | |
|---|--|
| 1499. Private sale of realty—Notice—Bids. | 1508. Contribution among devisees and legatees. |
| 1500. Sale must bring ninety per cent of appraised value—Reappraisements. | 1509. Sale of decedent's contract interest in lands. |
| 1501. Return of sale—Approval—Order for resale. | 1510. Purchaser's bond to secure payments. |
| 1502. Offer of increased bid—Duty of court. | 1511. Conditions of bond. |
| 1503. Order for conveyance. | 1512. Assignment of decedent's contract. |
| 1504. Confirmation conclusive as to regularity. | 1513. Redemption of decedent's mortgaged estate. |
| 1505. Sale or mortgage of realty to pay legacy. | 1514. Sale or mortgage to effect redemption. |
| 1506. Insufficiency of estate to pay debts. | 1515. Sale of mortgaged property, if redemption inexpedient. |
| 1507. Liability of devisees and legacies for debts. | 1516. Sales directed by will. |

XVIII.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

- | | |
|---|--|
| 1517. Powers and duties. | 1521. Actions on bonds of prior representatives. |
| 1518. Actions for recovery of property and on contract. | 1522. Compromise of claims. |
| 1519. Waste, conversion and trespass. | 1523. Recovery of decedent's fraudulent conveyances. |
| 1520. Actions on torts of decedent. | |

XIX.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS AND PAYMENT OF DEBTS.

- | | |
|---|--|
| 1524. Promise to pay decedent's debts. | 1537. Sale of unclaimed share. |
| 1525. Chargeable with whole estate. | 1538. Liability of agent. |
| 1526. Allowance of expenses. | 1539. Claimant for proceeds of sale—Escheat to state. |
| 1527. Uncollectible debts of estate—Purchase by executor of claims. | 1540. Receipts for expenses and charges—Filing. |
| 1528. Compensation—Attorney's fees. | 1541. Order for payment of debts. |
| 1529. Reports—Contents. | 1542. Mortgage and judgment preferences. |
| 1530. Notice of hearing—Settlement by court. | 1543. Allowance to precede payment. |
| 1531. Final report and petition for distribution. | 1544. Payments in case estate insufficient. |
| 1532. Time and place of hearings—Notice. | 1545. Expense of monument. |
| 1533. Hearing on final report—Decree of distribution. | 1546. Payment of claims—Liability of personal representatives. |
| 1534. Representation of minor by guardian. | 1547. Action on unpaid claim—Contribution. |
| 1535. Agent for nonresident distributee. | 1548. Order maturing claim not due. |
| 1536. Agent's bond and compensation. | 1549. Contingent and disputed claims. |
| | 1550. Letters after final settlement. |

XX.

DISTRIBUTION PRIOR TO SETTLEMENT AND ADVANCEMENT.

- | | |
|---|---|
| 1551. Application for premature distribution. | 1555. Costs. |
| 1552. Notice. | 1556. Enforcing repayment by distributee. |
| 1553. Resistance of application. | 1557. Advancements, determination of. |
| 1554. Order setting off share of estate—Bond to secure payment. | |

XXI.

SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACT.

- | | |
|--|--|
| 1558. Order for conveyance. | 1562. Certified copy of order—Filing. |
| 1559. Petition—Notice to executor. | 1563. Actions in case of death of person entitled. |
| 1560. Hearing. | 1564. Depositions of witnesses. |
| 1561. Conveyance under order of court. | |

PROBATE LAW AND PROCEDURE.

XXII.

APPOINTMENT OF GUARDIANS FOR MINORS, INSANE AND MENTALLY INCOMPETENT PERSONS.

- | | |
|--|--|
| 1565. Authority to appoint guardians. | 1569. Service by publication—Appointment by court. |
| 1566. Qualifications. | 1570. Substitute notice. |
| 1567. Petition—Notice—Consent of minor—Foreign guardian. | 1571. Representation by prosecuting attorney. |
| 1568. Service of notice. | |

XXIII.

POWERS AND DUTIES OF GUARDIANS OF MINORS, INSANE OR MENTALLY INCOMPETENT PERSONS OR THEIR ESTATES.

- | | |
|---|--|
| 1572. Guardians under court control—Legal age. | 1580. Testamentary guardians. |
| 1573. Oath and bond of guardian—Successive recoveries on bond. | 1581. Guardian ad litem. |
| 1574. What law governs. | 1582. Sale, lease or mortgage of property. |
| 1575. Inventory—Accounts—Payment of debts—Education of ward. | 1583. Petition—Contents. |
| 1576. Representation of ward—Compromises. | 1584. Law governing sales and mortgages—Leases. |
| 1577. Action against estate—Rejection of claim. | 1585. Irregularities — Conclusiveness of confirmation. |
| 1578. Judgments—Rank as claims. | 1586. Compensation and expenses. |
| 1579. Removal or death of guardians—Delivery of estate to successors. | 1587. Removal of property of nonresident ward—Procedure. |
| | 1588. Notice to creditors of ward—Limitation on claims. |

XXIV.

GENERAL PROVISIONS.

- | | |
|--|--|
| 1589. Jurisdiction of courts — Powers when law inapplicable. | 1591. Appeals to supreme court. |
| 1590. Exercise of powers. | 1592. Validation of prior probate proceedings. |

CHAPTER IV.—VALIDITY OF SALES OF ESTATES.

- | | |
|--|--|
| 1693. Sales not void on account of irregularity. | 1695. Chapter applies to past as well as future sales. |
|--|--|

CHAPTER V.—ADOPTION OF CHILDREN.

- | | |
|-------------------------------------|---|
| 1696. Petition for leave to adopt. | 1699. Effect of adoption—Descent of property. |
| 1697. Separate examination of wife. | |
| 1698. Order confirming adoption. | |

CHAPTER VI.—PROTECTION OF ORPHAN, HOMELESS OR NEGLECTED CHILDREN.

- | | |
|---|--|
| 1700. Adoption by incorporated societies. | 1704. Minor convicted of offense—Rights of parent. |
| 1701. Issue of warrant for taking child into custody—Proceedings. | 1705. Society not to act as guardian. |
| 1702. County charges—Surrender to society. | 1706. Hearing on habeas corpus—Evidence. |
| 1703. Investigation of neglect—Duty of police. | 1707. County charges—County to pay expenses. |

CHAPTER VII.—HABITUAL DRUNKARDS.

- | | |
|--|---|
| 1708. Who may be adjudged an habitual drunkard. | 1713. Liability for furnishing liquor to habitual drunkard. |
| 1709. Complaint, who may make. | 1714. List of habitual drunkards to be posted. |
| 1710. Summons—Hearing. | 1715. Order, how vacated. |
| 1711. Fees of officers—Costs. | |
| 1712. Penalty for selling liquor to habitual drunkard. | |

CHAPTER VIII.—ESTATES OF ABSENTEES.

- | | |
|--|---|
| 1715-1. Petition—Notice — Hearing—Ap-
pointment of trustee. | 1715-6. Period of trusteeship. |
| 1715-2. Inventory and appraisal—Bond. | 1715-7. Distribution to heirs—Notice of
hearing—Will. |
| 1715-3. Reports of trustee. | 1715-8. Provisional distribution—Bond of
distributees. |
| 1715-4. Sale of property—Application of
income. | 1715-9. Final distribution—Notice of ap-
plication. |
| 1715-5. Removal or resignation of trustee
—Final account. | 1715-10. Final settlement—Escheat. |

CHAPTER I.

DESCENT.

§ 1341. Descent of Real Property—Rule of.

When any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having devised the same, they shall descend subject to the debts as follows:—

1. If the decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband or wife and child, or issue of such child; if the decedent leaves a surviving husband or wife, and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the surviving husband or wife, and the remainder in equal shares to his children and to the lawful issue of any deceased child by right of representation. If there be no child of the decedent living at his death, the remainder goes to all of his lineal descendants; and if all the descendants are in the same degree of kindred to the decedent, they share equally; otherwise they take according to the right of representation;

2. If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother, if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. If decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother;

3. If there be no issue, nor husband nor wife, nor father and mother, nor either, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister, by right of representation;

4. If the decedent leaves a surviving husband or wife and no issue, and no father nor mother, nor brother nor sister, the whole estate goes to the surviving husband or wife;

5. If the decedent leaves no issue, nor husband nor wife, and no father nor mother, nor brother nor sister, the estate must go to the next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestors must be preferred to those claiming through an ancestor more remote, however;

6. If the decedent leaves several children, or one child and the issue of one or more other children, and any such surviving child dies under age, and not having been married, all the estate that comes to the deceased

child by inheritance from such decedent descends in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation;

7. If, at the death of such child, who dies under age, not having been married, all the other children of his parents are also dead, and any of them have left issue, the estate that came to such child by inheritance from his parent descends to the issue of all other children of the same parent and if all the issue are in the same degree of kindred to the child, they share the estate equally; otherwise they take according to the right of representation;

8. If the decedent leaves no husband, wife, or kindred, the estate escheats to the state, for the support of common schools in the county in which the decedent resided during lifetime, or where the estate may be situated. [L. '75, p. 53, § 1; Cd. '81, § 3302; 1 H. C., § 1480.]

Effect of adoption of child, see *infra*, § 1699.

For former laws on the subject of this chapter see: L. '54, pp. 305-308; L. '57, p. 24; L. '59, p. 7; L. '60, pp. 221-223; L. '63, pp. 261-264, Abb. R. P. S., pp. 373, 377.

It seems that this section fails to expressly provide for the descent of real estate in case the deceased left children and no husband or wife. The following from the Codes of 1854 and 1863 may be controlling when the deceased left children but no surviving spouse: "1st. In equal shares to his children, and to the issue of any deceased child, by right of representation, and if there be no child of the intestate living at the time of his death, his estate shall descend to all his other lineal descendants; and if all the same descendants are in the same degree of kindred to the intestate, they shall have the estate equally, otherwise they shall take according to representation." See Laws 1854, p. 306, § 231, subdiv. 1; Laws 1863, p. 261, § 340, subdiv. 1.

Cited in 1 Wash. 187; 3 Wash. 562; 10 Wash. 539; 14 Wash. 12, 15, 247; 18 Wash. 512; 25 Wash. 296; 47 Wash. 81; 48 Wash. 638; 60 Wash. 29; 84 Wash. 164, 165, 167; 86 Wash. 356; 87 Wash. 70; 93 Wash. 685; 100 Wash. 153; 108 Wash. 311.

This section applies only to the separate property of a husband or wife, inasmuch as the next section governs the descent of community property: *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614.

The passage of this act regulating the descent of property did not operate to prevent the act passed on the same day relating to adoption from becoming a law, but the two must be construed together as one act: *Wilbur's Estate*, In re, 14 Wash. 242, 44 Pac. 262.

NATURE AND COURSE IN GENERAL: See *Remington's Digest*, Dcs. & Dist., §§ 1-3.

What Law Governs: *Mabie v. Whitaker*, 10 Wash. 656, 39 Pac. 172; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337.

The passage of the act of 1875, regulating the descent of property, did not operate to prevent the act passed on the

same day relating to adoption from becoming a law, but the two must be construed together: *Wilbur's Estate*, In re, 14 Wash. 242, 44 Pac. 262.

Source of Title and Seisin of Intestate—Descent of Lands of Infant Dying Unmarried or Without Issue: *Fort's Estate*, In re, 14 Wash. 10, 44 Pac. 104.

PERSONS ENTITLED AND THEIR RESPECTIVE SHARES—HEIRS AND NEXT OF KIN: See *Remington's Digest*, Dcs. & Dist., §§ 4-1, 5-1. Degrees: *Sullivan's Estate*, In re, 48 Wash. 631, 94 Pac. 483.

Remote Collaterals—Division Between Paternal and Maternal Kindred: *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635; *Roberts' Estate*, In re, 84 Wash. 163, 146 Pac. 398.

Inheritance by or from aliens as proper subject of treaty regulation. 4 A. L. R. 1391; *Ann. Cas.* 1912A, 1100.

Right of alien enemy to take by inheritance. 11 A. L. R. 162.

Effect of treaties upon alien's right to inherit. 32 L. R. A. 177; L. R. A. 1915E, 327.

Family settlement of intestate's estate. 6 A. L. R. 555.

§ 1342. Descent of Community Property.

Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife of his or her half of the community property, it shall descend equally to the legitimate issue of his, her, or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration. [Cf. L. '75, p. 55, § 2; Cd. '81, §§ 3303, 2411, 2412; 1 H. C., § 1481.]

Cited in 7 Wash. 410, 411; 10 Wash. 661; 14 Wash. 13, 154; 18 Wash. 107; 54 Wash. 267; 69 Wash. 462; 82 Wash. 111; 83 Wash. 235; 90 Wash. 277; 105 Wash. 202, 203; 109 Wash. 230.

Descendants — Children in General: *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172; *Warburton v. White*, 18 Wash. 511, 52 Pac. 233, 532; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Ahern v. Ahern*, 31 Wash. 334, 71 Pac. 1023, 96 Am. St. Rep. 912; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Schlarb v. Castaing*, 50 Wash. 331, 97 Pac. 289.

SURVIVING HUSBAND OR WIFE: See *Remington's Digest*, Des. & Dist., §§ 7, 8. Descent of community property: *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *Renton's Estate*, In re, 10 Wash. 533, 39 Pac. 145; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005; *Sawyer v. Vermont Loan etc. Co.*, 41 Wash. 524, 84 Pac. 8; *Eckert v. Schmitt*, 60 Wash. 23, 110 Pac. 635.

See, also, *Guye's Estate*, In re, 54 Wash. 264, 103 Pac. 25, 132 Am. St. Rep. 1111.

A testator charges the payment of all debts, separate and community, upon his half of the community property, notwithstanding this section, and the wife takes her half freed therefrom as against other legatees, where, by the first paragraph, he directed his executors, as soon as they have sufficient funds, "belonging to my estate," to pay the funeral and administration expenses and all debts properly chargeable against his estate, and by the next paragraph willed to his wife her half of the community property, which, by section 6892, *infra*, he had no authority to will: *Redelsheimer v. Zepin*, 105 Wash. 199, 177 Pac. 736.

Power of Husband to Defeat Right by Conveyance: *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Mabie v. Whittaker*, 10 Wash. 656, 39 Pac. 172.

See, also, *Stewart v. Bank of Endicott*, 82 Wash. 106, 143 Pac. 458.

§ 1343. Tenancy in Dower and by Curtesy Abolished.

The provisions of section 1341 as to the inheritance of the husband and wife from each other, apply only to the separate property of the decedents, and take the place of tenancy in dower and tenancy by curtesy, which are hereby abolished. [L. '75, p. 55, § 3; Cd. '81, § 3304; 1 H. C., § 1482.]

Cited in 10 Wash. 539; 14 Wash. 15.

This section is not void for the reason that it is not embraced within the objects of the law within which it is found and enacted: *Richards v. Bellingham Bay L. Co.*, 54 Fed. 209.

The inchoate right of dower is not such a vested right or interest as cannot be taken away by legislative action: *Richards v. Bellingham Bay L. Co.*, *supra*; and dower as it existed in Washington territory prior to the Laws of 1879, page 79, section 18, which abolished dower, was not a right "established, accrued, or ac-

cruing," as to which, by section 31, such act was not to be construed as operating retrospectively: *Richards v. Bellingham Bay L. Co.*, *supra*.

At a time when the right of dower existed in Washington territory, a husband conveyed land without joining his wife in the deed, and, at the time of his death, this section and section 6897, *infra*, were in force, abolishing dower. Held, that the widow was not entitled to dower in the land so conveyed (47 Fed. 854, affirmed): *Richards v. Bellingham Bay L. Co.*, *supra*.

This section limits the operation of section 1341, *supra*, in husbands and wives inheriting from each other, to separate

property: *Fort's Estate, In re*, 14 Wash. 10, 44 Pac. 104.

§ 1344. Survivorship Between Joint Tenants Abolished.

If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenant had been tenants in common: Provided, that community property shall not be affected by this section. [L. '86, p. 165, § 1; 1 H. C., § 1438.]

Cited in 10 Wash. 659; 63 Wash. 89; 71 Wash. 272.

tain as to community lands: *Mabie v. Whittaker*, 10 Wash. 656, 29 Pac. 172.

The right of survivorship does not ob-

§ 1345. Illegitimate Child, Rights of.

Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child, and shall in all cases be considered as heir of his mother; and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate, and he theirs, as heretofore provided in like manner as if all the children had been legitimate, saving to the father and mother, respectively, their rights in the estates of all the said children, as provided heretofore in like manner as if all had been legitimate. [L. '75, p. 55, § 4; Cd. '81, § 3305; 1 H. C., § 1484.]

Cited in 20 Wash. 567; 22 Wash. 153; 81 Wash. 329; 90 Wash. 224, 277.

Legitimation: See Remington's Digest, Bast., §§ 2—6. Recognition or acknowledgment: *Rohrer's Estate, In re*, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350; *State ex rel. Meyer v. Clifford*, 81 Wash. 324, 142 Pac. 472, Ann. Cas. 1916D, 329.

§ 3. — **Effect:** *Gorkow's Estate, In re*, 20 Wash. 563, 56 Pac. 385; *Rohrer's Estate, In re*, 22 Wash. 151, 60 Pac. 122, 50 L. R. A. 350.

§ 4. **Duty to Support:** *State v. Tieman*, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854.

§ 5. — **Proceedings Under Bastardy Laws—Statutory Provisions:** *State v. Tie-*

man, 32 Wash. 294, 73 Pac. 375, 98 Am. St. Rep. 854.

§ 6. **Property—Inheritance by Bastards:** *Wasmund v. Wasmund*, 90 Wash. 274, 156 Pac. 3.

Right of inheritance of illegitimate child from or through mother. *Ann. Cas.* 1914D, 577; *Ann. Cas.* 1916E, 914.

Right of illegitimate child to inherit from or through father. *Ann. Cas.* 1917C, 826.

Succession between illegitimate brothers and sisters. 16 *Ann. Cas.* 987.

Inheritance by, from or through illegitimate. 23 *L. R. A.* 753; *Ann. Cas.* 1913C, 1338.

§ 1346. Property of Illegitimate Child, Descent of.

If any illegitimate child shall die intestate without lawful issue, his estate shall descend to his mother, or in case of her decease, to her heirs at law. [L. '75, p. 65, § 5; Cd. '81, § 3306; 1 H. C., § 1485.]

§ 1347. Degree of Kindred, How Computed.

The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half-blood shall inherit equally with those of the whole blood in the same degree. [L. '75, p. 56, § 6; Cd. '81, § 3307; 1 H. C., § 1486.]

Who are next of kin. 15 L. B. A. 302.

Right to inherit among kindred of half-blood. 29 L. B. A. 541; 26 L. B. A. (N. S.) 603.

§ 1348. Advancement, How Considered.

Any estate, real or personal, that may have been given by the intestate in his lifetime as an advancement to any child, or other lineal descendant, shall be considered a part of the intestate's estate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child or other descendant, toward his share of the intestate's estate. [L. '75, p. 56, § 7; Cd. '81, § 3308; 1 H. C., § 1487.]

Cited in 26 Wash. 121.

§ 1349. Effect of Advancements on Distributive Shares.

If the amount of such advancement then exceed the share of the heir so advanced, he shall be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement, and if the amount so received shall be less than his share, he shall be entitled to so much more as will give him his full share of the estate of the deceased. [L. '75, p. 56, § 8; Cd. '81, § 3309; 1 H. C., § 1488.]

§ 1350. Advancement of Realty, Effect on Distributive Shares.

If any such advancement shall have been made in real estate, the value thereof shall, for the purposes of the preceding section, be considered as part of the real estate to be divided, and if it be in personal estate, and if in either case it shall exceed the share of real or personal estate respectively that would have come to the heir so advanced, he shall not refund any part of it, but shall receive so much less out of the other part of the estate as will make the whole share equal to those of the other heirs who are in the same degree with him. [L. '75, p. 56, § 9; Cd. '81, § 3310; 1 H. C., § 1489.]

§ 1351. Advancement, What is.

All gifts and grants shall be deemed to have been made in advancement, if expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant. [L. '75, p. 57, § 10; Cd. '81, § 3311; 1 H. C., § 1490.]

Advancements: See Remington's Digest, 7 Wash. 90, 34 Pac. 471; Van Erocklin v. Des. & Dist., § 22; Girault v. Hotaling Co., Wood, 38 Wash. 384, 80 Pac. 530.

When interest chargeable on advancement in distribution of estate. *Ann. Cas.* 1912A, 955; *Ann. Cas.* 1918E, 212; 14 *L. R. A.* 716.

Gift to one spouse by parent of other as advancement. 18 *Ann. Cas.* 546; 26 *L. R. A. (N. S.)* 1050.

Application of doctrine of advancements in case of partial intestacy. 6 *Ann. Cas.* 1011.

Statement in will as evidence of advancement. *Ann. Cas.* 1915A, 930.

§ 1352. Value of Estate Advanced.

If the value of the estate so advanced shall be expressed in the conveyance, or in the charge thereof made by the intestate, or in the acknowledgment by the party receiving it, it shall be considered of that value in the division and distribution of the estate; otherwise it shall be estimated at its value when given. [L. '75, p. 57, § 11; Cd. '81, § 3312; 1 H. C., § 1491.]

§ 1353. Death of Descendant to Whom Advancement Made.

If any child or lineal descendant so advanced, shall die before the intestate, leaving issue, the advancement shall be taken into consideration in the division and distribution of estate, and the amount thereof shall be allowed accordingly by the representatives of the heir so advanced, as so much received towards their share of the estate in like manner as if the advancement had been made directly to them. [L. '75, p. 57, § 12; Cd. '81, § 3313; 1 H. C., § 1492.]

§ 1354. Words "Issue" and "Real Estate" Defined.

The word "issue," as used in this chapter, includes all the lawful lineal descendants of the ancestor, and the words "real estate," include all lands, tenements, and hereditaments, and all rights thereto, and all interest therein possessed and claimed in fee simple, or for the life of a third person. [L. '75, p. 57, § 13; Cd. '81, § 3314; 1 H. C., § 1493.]

§ 1355. Right of Representation—Posthumous Children, Inheritance by.

Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another that their parent would have taken if living. Posthumous children are considered as living at the death of their parent. [L. '75, p. 57, § 14; Cd. '81, § 3315; 1 H. C., § 1494.]

Child en ventre sa mere as entitled to take distributive share of decedent's estate. 7 *Ann. Cas.* 135.

§ 1356. Escheats for Want of Heirs.

Whenever any person possessed of any property within this state shall die intestate leaving no heirs, such property shall escheat to, and the title thereto immediately vest in the state of Washington, subject, however, to existing liens thereon, the payments of decedent's debts, and the expenses of administration. [L. '07, p. 253, § 1.]

Cited in 75 *Wash.* 103; 87 *Wash.* 71.

Escheats: See Remington's Digest, Escheat, §§ 1—5.

§ 1. **Jurisdiction:** *Territory v. Klee*, 1 *Wash.* 183, 23 *Pac.* 417.

§ 2. **Necessity of Proceeding:** *Territory*

v. Klee, 1 *Wash.* 183, 23 *Pac.* 417; *Abrams v. State*, 45 *Wash.* 327, 88 *Pac.* 327, 122 *Am. St. Rep.* 914, 13 *Ann. Cas.* 527, 9 *L. R. A. (N. S.)* 186; *State ex rel. Atkinson v. World Real Estate Com. Co.*, 46 *Wash.* 104, 89 *Pac.* 471.

§ 3. Validity and Effect of Escheat Grant: Helm v. Johnson, 40 Wash. 420, 82 Pac. 402.

§ 4. Recovery of Escheated Property: Territory v. Klee, 1 Wash. 183, 23 Pac. 417.

§ 5. Evidence—Burden of Proof: Miller's Estate, In re, 87 Wash. 64, 151 Pac. 105.

See, also, State ex rel. Tanner v. Ry-
chen, 113 Wash. 90, 193 Pac. 220.

Property subject to escheat to state.
Ann. Cas. 1912D, 382.

Necessity for judicial proceeding to
effect escheat. 15 L. R. A. (N. S.)
379.

Presumptions and burden of proof in
proceedings to establish escheat.
Ann. Cas. 1913E, 383.

§ 1356-1. Inheritance from Step-parent.

If a person die leaving a surviving spouse and issue by a former spouse and leaving a will whereby all or substantially all the deceased's property passes to the surviving spouse or having before death conveyed all or substantially all his or her property to the surviving spouse, and afterwards the latter die without heirs and without disposing of his or her property by will so that except for this act the same would all escheat, the issue of the spouse first deceased shall take and inherit from the spouse last deceased the property so acquired by will or conveyance or the equivalent thereof in money or other property. [L. '19, p. 680, § 1.]

§ 1356-2. Retroactive Effect of Preceding Section.

Section 1356-1 shall be retroactive as to estates unadministered or in course of administration and undistributed. [L. '19, p. 681, § 2.]

§ 1356-3. Escheats in Default of Legal Heirs.

Except as provided in section 1356-1, if a person die intestate leaving no husband or wife or descendant or parent or ancestor, and no descendant of a parent or of a parent's parent, his estate shall escheat to the state for the support of the common schools. [L. 19, p. 681, § 3.]

§ 1357. Administration of Escheated Estates.

Such estates shall be administered and settled in the same manner as other estates. If at the expiration of eighteen months after the issuance of letters of administration no heirs shall have appeared and established their claim thereto, the court having jurisdiction of such estate shall render a decree escheating all the property and effects of such decedent to the state of Washington. [L. '07, p. 253, § 2.]

Cited in 87 Wash. 71.

§ 1358. Personal Property to be Sold.

After any estate shall have been escheated as aforesaid, it shall be the duty of the administrator thereof, under the supervision and direction of the court, to sell all the personal property, such sales to be made in such manner and upon such terms and conditions as the court may deem to the best advantage to the estate. The proceeds of such personal property shall be first exhausted before any real property shall be subjected to the debts of decedent, expenses of administration, or the satisfaction of liens thereon. [L. '07, p. 254, § 3.]

§ 1359. Tax Commission—Powers in Relation to Escheats.

The state board of tax commissioners shall have supervision of all matters relating to escheats. Whenever the said board shall have information that any person possessed of property within this state has died intestate and without known heirs, said board, or any member thereof, may apply to the court for the appointment of an administrator, or take such other steps as it may deem proper. No sale of any property of such estate, except perishable goods or settlement of any final account, shall be made or be valid until after fifteen days' notice thereof in writing shall have been first served upon the said board of tax commissioners. Said board, or any member thereof, may demand of any administrator, other officer or person having charge of or being in possession of such estate or property, or any portion thereof, and it shall be the duty of such officer or person to furnish said board, or any member thereof, any information or copies of any papers, vouchers, claims or reports in his possession, relating thereto, and failure or refusal so to do shall be cause for his removal by the court. [L. '07, p. 254, § 4.]

§ 1360. Account of Administrator—Lists of Property.

Upon the settlement of any escheated estate, and before the discharge of the administrator, officer or person in charge thereof, all moneys in his hands shall be paid to the state treasurer who shall issue his receipt therefor in duplicate, one of which shall be filed with the state board of tax commissioners, and he shall prepare a duplicate list accurately describing all real property so escheated, one of which shall be filed with the said state board of tax commissioners and one in the office of the commissioner of public lands. [L. '07, p. 254, § 5.]

§ 1361. Record of Escheats.

The state board of tax commissioners shall keep a record in which shall be entered memoranda of all matters and proceedings in relation to escheats, and in which shall be entered a description of all real property escheated, and they shall also keep an account of all moneys collected and paid into the state treasury under the provisions of this act. [L. '07, p. 255, § 6.]

§ 1362. Escheats to Permanent School Fund.

All escheats shall inure to and become a part of the permanent common school fund of the state, and all escheated real property shall be managed, sold and handled in the manner provided by law for the management, disposition and sale of the state common school funds. [L. '07, p. 255, § 7.]

§ 1363. Attorney General—Duty as to Escheats.

It shall be the duty of the attorney general and of the several county attorneys of the state to advise and assist the said state board of tax commissioners in any and all of the matters and proceedings that may be had under the provisions of this act. [L. '07, p. 255, § 8.]

CHAPTER II.

DISTRIBUTION.

§ 1364. Distribution of Separate Personal Estate.

When any person shall die possessed of any separate personal estate, or of any right or interest therein not lawfully disposed of by his last will, the same shall be applied and distributed as follows:—

1. The widow, if any, shall be allowed all articles of her apparel or ornament, according to the degree and estate of her husband, and such provisions and other necessities, for the use of herself and family under her care, as shall be allowed and ordered in pursuance of the provisions of any law; and this allowance shall be made as well when the widow receives the provision made for her in the will of her husband as when he dies intestate;

2. The personal estate remaining after such allowance shall be applied to the payment of the debts of the deceased, with the charges for the funeral and the settling of the estate;

3. The residue, if any, of the personal estate shall be distributed among the same persons as would be entitled to the real estate by section 1341, and in the same proportion as provided, excepting as herein further provided;

4. If the intestate leave a husband and issue, the husband shall be entitled to one-half the residue;

5. If there be no issue, the husband shall be entitled to the whole of the residue;

6. If the intestate leave a widow and issue, the widow shall be entitled to one-half of said residue;

7. If there be no issue, the widow shall be entitled to the whole of the residue;

8. If there be no husband, widow, or kindred of the intestate, the said personal estate shall escheat to the state, for the use of common schools in the particular county in which the intestate shall have resided at time of death. [L. '75, p. 57, § 15; Cd. '81, § 3316; 1 H. C., § 1495.]

Cited in 10 Wash. 539; 14 Wash. 15;
70 Wash. 380; 102 Wash. 698.

The distinction between real and personal property does not obtain in this country, and the word "inheritance" as

used in the law of descent applies to personalty as well as land, especially in view of this section: Fort's Estate, In re, 14 Wash. 10, 44 Pac. 104.

§ 1365. Effect of Advancement Where Widow and Issue Survive.

If the intestate leave a widow and issue, and any relation have received an advancement from the intestate in his lifetime, the value of such advancement shall not be taken into consideration in computing the one-half part to be assigned to the widow, but she shall be entitled to the one-half part only of the said residue, after deducting the value of the advancement. [L. '75, p. 58, § 16; Cd. '81, § 3317; 1 H. C., § 1496.]

ADVANCEMENTS: See Remington's Van Brocklin v. Wood, 38 Wash. 384, 80 Digest, Des. & Dist., § 22; Girault v. Pac. 530.
Hotelling Co., 7 Wash. 90, 34 Pac. 471;

§ 1366. Real Property Vests in Whom—Rights of Heirs in.

When a person dies seised of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life

of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: Provided that no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the executor or administrator when appointed, and persons lawfully claiming under such executor or administrator; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the executor or administrator and those lawfully claiming under such executor or administrator. [L. '95, p. 197, § 1.]

Cited in 10 Wash. 661; 16 Wash. 493; 18 Wash. 107; 23 Wash. 235; 25 Wash. 541; 27 Wash. 19; 33 Wash. 207; 38 Wash. 264; 41 Wash. 529; 42 Wash. 147, 148, 157, 351—354; 46 Wash. 186—189; 49 Wash. 290; 55 Wash. 286; 57 Wash. 364, 450, 451, 484; 72 Wash. 677; 79 Wash. 586; 86 Wash. 57, 62; 91 Wash. 609; 92 Wash. 92; 93 Wash. 335; 96 Wash. 681; 97 Wash. 550; 109 Wash. 230, 556, 559.

Construing in *pari materia* the acts of 1895, pages 197 and 109 (§§ 1366, 528 et seq.), the acts are not inconsistent, but the heirs take the property cum onere, and subject to existing laws and the right of the surviving heirs to claim a homestead out of the property: *Stewart v. Fitzsimmons*, 86 Wash. 55, 149 Pac. 659.

This section is not inconsistent with and does not impliedly repeal the earlier law (Rem. & Bal. Code, §§ 1449, 1534, 1535), giving an administrator the right to the possession of the real estate: *Gibson v. Slater*, 42 Wash. 347, 84 Pac. 648.

RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES—NATURE AND ESTABLISHMENT OF RIGHTS IN GENERAL: See Remington's Digest, Des. & Dist., §§ 9—21. Rights in general on death of ancestor: *Barker's Estate*, In re, 5 Wash. 390, 31 Pac. 976; *Brenchley's Estate*, In re, 96 Wash. 223, 164 Pac. 913, L. R. A. 1917E, 968; *Showalter v. Spangle*, 93 Wash. 326, 160 Pac. 1042.

§ 10. **Establishment and Determination of Heirship or Right to Share in Distribution—Jurisdiction:** *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150; *Webster v. Seattle Trust Co.*, 7

Wash. 642, 33 Pac. 970, 35 Pac. 1082; *Reformed Presby. Church v. McMillan*, 31 Wash. 643, 72 Pac. 502.

§ 11. — **Admissibility and Sufficiency of Evidence:** *Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409; *Mace v. Duffy*, 39 Wash. 597, 81 Pac. 1053; *Sullivan's Estate*, In re, 48 Wash. 631, 94 Pac. 483; *Siebs' Estate*, In re, 70 Wash. 374, 126 Pac. 912, Ann. Cas. 1913E, 125.

§ 12. **Title of Heirs or Distributees—In General:** *Prefontaine v. McMicken*, 16 Wash. 16, 47 Pac. 231.

§ 13. — **Real Property and Interests Therein—Necessity of Distribution:** *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602; *Lawrence v. Bellingham Bay etc. R. Co.*, 4 Wash. 664, 30 Pac. 1099; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Tucker v. Brown*, 9 Wash. 357, 37 Pac. 456; *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765; *Anrud v. Scandinavian-Amer. Bank*, 27 Wash. 16, 67 Pac. 364; *Sullivan's Estate*, In re, 36 Wash. 217, 78 Pac. 945; *Murphy v. Murphy*, 42 Wash. 142, 84 Pac. 646; *Bickford v. Stewart*, 55 Wash. 278, 104 Pac. 263, 34 L. R. A. (N. S.) 623; *Trimble v. Donahey*, 96 Wash. 677, 165 Pac. 1051.

§ 14. **Rights as Against Administrator in General:** *Gardella v. Meeker*, 3 W. T. 178, 13 Pac. 709.

§ 15. **Possession and Control of Property:** *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765.

§ 16. **Agreements Between Heirs and Distributees:** *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765.

§ 17. Actions Between Heirs and Distributees: Scott v. Mathews, 25 Wash. 486, 65 Pac. 756.

§ 19. Rights and Liabilities of Purchasers from or Assignees of Heirs or Distributees: Bjmerland v. Eley, 15 Wash. 101, 45 Pac. 730; Vermont Loan & T. Co. v. Cardin, 19 Wash. 304, 53 Pac. 164.

§ 20. Actions by Heirs or Distributees—Necessity for distribution: Balch v. Smith, 4 Wash. 497, 30 Pac. 648; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Tucker v. Brown, 9 Wash. 357, 37 Pac. 456.

§ 21. Actions Against Heirs or Distributees: Prefontaine v. McMicken, 16 Wash. 16, 47 Pac. 231; Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119.

In the foreclosure of a mortgage given by an ancestor his heirs are indispensable parties, under the terms of this section: Anrud v. Scandinavian-Amer. Bank, 27 Wash. 16, 67 Pac. 364.

The title to lots does not vest in legatees upon the death of the testator, in the case of a devise, where the intention is clear, and is to be implied, that the lots were to be conveyed and the proceeds divided by the executor, who is a trustee for all purposes necessary to execute the will: Martin v. Moore, 49 Wash. 288, 94 Pac. 1087.

Rights of heirs in partnership real estate. Ann. Cas. 1912D, 1207; 27 L. R. A. 348.

§ 1367. Titles of Heirs Confirmed.

This act shall apply to and govern the transmission of title of lands, tenements and hereditaments in the case of the estates of persons hereafter dying and of persons already deceased, whether letters testamentary or of administration have been granted on such estates or not, and the title of all heirs and devisees, and their grantees, to any such real property is hereby confirmed and made valid to the same extent as if this act had been passed before the death of such decedent. [L. '95, p. 198, § 2.]

"This act" included §§ 1366-1371.

Cited in 42 Wash. 147, 148.

§ 1368. Debts.

No real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of the death of such decedent. [L. '95, p. 198, § 3.]

Cited in 32 Wash. 468; 42 Wash. 147, 353-355; 43 Wash. 537, 538; 57 Wash. 450, 451; 95 Pac. 570.

Funeral expenses constitute a debt against a decedent, within the contemplation of this section: Smith's Estate, In re, 25 Wash. 539, 66 Pac. 93.

DEBTS OF INTESTATE AND ENCUMBRANCES ON PROPERTY: See Remington's Digest, Des. & Dist., §§ 24-28. Liabilities on descent of real property—Resulting trust: Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027.

§ 25. — Liens and Encumbrances Created by Intestate: Scammon v. Ward, 1 Wash. 179, 23 Pac. 439; Reed v. Miller, 1 Wash. 426, 25 Pac. 334.

§ 26. Liens for Debts as Against Heirs: Prefontaine v. McMicken, 16 Wash. 16, 47 Pac. 231.

§ 27. Actions Against Heirs and Distributees—Jurisdiction and Venue: Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027.

§ 28. — Conditions Precedent: Prefontaine v. McMicken, 16 Wash. 16, 47 Pac. 231.

RIGHTS AND REMEDIES OF CREDITORS OF HEIRS AND DISTRIBUTEES: See Remington's Digest, Des. & Dist., §§ 29, 30.

Right to Subject Interests in Estate in General: Mears v. Lamona, 17 Wash. 148, 49 Pac. 251. **Actions and Other Proceedings by Creditors:** Mears v. Lamona, 17 Wash. 148, 49 Pac. 251.

ADMINISTRATION IN GENERAL: See Remington's Digest, Ex. & Ad., § 1.

Necessity of Administration: Barlow v. Coggan, 1 W. T. 257; Territory v. Klee, 1 Wash. 183, 23 Pac. 417; Hanford v. Davies, 1 Wash. 476, 25 Pac. 329; Hills' Estate, In re, 6 Wash. 285, 33 Pac. 585; Hill v. Young, 7 Wash. 33, 34 Pac. 144; Tucker v. Brown, 9 Wash. 357, 37 Pac. 456; Murphy v. Murphy, 42 Wash. 142, 84 Pac. 646; Fuhrman v. Power, 43 Wash. 533, 86 Pac. 940; State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 Pac. 942; State ex rel. Mann v. Superior Court, 52 Wash. 149, 100 Pac. 198; Duvall v. Healy Lumber Co., 57 Wash. 446, 107 Pac. 357, 109 Pac. 305.

See, also, Lambrecht's Estate, In re, 112 Wash. 645, 192 Pac. 1018.

It is not enough to dispense with administration, that an heir testified that he was positive that the deceased left no debts: *Collins' Estate*, In re, 102 Wash. 697, 173 Pac. 1016.

Under this section the real estate of a deceased person is charged with debts only in case letters were issued within the period of limitation, and where more than six years have elapsed before the issuance of letters the real estate cannot be

charged with said debts: *Smith's Estate*, In re, 25 Wash. 539, 66 Pac. 93.

Under this section, the claim for advances made by a second wife to liquidate debts owing at the time of the first wife's death cannot be asserted against the deceased wife's community interest, twenty years after the death of the first wife, no letters having been issued upon her estate: *Mason's Estate*, In re, 95 Wash. 564, 164 Pac. 205.

§ 1369. "Heirs," Meaning of.

The word "heirs" shall be construed as meaning the person or persons to whom land, tenements and hereditaments descend as defined in sections from 1341 to 1355, both inclusive. [L. '95, p. 198, § 4.]

§ 1370. Community Interests.

This act shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in section 1342, subject to all the charges mentioned in section 1366 of this act. [L. '95, p. 199, § 5.]

Cited in 79 Wash. 586.

§ 1370a. (1371) Liability of Existing Estates.

Nothing in this act shall have the effect to prevent the real estate of a person deceased for six years prior to the going into effect of this act from being liable for his debts, where letters testamentary or of administration of the estate of such deceased person shall be issued prior to one year after the going into effect of this act. [L. '95, p. 199, § 6.]

CHAPTER III.

PROBATE CODE.

The section numbers in this chapter are the only numbers in Volume I of this code that do not correspond with the section numbers of Volume I of Remington & Ballinger's Code.

I.

JURISDICTION AND POWERS OF THE COURT.

§ 1371. Jurisdiction.

The superior courts in the exercise of their jurisdiction of matters of probate shall have power to probate or refuse to probate wills, appoint administrators, executors and guardians of insane and incompetent persons and minors, and administer and settle all such estates, award processes and cause to come before them all persons whom they may deem it necessary to examine, and order and cause to be issued all such writs as may be proper or necessary, and do all things proper or incident to the exercise of such jurisdiction. [L. '17, p. 642, § 1. Cf. L. '54, p. 309, § 3; L. '73, p. 253, § 3; Cd. '81, § 1299; L. '91, p. 380, § 1; 2 H. C., § 845.]

See Const., Art. IV, § 6.

Cited in 17 Wash. 489; 28 Wash. 70; 16 Wash. 298; 86 Wash. 176; 101 Wash. 93; 107 Wash. 90; 112 Wash. 558.

Jurisdiction of Courts—In General: See Remington's Digest, Ex. & Ad., § 4; Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863; Wilbur's Estate v. Bingham, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886; Dooley v. Russell, 10 Wash. 195, 38 Pac. 1000; Furth v. United States Mtg. & T. Co., 13 Wash. 73, 42 Pac. 523; State ex rel. Warren v. Ayer, 17 Wash. 127, 49 Pac. 226; Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

The jurisdiction of the superior court in matters of probate being confined to matters incidental to the settlement of the

estates of decedents and of estates under control of guardians, its power cannot be invoked to determine controversies between third parties which in no way affect the interests of the estate itself: Winston v. Crowe, 28 Wash. 65, 68 Pac. 174.

Power of probate court to determine questions involving incidentally title to real estate. 5 Ann. Cas. 192.

Jurisdiction of probate courts to construe wills. 5 Ann. Cas. 473.

Jurisdiction of probate court to determine title to property between estate and stranger. 6 Ann. Cas. 878.

§ 1372. Books of Record to be Kept by Clerk.

There shall be kept in the office of the clerk of the superior court the following books of record for probate matters:

(1) A journal, in which shall be entered all orders, decrees and judgments made by the court, or the judge thereof, and the minutes of the court, in probate proceedings.

(2) A record of wills, in which shall be recorded all wills admitted to probate.

(3) A record of letters testamentary and of administration, in which all letters testamentary and of administration shall be recorded.

(4) A record of bonds, in which all bonds and obligations required by law to be approved by the court or judge in matters of probate shall be recorded.

(5) A record of claims, in which at least one page shall be given to each estate or case, wherein shall be entered, under the title of each estate or case, in separate columns properly ruled: 1, the names of claimants against the estate; 2, the date of filing proof of claim; 3, the amount claimed; 4, the amount allowed; 5, the date of allowance; 6, the nature of the claim; 7, the amount paid; 8, the number of the voucher for each payment; 9, the date of filing the voucher; 10, the date of disallowance and of notice of disallowance.

(6) A memorandum of the files, in which at least one page shall be given to each estate or case, wherein shall be noted each paper filed in the case, except proof of claims and vouchers noted in record of claims, and the date of filing each paper.

(7) A record of marriages, in which certificates of all marriages solemnized in the county shall be recorded. [L. '17, p. 642, § 2.]

II.

NOTICES AND CITATIONS.

§ 1373. Notices—Manner of Giving.

Whenever a personal notice is required to be given to any party to a proceeding in matters of probate, and other proceedings under this act, and no other mode of giving notice is prescribed, it may be given in the manner required for the service of summons in civil actions or by citation issued from the court, signed by the clerk and under the seal of the

court, directed to the sheriff of the proper county, requiring him to cite such person to appear before the court or judge, as the case may be, at a time and place to be named in such citation. In the body of the citation shall be briefly stated the nature or character of the proceedings. [L. '17, p. 643, § 3.]

A citation directed to the executor personally and not as executor, is sufficient to give jurisdiction: *Murphy's Estate*, In re, 98 Wash. 548, 168 Pac. 175.

Right to probate will on service of notice by publication. 35 L. R. A. (N. S.) 1058.

Persons entitled to notice of probate of will. *Ann. Cas.* 1914B, 427.

§ 1374. Service of Notice.

The officer to whom the citation is directed shall serve it by delivering a copy to the person or persons named therein, and shall return the original to the court according to its direction, indorsing thereon the time and manner of service. [L. '17, p. 644, § 4.]

§ 1375. Time of Service.

In all cases in which citations are issued from the superior court in probate and other proceedings under this act, they shall be served at least ten days before the time at which they are made returnable, except when issued from the court in cases where the law requires the judge to issue them upon his own motion, and he does so issue them; and in such cases they shall be served in sufficient time to allow the person served to be in attendance on the court. [L. '17, p. 644, § 5.]

III.

VENUE.

§ 1376. Venue.

Wills shall be proved and letters testamentary or of administration shall be granted:

(1) In the county of which deceased was a resident or had his place of abode at the time of his death.

(2) In the county in which he may have died, or in which any part of his estate may be, he not being a resident of the state.

(3) In the county in which any part of his estate may be, he having died out of the state, and not having been a resident thereof at the time of his death. [L. '17, p. 644, § 6.]

Domicile of Decedent: See *Remington's Digest*, Ex. & Ad., § 5; *Territory v. Klee*, 1 Wash. 183, 23 Pac. 417; *State ex rel. Baldwin v. Superior Court*, 11 Wash. 111, 39 Pac. 818; *Stern v. Sill*, 39 Wash. 557, 81 Pac. 1007; *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560, 10

Ann. Cas. 20; *Buchholz v. Buchholz*, 63 Wash. 213, 115 Pac. 88, *Ann. Cas.* 1912D, 395.

Situs of Assets: See *Remington's Digest*, Ex. & Ad., § 6; *McCoy v. Ayres*, 2 W. T. 203, 2 Pac. 273; *Hanford v. Davies*, 1 Wash. 476, 25 Pac. 329.

§ 1377. Conflicting Jurisdictions.

When the estate of the deceased is in more than one county, he not having been a resident of the state at the time of his death, the superior court of that county in which the application is first made for letters testamentary or of administration shall have exclusive jurisdiction of the settlement of the estate. [L. '17, p. 644, § 7.]

§ 1378. Retention of Jurisdiction.

All orders, settlements, trials and other proceedings, under this act shall be had or made in the county in which letters testamentary or of administration were granted. [L. '17, p. 644, § 8.]

IV.

CUSTODY, PROOF AND PROBATE OF WILLS.

§ 1379. Delivery of Will by Custodian—Penalty.

Any person having the custody or control of any will shall, within thirty days after he shall have received knowledge of the death of the testator or testatrix, deliver said will to the superior court having jurisdiction, or to the person named in the will as executor or executrix; and any executor or executrix having in his custody or control any will shall within forty days after he received knowledge of the death of the testator or testatrix either present the same for probate to the court having jurisdiction, or present the same to such court with his written refusal to serve as such executor or executrix; any person who shall willfully violate any of the provisions of this section with intent to injure or defraud any person shall be deemed guilty of a gross misdemeanor, and any person who shall without reasonable excuse violate any of the provisions of this section shall be liable to any person interested in the will for damages caused by such neglect. [L. '17, p. 645, § 9.]

Duty to Produce: See Remington's Digest, Wills, § 16-1; *Myers v. Exchange National Bank*, 96 Wash. 244, 164 Pac. 951, L. R. A. 1918A, 67.

A right of action under this section for damages against any person having custody of a will, for failure to deliver the will for probate within thirty days after the death of the testator, is an action upon the statute for a penalty, under sec-

tion 159, subdivision 6, *supra*, which must be commenced within three years after the cause of action arose: *Myers v. Exchange National Bank*, 96 Wash. 244, 164 Pac. 951, L. R. A. 1918A, 67.

Necessity for Probate.—Where a non-resident testator dies leaving real estate in this state, it is necessary that his will be probated here: *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253.

§ 1380. Application for Probate—Hearing—Order.

Applications for the probate of a will and for letters testamentary, or either, may be made to the judge of the court having jurisdiction and the court may immediately hear the proofs and either probate or reject such will as the testimony may justify. Upon such hearing the court shall make and cause to be entered a formal order, either establishing and probating such will, or refusing to establish and probate the same, and such order shall be conclusive as against all the world except in the event of a contest of such will as hereinafter provided. All testimony in support of the will shall be reduced to writing, signed by the witnesses, and certified by the judge of the court. [L. '17, p. 645, § 10.]

Time for Probate: See Remington's Digest, Wills, § 30; *Sullivan's Estate*, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895; *Peirce's Estate*, In re, 63 Wash. 437, 115 Pac. 835; *State ex rel. Woods v. Superior Court*, 76 Wash. 27, 135 Pac. 494.

Nuncupative Wills—Amendment.—Upon

the probate of a nuncupative will, the court may, in the exercise of its sound discretion, permit the alleged will and records to be amended to conform to the facts found: *Miller's Estate*, In re, 47 Wash. 253, 91 Pac. 967, 125 Am. St. Rep. 904, 14 Ann. Cas. 1163, 13 L. R. A. (N. S.) 1092.

§ 1381. Commission to Take Testimony of Attesting Witnesses.

If any witness be prevented by sickness from attending at the time any will is produced for probate, or reside out of the state or more than thirty miles from the place where the will is to be proven, such court may issue a commission annexed to such will, and directed to any judge, justice of the peace, notary public, or other person, empowering him to take and certify the attestation of such witness. [L. '17, p. 645, § 11.]

§ 1382. Proof in Case of Death or Insanity of Witness.

When one of the witnesses to any such will shall be examined and the other witness or witnesses are dead, insane, or their residence be unknown, then proof shall be taken of the handwriting of the testator and of the witness dead, insane, or whose residence is unknown, and all such other circumstances as would tend to prove such will.

If it should appear to the satisfaction of the court that all the subscribing witnesses to any such will are dead, insane, or their residence unknown, the court shall take and receive proof of the handwriting of the testator and subscribing witnesses, to the will and such other facts and circumstances as would tend to prove such will. [L. '17, p. 646, § 12.]

Probate of will in case of absence
or death of one or more witnesses.
Ann. Cas. 1914C, 902.

Proof of signature of testator when
attesting witnesses are dead. 44
L. R. A. 142.

§ 1383. Filing and Recording Wills.

All wills shall be recorded in the book kept for that purpose, within thirty days after probate, and the original wills shall be carefully filed with the clerk, but may be withdrawn on the order of the court. [L. '17, p. 646, § 13.]

Failure to record a will does not relieve
a purchaser of taking notice of the in-
terests of devisees where the will was
probated in the county in which the

land is located: Horton v. Barto, 57
Wash. 477, 107 Pac. 191, 135 Am. St. Rep.
999.

§ 1384. Record as Evidence.

The record of any will made, probated and recorded as herein provided, and the exemplification of such record by the clerk in whose custody the same may be, shall be received as evidence, and shall be as effectual in all cases as the original would be if produced and proven [L. '17, p. 646, § 14.]

V.**WILL CONTESTS.****§ 1385. Contests—Time of Filing—Issues Triable.**

If any person interested in any will shall appear within six months immediately following the probate or rejection thereof, and by petition to the superior court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. Issue shall be made up, tried and determined in said

court respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of such last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of such will.

If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding and final as to all the world: Provided, however, every infant, person absent from the United States or of unsound mind, in whom a right to contest any will heretofore probated or rejected exists by virtue of any prior law, shall have one year from and after this act goes into effect within which to initiate such contest: Provided further, that this act shall not have the effect of shortening the period given by any prior law to persons other than those mentioned in the last above proviso, within which to contest any will probated or rejected prior to the going into effect of this act. [L. '17, p. 646, § 15.]

Determination in Probate Proceedings as to Validity or Construction of Provisions of Will: See Remington's Digest, Wills, §§ 25—28. In general: *Montrose v. Byrne*, 24 Wash. 288, 64 Pac. 534.

§ 26. Actions to Determine Validity—Before Death: *Pond v. Faust*, 90 Wash. 117, 155 Pac. 776, Ann. Cas. 1918A, 736.

§ 27. Persons Who may Attack or Contest Will or Probate—In General: *Renton's Estate*, In re, 10 Wash. 533, 39 Pac. 145; *Siebs' Estate*, In re, 70 Wash. 374, 126 Pac. 912, Ann. Cas. 1913E, 125.

§ 28. — Estoppel or Agreement Affecting Right: *Rader v. Stubblefield*, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20.

The right to contest a will survives to the heirs or personal representatives of the heir of the putative testator: *Ingersoll v. Gourley*, 72 Wash. 462, 130 Pac. 743.

Limitations—Action to Contest Will: See Remington's Digest, Wills, § 32; *Sullivan's Estate*, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895; *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 Pac. 494; *Davis v. Seavey*, 95 Wash. 57, 163 Pac. 35, Ann. Cas. 1918D, 314; *Horton v. Barto*, 57 Wash. 477, 107 Pac. 191, 135 Am. St. Rep. 999; *Davis v. Seavey*, 95 Wash. 57, 163 Pac. 35, Ann. Cas. 1918D, 314.

Rem. Code, § 1307, included fraud in effecting the probate, and was not limited to causes affecting the validity of the will at the time it was executed: *Hoscheid's Estate*, In re, 78 Wash. 309, 139 Pac. 61.

Jurisdiction of Actions Relating to Wills or Probate: See Remington's Digest, Wills, § 31; *Newport v. Newport*, 5 Wash. 114, 31 Pac. 428; *Seattle v. McDonald*, 26 Wash. 98, 66 Pac. 145; *Macdonald's Estate*, In re, 29 Wash. 422, 69 Pac. 1111; *Hoscheid's Estate*, In re, 78 Wash. 309, 139 Pac. 61.

Judgment: See Remington's Digest, Wills, §§ 48—50. Entry and record: *State ex rel. Mann v. Superior Court*, 52 Wash. 149, 100 Pac. 198.

§ 49. Effect of Probate on Will—Relation Back to Death of Testator: *Christofferson v. Pfenning*, 16 Wash. 491, 48 Pac. 264.

§ 50. Record of Will as Conveyance: *Cullen v. Bowen*, 36 Wash. 665, 79 Pac. 305.

CONCLUSIVENESS OF PROBATE: See Remington's Digest, Wills, §§ 56, 57.

Collateral Attack on Probate or Judgment: *Horton v. Barto*, 57 Wash. 477, 107 Pac. 191, 135 Am. St. Rep. 999; **Conclusiveness of Probate or Record:** *Hoscheid's Estate*, In re, 78 Wash. 309, 139 Pac. 61.

A similar section held to afford a plain, speedy and adequate remedy by providing that a will admitted to probate is binding on all persons, if not contested within one year, and by providing a plain procedure for determining all questions affecting its validity, which may be raised by contest within such year: *State ex rel. Stratton v. Tallman*, 25 Wash. 295, 65 Pac. 545.

Who may contest will. **L. R. A.** 1918A, 447.

Right of state to contest will. 14 **Ann. Cas.** 959; 2 **L. R. A. (N. S.)** 643.

Right of widow of decedent to contest his will. 11 **Ann. Cas.** 1015.

Contest of will by judgment creditor of heir as interested person. 14 **Ann. Cas.** 334.

Power or duty of guardian, administrator or the like to contest will. **Ann. Cas.** 1918B, 536.

Right of mere legatee or devisee to contest will. **Ann. Cas.** 1917C, 905.

Acceptance of benefit under will as affecting right to attack its valid-

ity. 3 Ann. Cas. 525; Ann. Cas. 1913E, 1182.

§ 1386. Citation on Contest.

Upon the filing of the petition referred to in the next preceding section, a citation shall be issued to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, and to all legatees named in the will residing in the state, or to their guardians if any of them are minors, or their personal representatives if any of them are dead, requiring them to appear before the court, on a day therein specified, to show cause why the petition should not be granted. [L. '17, p. 647, § 16.]

NOTICE, PETITIONS AND PLEADINGS: See Remington's Digest, Wills, §§ 34—37. **Notice of Application for Probate or Contest:** Sullivan's Estate, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895; Murphy's Estate, In re, 98 Wash. 548, 168 Pac. 175.

§ 35. **Petition for Probate—In General:** Renton's Estate, In re, 10 Wash. 533, 39

Pac. 145; Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; Peirce's Estate, In re, 63 Wash. 437, 115 Pac. 835.

§ 36. — **Lost Will:** Harris v. Harris, 10 Wash. 555, 39 Pac. 148.

§ 37. **Pleading in Actions to Contest or Set Aside Will or Probate:** Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145.

§ 1387. Burden of Proof.

In any such contest proceedings the previous order of the court probating, or refusing to probate, such will shall be prima facie evidence of the legality of such will, if probated, or its illegality, if rejected, and the burden of proving the illegality of such will, if probated, or the legality of such will, if rejected by the court, shall rest upon the person contesting such probate or rejection of the will. [L. '17, p. 647, § 17.]

Cited in 112 Wash. 382.

EVIDENCE: See Remington's Digest, Wills, §§ 38—42. **Presumptions and Burden of Proof:** Hunt v. Phillips, 34 Wash. 362, 75 Pac. 970; Sullivan's Estate, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895; Murphy's Estate, In re, 98 Wash. 548, 168 Pac. 175.

See, also, Adin's Estate, In re, 112 Wash. 379, 192 Pac. 887.

§ 39. **Admissibility — Execution, Existence and Genuineness:** Beck's Estate, In re, 79 Wash. 331, 140 Pac. 340.

§ 40. **Motives and Intent:** Morrison v. Morrison, 25 Wash. 466, 65 Pac. 779; German-American State Bank of Ritzville v. Godman, 83 Wash. 231, 145 Pac. 221.

§ 41. — **Declarations of Testator:** Harris v. Harris, 10 Wash. 555, 39 Pac. 148.

§ 42. **Weight and Sufficiency:** Beck's Estate, In re, 79 Wash. 331, 140 Pac. 340.

HEARING, TRIAL, JUDGMENT AND REVIEW: See Remington's Digest, Wills, §§ 45—47. **Withdrawal or Dismissal of Proceedings Before Trial:** Sullivan's Estate, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895; Tresidder's Estate, In re, 70 Wash. 15, 125 Pac. 1034.

§ 46. **Submission of Issues to Jury:** Clayson's Estate, In re, 26 Wash. 253, 66 Pac. 410.

§ 47. **Conduct of Hearing or Trial in General:** Richardson v. Moore, 30 Wash. 406, 71 Pac. 18.

Weight and Sufficiency of Evidence of Capacity, etc.: See Remington's Digest, Wills, § 7; Gorkow's Estate, In re, 20 Wash. 563, 56 Pac. 385; Richardson v. Moore, 30 Wash. 406, 71 Pac. 18; Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; Hunt v. Phillips, 34 Wash. 362, 75 Pac. 970; Hartley v. Lord, 38 Wash. 221, 80 Pac. 433; Rathjens v. Merrill, 38 Wash. 442, 80 Pac. 754; Wetmore's Estate, In re, 44 Wash. 567, 87 Pac. 1151; Rathjen's Estate, In re, 45 Wash. 55, 87 Pac. 1070; Converse v. Mix, 63 Wash. 318, 115 Pac. 305; Weatherall v. Weatherall, 63 Wash. 526, 115 Pac. 1078; Siebs' Estate, In re, 70 Wash. 374, 126 Pac. 912, Ann. Cas. 1913E, 125; Jeff's Estate, In re, 73 Wash. 212, 131 Pac. 847; Ingersoll v. Gourley, 78 Wash. 406, 139 Pac. 207, Ann. Cas. 1915D, 570; Jasinto v. Hamblen, 79 Wash. 590, 140 Pac. 677; Wilson v. Craig, 86 Wash. 465, 150 Pac. 1179, Ann. Cas. 1917B, 871; Hanson's Estate, In re, 87 Wash. 113, 151 Pac. 264; Points v. Nier, 91 Wash. 20, 157 Pac. 44, Ann. Cas. 1918A, 1046; Bacon's Estate, In re,

91 Wash. 1, 156 Pac. 845; Pond's Estate v. Faust, 95 Wash. 346, 163 Pac. 753; Richardson's Estate, In re, 96 Wash. 123, 165 Pac. 656; Murphy's Estate, In re, 98 Wash. 548, 168 Pac. 175.

See, also, Geissler's Estate, In re, 104 Wash. 452, 177 Pac. 330; Terpening v. Beach, 105 Wash. 270, 177 Pac. 674; Rutherford's Estate, In re, 110 Wash. 148,

188 Pac. 27; White v. White, 111 Wash. 354, 190 Pac. 1003; Roy's Estate, In re, 113 Wash. 277, 193 Pac. 682.

Burden of proof in contest of will instituted after probate. **Ann. Cas.** 1914C, 535.

Burden of proof as to testamentary capacity of testator. 17 **L. R. A.** 494; 36 **L. R. A.** 724, 733.

§ 1388. Revocation of Probate.

If, upon the trial of said issue, it shall be decided that the will is for any reason invalid, or that it is not sufficiently proved to have been the last will of the testator, the will and probate thereof shall be annulled and revoked, and thereupon and thereafter the powers of the executor or administrator with the will annexed shall cease, but such executor or administrator shall not be liable for any act done in good faith previous to such annulling or revoking. [L. '17, p. 647, § 18.]

§ 1389. Costs.

If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, which costs may in the discretion of the court include a reasonable attorney's fee. [L. '17, p. 648, § 19.]

Cited in 102 Wash. 498.

Persons, Property and Funds Liable for Costs: See Remington's Digest, Wills, §§ 51—55; Rathjen's Estate, In re, 45 Wash. 55, 87 Pac. 1070; Statler's Estate, In re, 58 Wash. 199, 108 Pac. 433; Jasinto v. Hamblen, 79 Wash. 590, 140 Pac. 677; State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375; Gorkow's Estate, In re, 20 Wash. 563, 56 Pac. 385; Hunt v. Phillips, 34 Wash. 362, 75 Pac. 970.

See, also, Hutton's Estate, In re, 106 Wash. 578, 180 Pac. 882, 3 A. L. R. 1673; Geissler's Estate, In re, 110 Wash. 14, 187 Pac. 711.

Under this section substituting a discretionary power to award costs in will contests for the arbitrary rule of Rem. Code, section 1313, requiring costs to be awarded against an unsuccessful contestant, it is an abuse of discretion to award costs against a contestant who

made out a prima facie showing of probable cause for contesting a will, it being made to appear that the testator had executed a prior will in favor of contestant and had probably been unduly influenced to execute a later will: Eichlers' Estate, In re, 102 Wash. 497, 173 Pac. 435.

Right of person named as executor in will to recover from estate money expended in unsuccessful attempt to sustain will. **Ann. Cas.** 1918D, 166.

Right of executor to allowance for attorney's fees for services rendered in attempt to establish or resist attack upon will. 26 **L. R. A. (N. S.)** 757; **L. R. A.** 1917A, 450.

Right to allowance out of the estate of attorney's fees in attempt to establish or defeat a will. 10 **A. L. R.** 783.

VI.

LOST OR DESTROYED WILLS.

§ 1390. Taking Proof—Lost Wills—Judgment—Recording.

Whenever any will be lost or destroyed, the superior court shall have power to take proof of the execution and validity of such will and to establish the same, notice to all persons interested having been first given. Such proof shall be reduced to writing and signed by the witnesses and filed with the clerk of court.

No will shall be allowed to be proved as a lost or destroyed will unless the same shall be proved to have been in existence at the time of the death of the testator, or be shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions shall be clearly and distinctly proved by at least two witnesses, and when any such will shall be so established, the provisions thereof shall be distinctly stated in the judgment establishing it, and such judgment shall be recorded as wills are required to be recorded. Executors of such will or administrators with the will annexed may be appointed by the court in the same manner as is herein provided with reference to original wills presented to the court for probate. [L. '17, p. 648, § 20.]

Proof of Lost Will and Contests: See Remington's Digest, Wills, §§ 36, 37, 43; Harris v. Harris, 10 Wash. 555, 39 Pac. 148; Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145; Needham's Estate, In re, 70 Wash. 229, 126 Pac. 429.

Evidence to establish lost or destroyed wills. 38 L. R. A. 433.

Declarations of testator, alone as

proof of contents of lost will. Ann. Cas. 1915B, 253.

Necessity and sufficiency of proof to account for nonproduction of will upon application to probate it as a lost or destroyed will. 50 L. R. A. (N. S.) 861.

Probate of part of will where balance lost or destroyed. 18 Ann. Cas. 630; 26 L. R. A. (N. S.) 654.

§ 1391. Acting Administrators—Pendency of Proceedings.

If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration shall have been granted on the estate of the testator, or letters testamentary of any previous will of the testator shall have been granted, the court shall have authority to restrain the administrators or executors so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will. [L. '17, p. 648, § 21.]

VII.

FOREIGN WILLS.

§ 1392. Foreign Wills—Admission to Probate in This State.

Wills probated in any other state or territory of the United States, or in any foreign country or state, shall be admitted to probate in this state on the production of a copy of such will and of the original record of probate thereof, authenticated by the attestation of the clerk of the court in which such probate was made; or if there be no clerk, by the attestation of the judge thereof, and by the seal of such officers, if they have a seal. [L. '17, p. 649, § 22.]

Probate of Foreign Wills—Situs of Property and Original Probate in Other Jurisdiction: See Remington's Digest, Wills, § 29; Clayson's Estate, In re, 26 Wash. 253, 66 Pac. 410; Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20; Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; Alaska Banking & Safe Deposit Co. v. Noyes, 64 Wash. 672, 117 Pac. 492.

FOREIGN AND ANCILLARY ADMINISTRATION: See Remington's Digest, Ex. & Ad., §§ 170—174.

§ 170. **Foreign Appointment:** Barlow v. Coggan, 1 W. T. 257; Hanford v. Davies, 1 Wash. 476, 25 Pac. 329.

§ 171. **Ancillary Appointment:** Hanford v. Davies, 1 Wash. 476, 25 Pac. 329; Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20.

§ 171-1. **Presentation and Allowance of Claims:** Bell's Estate, In re, 70 Wash. 498, 127 Pac. 100.

§ 172. **Distribution of Estate:** Rader v. Stubblefield, 43 Wash. 334, 86 Pac. 560, 10 Ann. Cas. 20.

§ 173. **Actions by Foreign Executors or Administrators:** *Munson v. Exchange National Bank*, 19 Wash. 125, 52 Pac. 1011; *Waldo v. Milroy*, 19 Wash. 156, 52 Pac. 1012.

§ 174. **Actions Against Foreign Executors or Administrators:** *McCoy v. Ayers*, 2 W. T. 307, 5 Pac. 843.

Necessity of probate of foreign will in domestic state. 9 Ann. Cas. 423.

Jurisdiction to admit to probate will not probated at testator's domicile. 33 L. R. A. (N. S.) 658.

Effect of probate of will in another state. 20 L. R. A. 673; 48 L. R. A. 131; 6 L. R. A. (N. S.) 617.

Presumption as to probate of will in another state. 48 L. R. A. 136.

§ 1393. Application of Laws to Foreign Wills.

All provisions of law relating to the carrying into effect of domestic wills after probate thereof shall, so far as applicable, apply to foreign wills admitted to probate in this state. [L. '17, p. 649, § 23.]

VIII.

WILLS.

§ 1394. Who may Make Will.

Every person who shall have attained the age of majority, of sound mind, may by last will devise all his or her estate, real and personal. [L. '17, p. 649, § 24.]

EXTENT AND POWER OF TESTAMENTARY CAPACITY: See *Remington's Digest*, Wills, §§ 1—6.

§ 1. **Property and Rights Subject to Testamentary Disposition:** *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *German-Amer. State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221; *Irwin v. Rogers*, 91 Wash. 284, 157 Pac. 690, L. R. A. 1916E, 1130.

Where a deed to a devisee was made at the same time the will was executed, and the will recited that the property had been deeded to him, the grantee, to whom the deed was delivered at once, takes under the deed and not under the will, so that his estate is not defeated by a contest of the will, under the forfeiture clause in the will: *White v. Chellew*, 108 Wash. 628, 185 Pac. 621.

Where title to land devised had passed under a deed to the devisee, delivered during the testator's lifetime, it would not be forfeited by the grantee's contest of the will, under the forfeiture clause in the will in case of contests by beneficiaries: *White v. Chellew*, 108 Wash. 526, 185 Pac. 619.

The right to make a testamentary disposition of property is governed by the laws in force at the date of the testator's death, and wills must conform thereto: *Strand v. Stewart*, 51 Wash. 685, 99 Pac. 1027.

Community property is subject to testamentary disposition, to the extent of the testator's one-half interest, under this

section, and section 1342, supra: *German-American State Bank of Ritzville v. Godman*, 83 Wash. 231, 145 Pac. 221.

§ 3. **Indians:** *Jackson v. Thompson*, 38 Wash. 282, 80 Pac. 454.

§ 4. **Testamentary Capacity — Presumptions and Burden of Proof:** *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754; *Hanson's Estate, In re*, 87 Wash. 113, 151 Pac. 264; *Pond's Estate v. Faust*, 95 Wash. 346, 165 Pac. 656; *Murphy's Estate, In re*, 98 Wash. 548, 168 Pac. 175.

See, also, *Roy's Estate, In re*, 113 Wash. 277, 193 Pac. 682.

§ 5. — **Insanity:** *Baldwin's Estate, In re*, 13 Wash. 666, 43 Pac. 934; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754.

§ 6. — **Admissibility of Evidence in General:** *Gorkow's Estate, In re*, 20 Wash. 563, 56 Pac. 385; *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489; *Hanson's Estate, In re*, 87 Wash. 113, 151 Pac. 264.

What constitutes testamentary capacity or incapacity. 27 L. R. A. (N. S.) 2; L. R. A. 1915A, 450.

Validity of will made by blind person. Ann. Cas. 1916D, 792.

Insane delusion as to relative as affecting testamentary capacity. Ann. Cas. 1916C, 4, 29, 33, 35; Ann. Cas. 1918D, 471.

Religious belief other than in spiritualism as affecting testamentary capacity. **Ann. Cas.** 1915D, 573.

Effect of guardianship of adult on testamentary capacity. 8 **A. L. R.** 1375.

§ 1395. How Executed—Foreign Wills Excepted.

Every will shall be in writing signed by the testator or the testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator by his direction or request: Provided, however, that a last will and testament, executed without this state, in the mode prescribed by law, either of the place where executed or the testator's domicile, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state. [L. '17, p. 649, § 25.]

Cited in 101 Wash. 131.

REQUISITES AND VALIDITY: See Remington's Digest, Wills, §§ 8—20. **Contracts to Devise—Making Requests and Validity:** Worden v. Worden, 96 Wash. 592, 165 Pac. 501; Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465.

See, also, Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572; Wall v. Estate of McEnnery, 105 Wash. 445, 178 Pac. 631.

§ 8-1. — **Rights and Remedies on Breach:** Worden v. Worden, 96 Wash. 610, 165 Pac. 508; Worden v. Worden, 96 Wash. 592, 165 Pac. 501.

§ 9. **Agreements as to Mutual Wills:** Prince v. Prince, 64 Wash. 552, 117 Pac. 255.

§ 10. **Validity and Sufficiency of Provisions of Will in General:** Barker's Estate, In re, 5 Wash. 390, 31 Pac. 976; Van Brocklin v. Wood, 38 Wash. 384, 80 Pac. 530.

§ 12. **Instrument Operating as Will and Also as Deed or Contract:** Simmons v. Macomber, 60 Wash. 469, 111 Pac. 579.

An agreement between husband and wife whereby title to community realty is passed to the survivor upon the death of either spouse, as provided by section 6894, *infra*, is not a will and is not governed by the law relating to wills: McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060.

§ 13. **Execution—Subscription:** Brown's Estate, In re, 83 Wash. 528, 145 Pac. 591; Wilson v. Craig, 86 Wash. 465, 150 Pac. 1179, **Ann. Cas.** 1917B, 871; Points v. Nier, 91 Wash. 20, 157 Pac. 44, **Ann. Cas.** 1918A, 1046; Connolly's Estate, In re, 89 Wash. 168, 154 Pac. 155, **L. R. A.** 1916D, 635.

§ 13-1. — **Attestation:** Jones' Estate, In re, 101 Wash. 128, 172 Pac. 206; Brown's Estate, In re, 101 Wash. 314, 172 Pac. 247.

§ 14. **Technical Words of Disposition:** Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677.

§ 15. **Certainty:** Gorkow's Estate, In re, 20 Wash. 563, 56 Pac. 385; Cross v. Cross, 23 Wash. 673, 63 Pac. 528.

§ 17. **Undue Influence:** Tresidder's Estate, In re, 70 Wash. 15, 125 Pac. 1034; Rathjens v. Merrill, 38 Wash. 442, 80 Pac. 754.

See, also, White v. White, 111 Wash. 354, 190 Pac. 1003; Adin's Estate, In re, 112 Wash. 379, 192 Pac. 887; Roy's Estate, In re, 113 Wash. 277, 193 Pac. 682.

§ 18. — **Presumptions and Burden of Proof:** Tresidder's Estate, In re, 70 Wash. 15, 125 Pac. 1034.

§ 19. — **Admissibility of Evidence:** Tresidder's Estate, In re, 70 Wash. 15, 125 Pac. 1034.

§ 20. — **Weight and Sufficiency of Evidence:** Rathjen's Estate, In re, 45 Wash. 55, 87 Pac. 1070; Palmer's Will, In re, 52 Wash. 644, 101 Pac. 220; Converse v. Mix, 63 Wash. 318, 115 Pac. 305; Patterson's Estate, In re, 68 Wash. 377, 123 Pac. 515; Murphy's Estate, In re, 98 Wash. 548, 168 Pac. 175.

Place of signature of attesting witnesses to will. 10 **A. L. R.** 429.

Execution of will of blind person. 9 **A. L. R.** 1416.

Where witness is deemed to subscribe will in testator's presence. 6 **Ann. Cas.** 414, 1 **L. R. A. (N. S.)** 393; **L. R. A.** 1916C, 950.

Necessity that testator sign "at end" of will in absence of statute. **Ann. Cas.** 1916E, 140.

Writing name of testator in body of will as a signature thereto. 29 **L. R. A. (N. S.)** 63; 46 **L. R. A. (N. S.)** 552; **L. R. A.** 1917D, 632.

Necessity that witnesses see signature by testator. 38 **L. R. A. (N. S.)** 161.

Effect of signature of witness to will before testator signs it. 14 **L. R. A.** 160; 26 **L. R. A. (N. S.)** 1126.

Sufficiency of signature to will with respect to manner of signing. 18 *Ann. Cas.* 769; *Ann. Cas.* 1917B,

874; 22 *L. R. A.* 370; *L. R. A.* 1915D, 905.

§ 1396. Interest on devises.

No interest shall be allowed or calculated on any devise contained in any will unless such will expressly provide for such interest. [L. '17, p. 650, § 26.]

§ 1397. Testator's Signature by Subscribing Witness.

Every person who shall sign the testator's or testatrix's name to any will by his or her direction shall subscribe his own name as a witness to such will and state that he subscribed the testator's name at his request. [L. '17, p. 650, § 27.]

§ 1398. Revocation, How Effected.

No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked except by a subsequent will in writing, or by burning, canceling, tearing, or obliterating the same, by the testator or testatrix, or in his or her presence, by his or her consent or direction. [L. '17, p. 650, § 28.]

Revocation by Subsequent Will—Making and Effect, In General: See Remington's Digest, Wills, § 21; *Mason v. McLean*, 6 Wash. 31, 32 Pac. 1006; *Peirce's Estate*, In re, 63 Wash. 437, 115 Pac. 835; *Edwall's Estate*, In re, 75 Wash. 391, 134 Pac. 1041; *McClanahan v. McClanahan*, 77 Wash. 138, 137 Pac. 479, *Ann. Cas.* 1915A, 461.

Evidence of Revocation: See Remington's Digest, Wills, § 44; *Harris v. Harris*, 10 Wash. 555, 39 Pac. 148.

Subsequent execution of defective will as revocation of prior will.

Ann. Cas. 1912D, 235; *L. R. A.* 1916C, 92.

Effect on will of canceling, obliterating or destroying particular clause. *Ann. Cas.* 1912D, 174; 38 *L. R. A.* (N. S.) 797.

Presumption of revocation of will from destruction of one copy of will executed in duplicate. *Ann. Cas.* 1912A, 273; *Ann. Cas.* 1918E, 229.

Revocation of will by invalid or inoperative codicil. 20 *Ann. Cas.* 1001.

§ 1399. Subsequent Marriage of Testator—Divorce.

If, after making any will, the testator shall marry and the wife, or husband, shall be living at the time of the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such survivor by marriage settlement, or unless such survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received. A divorce, subsequent to the making of a will, shall revoke the will as to the divorced spouse. [L. '17, p. 650, § 29.]

Marriage and Birth of Issue: See Remington's Digest, Wills, § 22; *Petridge's Will*, In re, 47 Wash. 77, 91 Pac. 634; *Adler's Estate*, In re, 52 Wash. 539, 100 Pac. 1019; *Koontz v. Koontz*, 83 Wash. 180, 145 Pac. 201; *Van Guelpen's Estate*, In re, 87 Wash. 146, 151 Pac. 245, *Ann. Cas.* 1917C, 1037.

Testator's marriage as revocation of will under statute making wife heir of husband. 17 *Ann. Cas.* 1142; 25 *L. R. A.* (N. S.) 182.

Divorce of testator as revocation of will. 3 *Ann. Cas.* 230; 16 *Ann. Cas.* 544; 69 *L. R. A.* 940.

§ 1400. Agreements to Convey not to Effect Revocation.

A bond, covenant, or agreement made for a valuable consideration by a testator to convey any property, devised or bequeathed in any last will previously made, shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant, or agreement, for specific performance or otherwise, against devisees or legatees, as might be had by law against the heirs of the testator or his next of kin, if the same had descended to him. [L. '17, p. 650, § 30.]

Sale of real property specifically devised as revocation of devise. *Ann. Cas.* 1913B, 56.

§ 1401. Charges or Encumbrances not to Effect Revocation.

A charge or encumbrance upon any real or personal estate for the purpose of securing the payment of money, or the performance of any covenant or agreement, shall not be deemed a revocation of any will relating to the same estate, previously executed. The devises and legacies therein contained shall pass and take effect, subject to such charge or encumbrance. [L. '17, p. 650, § 31.]

§ 1402. Intestacy as to Children not Named.

If any person make his last will and die leaving a child or children or descendants of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part. [L. '17, p. 651, § 32.]

Operation and Effect of Will—Pretermitted Child: See Remington's Digest, Des. & Dist., § 6; Bower v. Bower, 5 Wash. 225, 31 Pac. 598; Barker's Estate, In re, 5 Wash. 390, 31 Pac. 976; Mason v. McLean, 6 Wash. 31, 32 Pac. 1006; Hill v. Hill, 7 Wash. 409, 35 Pac. 360; Webster v. Seattle Trust Co., 7 Wash. 642, 33 Pac. 970, 35 Pac. 1082; Purdy v. Davis, 13 Wash. 164, 42 Pac. 520; Gorkow's Estate, In re, 20 Wash. 563, 56 Pac. 385; Morri-

son v. Morrison, 25 Wash. 466, 65 Pac. 779.

See, also, McKnight v. McDonald, 34 Wash. 98, 74 Pac. 1060; Moore v. Elliott, 76 Wash. 520, 136 Pac. 849; Gehlen v. Gehlen, 77 Wash. 17, 137 Pac. 312.

Word "child" in statute of pretermis-
sion as including illegitimate child.
Ann. Cas. 1918B, 253.

Remedy of pretermitted heirs. 37
L. B. A. (N. S.) 1143.

§ 1403. Advancements.

If such child or children or their descendants, shall have an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they shall take nothing by virtue of the provisions of the preceding section. Nothing shall be considered an advancement unless charged in writing by the decedent as an advancement, or acknowledged in writing as such by the child or other successor or heir. [L. '17, p. 651, § 33.]

§ 1404. Death of Devisee Before Testator.

When any estate shall be devised to any child, grandchild, or other relative of the testator, and such devisee shall die before the testator, having lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator. A spouse is not a relative under the provisions of this section. [L. '17, p. 651, § 34.]

A wife is not a "relative" of her husband: *Renton's Estate, In re*, 10 Wash. 533, 89 Pac. 145.

§ 1405. Revival of Prior Will by Revocation of Subsequent.

If, after making any will, the testator shall duly make and execute a second will, the destruction, cancellation, or revocation of such second will shall not revive the first will unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will. [L. '17, p. 651, § 35.]

Destruction of revoking will as working revival of prior will. 4 *Ann. Cas.* 313; 13 *Ann. Cas.* 245; *Ann. Cas.* 1913E, 120; *Ann. Cas.* 1916E,

. 718; 37 *L. R. A.* 575; 14 *L. R. A. (N. S.)* 937; 37 *L. R. A. (N. S.)* 291.

§ 1406. Nuncupative Wills.

No nuncupative will shall be good when the estate bequeathed exceeds the value of two hundred dollars (\$200) unless the same be proved by two witnesses who were present at the making thereof, and it be proven that the testator, at the time of pronouncing the same, did bid some person present to bear witness that such was his will, or to that effect, and such nuncupative will was made at the time of the last sickness. Nothing herein contained shall prevent any mariner at sea or soldier in the military service from disposing of his wages or other personal property by nuncupative will. No real estate shall be devised by a nuncupative will. [L. '17, p. 651, § 36.]

Nuncupative Will: See *Remington's Digest, Wills*, § 16; *Miller's Estate, In re*, 47 Wash. 253, 91 Pac. 967, 125 Am. St. Rep. 904, 14 *Ann. Cas.* 1163, 13 *L. R. A. (N. S.)* 1092; *Brown v. State*, 87 Wash. 44, 151 Pac. 81, *Ann. Cas.* 1917D, 604; *Irwin v. Rogers*, 91 Wash. 284, 157 Pac. 690, *L. R. A.* 1916E, 1130.

What is "last sickness" permitting a nuncupative will. 13 *L. R. A. (N. S.)* 1092; 9 *A. L. R.* 464.

Statutory restrictions as to time of making nuncupative will. 3 *Ann. Cas.* 317; 14 *Ann. Cas.* 1164.

Necessity and sufficiency of regatio testium to establish proof of nuncupative will. 10 *Ann. Cas.* 1132.

§ 1407. Proof of Nuncupative Will.

No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words or the substance thereof be first committed to writing, and in all cases a citation issued to the widow or next of kin of the deceased that they may contest the will if they think proper. [L. '17, p. 652, § 37.]

This section refers to the testimony and not merely to the petition offering the will; and failure to offer the proofs within six months is not excused by

delay in consequence of the several pleas of the next of kin; in view of the provision that the court may immediately receive the proofs when the will is ex-

hibited: *Greenleaf's Estate*, In re, 69 Wash. 478, 125 Pac. 789.

The probate of a nuncupative will is properly denied where no proof was offered within six months after speaking the words, as expressly required by this section: *Brown's Estate*, In re, 101 Wash. 314, 172 Pac. 247.

The probate of a will is void for want of jurisdiction when no notice to the widow or next of kin was given under this section: *Sullivan's Estate*, In re, 40 Wash. 202, 82 Pac. 297, 111 Am. St. Rep. 895.

§ 1408. Devises, etc., to Subscribing Witnesses.

All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, shall be void unless there are two other competent witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will. If such witness, to whom any beneficial devise, legacy or gift may have been made or given, would have been entitled to any share in the testator's estate in case the will is not established, then so much of the estate as would have descended or would have been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him. [L. '17, p. 652, § 38.]

§ 1409. Devise of Land, What Passes.

Every devise of land in any will shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it shall clearly appear by the will that he intended to convey a less estate. [L. '17, p. 652, § 39.]

Estates Created—Fee Simple: See *Remington's Digest*, Wills, § 70; *Reeves v. School District*, 24 Wash. 282, 64 Pac. 752.

See, also, *White v. Chellew*, 108 Wash. 526, 185 Pac. 619.

§ 1410. Estates for Life—Remainders.

If any person, by last will, devise any real estate to any person for the term of such person's life, such devise vests in the devisee an estate for life, and without the remainder is specially devised, it shall revert to the heirs at law of the testator. [L. '17, p. 653, § 40.]

§ 1411. After-acquired Estates.

Any estate, rights or interest in lands acquired by the testator after the making of his or her will shall pass thereby, and in like manner as if owned at the time of making the will, if such manifestly appear by the will to have been the intention of the testator. [L. '17, p. 653, § 41.]

When after-acquired realty passes by will. 18 Ann. Cas. 167:

§ 1412. Contribution Among Legatees and Heirs.

When any testator in his last will shall give any chattel or real estate to any person, and the same shall be taken in execution for the payment of the testator's debts, then all the other legatees, devisees and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken. [L. '17, p. 653, § 42.]

§ 1413. Enforcement by Court.

When any devisees, legatees or heirs shall be required to refund any part of the estate received by them, for the purpose of making up the share, devise or legacy of any other devisee, legatee or heir, the superior court, upon the petition of the person entitled to contribution or distribution of such estate, may order the same to be made and enforce such order. [L. 17, p. 653, § 43.]

§ 1414. Codicils Included in Term "Will."

The term "will," as used in this chapter, shall be so construed as to include all codicils attached to any will. [L. '17, p. 653, § 44.]

§ 1415. Intent of Testator Controlling.

All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them. [L. '17, p. 653, § 45.]

Cited in 101 Wash. 578; 111 Wash. 492.

CONSTRUCTION, RIGHTS, OPERATION AND EFFECT: See Remington's Digest, Wills, §§ 58—88. **What Law Governs:** Stewart's Estate, In re, 26 Wash. 32, 66 Pac. 148, 67 Pac. 723.

See, also, Davis v. Brown, 112 Wash. 121, 191 Pac. 1098.

§ 59. Intention of Testator—Ascertainment from Words of Will: Newport v. Newport, 5 Wash. 114, 31 Pac. 428; McCullough v. Lauman, 38 Wash. 227, 80 Pac. 441; Peters' Estate, In re, 101 Wash. 572, 172 Pac. 870; Olsen v. Hagan, 102 Wash. 321, 172 Pac. 1173.

§ 60. Construction in Favor of Heirs: Hunt v. Phillips, 34 Wash. 362, 75 Pac. 970.

§ 61. Construction in Favor of Instrument—Operation and Effect and Construction Against Intestacy: Lotzgesell's Estate, In re, 62 Wash. 352, 113 Pac. 1105.

§ 62. Construing Instruments Together—Wills and Codicils: Hunt v. Hunt, 18 Wash. 14, 50 Pac. 578.

§ 63. Evidence to Aid Construction—Ambiguity or Uncertainty in Language: Taylor v. Horst, 23 Wash. 446, 63 Pac. 231.

§ 64. — Identification of Persons or Other Objects: Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502; Rathjens v. Merrill, 32 Wash. 442, 80 Pac. 754; Siegley v. Simpson, 73 Wash. 69, 131 Pac. 479, Ann. Cas. 1915B, 63, 47 L. R. A. (N. S.) 514; Moran's Estate, In re, 95 Wash. 428, 163 Pac. 922.

See, also, Wilson's Estate, In re, 111 Wash. 491, 191 Pac. 615.

§ 66. — Showing Extrinsic Facts and Circumstances: Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

For the purpose of forcing an election, extrinsic evidence is not admissible to establish the intent to dispose of property over which the testator had no testamentary power of disposition: Herrick v. Miller, 69 Wash. 456, 125 Pac. 974.

A clause in a will asking the sole beneficiary to "make provision for my son R. as requested by me," must be construed in the light of several former wills in favor of R. and the circumstances surrounding its execution: Tresidder's Estate, In re, 70 Wash. 15, 125 Pac. 1034.

§ 68. Classes—Devise or Bequest to Class or to Individuals: Peck v. Peck, 70 Wash. 548, 137 Pac. 137.

See, also, Hutton's Estate, In re, 106 Wash. 578, 180 Pac. 882, 3 A. L. R. 1673.

§ 68-1. Particular Descriptions of Real Property: Peters' Estate, In re, 101 Wash. 572, 172 Pac. 870.

§ 69. Residuary Clause—Restriction and Amount: McCullough v. Lauman, 38 Wash. 227, 80 Pac. 441.

§ 70-1. Conditions and Restrictions—Marriage: Nichols' Estate, In re, 102 Wash. 303, 172 Pac. 1146, L. R. A. 1918E, 986.

See, also, White v. Chellew, 108 Wash. 526, 185 Pac. 619.

§ 71. Estates in Trust — Precatory Words Necessary or Sufficient to Create Trust: Hunt v. Hunt, 18 Wash. 14, 50 Pac. 578.

§ 72. — Construction of Testamentary Trusts—Trustees: Smith v. Smith, 15 Wash. 239, 46 Pac. 249.

§ 73. — Cestuis Que Trust: Denton v. Schneider, 80 Wash. 506, 142 Pac. 9.

§ 74. Construction of Testamentary Powers—In General: Foley v. McDonnell,

48 Wash. 272, 93 Pac. 321; Cornett's Estate, In re, 102 Wash. 254, 173 Pac. 44.

See, also, Redelsheimer v. Zepin, 105 Wash. 199, 177 Pac. 736; McDonald's Estate, In re, 110 Wash. 366, 188 Pac. 523.

§ 75. — Power of Disposition: Sprague v. Betz, 44 Wash. 650, 87 Pac. 916.

§ 76. — Creation of Testamentary Powers: Webster v. Thorndyke, 11 Wash. 390, 39 Pac. 677.

§ 77. Actions to Construe Wills—Jurisdiction and Venue: Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

§ 79. Rights as Against Executor in General: Rogers v. Strobach, 15 Wash. 472, 46 Pac. 1040.

See, also, Slasor v. Slasor, 111 Wash. 90, 189 Pac. 546.

§ 80. Estoppel by Acceptance of Devise or Legacy: Goss' Estate, In re, 73 Wash. 330, 132 Pac. 409.

§ 81. Property or Fund Out of Which Legacies are to be Paid: German Am. State Bank v. Godman, 83 Wash. 231, 145 Pac. 221; Slocum's Estate, In re, 96 Wash. 110, 164 Pac. 759.

§ 82. Time of Accrual of Right to Legacy or Devise: Jesseph v. Westerberg, 94 Wash. 602, 162 Pac. 1004.

See, also, Davis v. Brown, 112 Wash. 121, 191 Pac. 1098.

§ 83. Interest on Legacies: Jesseph v. Westerberg, 94 Wash. 602, 162 Pac. 1004; Marconnier v. Preston, 96 Wash. 374, 165 Pac. 72.

§ 84. Actions by Devises or Legatees: Dunn v. Peterson, 4 Wash. 170, 29 Pac. 998; Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

§ 85. Construction of Specific Devises and Bequests in General: McCullough v. Lauman, 38 Wash. 227, 80 Pac. 441; Lotzgesell's Estate, In re, 62 Wash. 352, 113 Pac. 1105; Martin v. Barger, 62 Wash. 672, 114 Pac. 505; Stahl v. Schwartz, 67 Wash. 25, 120 Pac. 856.

§ 86. Election—Provisions of Will and Right as Heir: Lewis v. Lichty, 3 Wash. 213, 28 Pac. 356, 28 Am. St. Rep. 25; Herrick v. Miller, 69 Wash. 456, 125 Pac. 974; Parkes' Estate, In re, 101 Wash. 659, 172 Pac. 908.

§ 87. Covenants of Testator: Hyde v. Hellar, 10 Wash. 586, 39 Pac. 249.

§ 88. — Property and Funds Applicable to Debts and Order of Liability in General: Newport v. Newport, 5 Wash. 114, 31 Pac. 428.

See, also, Davis v. Brown, 112 Wash. 121, 191 Pac. 1098.

Testimony of scrivener as admissible to show intention of testator. **Ann. Cas.** 1913A, 1017; 38 **L. R. A. (N. S.)** 91.

Admissibility of parol evidence to create or rebut presumption of satisfaction of debt by legacy or devise to creditor. **L. R. A.** 1915B, 1178.

Construction together as one will of several testamentary instruments partially inconsistent. 18 **Ann. Cas.** 284; **Ann. Cas.** 1917E, 781.

§ 1416. Words Importing Number and Sex.

Words in this chapter contained, or in this act, which import the singular number only, may also be applied to the plural of persons and things, and words importing the masculine gender only may be extended to females also, when such construction shall be necessary. [L. '17, p. 653, § 46.]

IX.

LETTERS TESTAMENTARY AND OF ADMINISTRATION.

§ 1417. Letters to Executors—Refusal to Serve.

After probate of any will, letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom administration would have been granted if there had been no will. [L. '17, p. 654, § 47.]

APPOINTMENT, QUALIFICATION AND TENURE: See Remington's Digest, **Ex. & Ad., § 4. Jurisdiction of Courts—In General:** Scott v. McNeal, 5 Wash. 309,

31 Pac. 873, 34 Am. St. Rep. 863; Wilbur's Estate, In re, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886; Dooly v. Russell, 10 Wash. 195, 38 Pac. 1000; Furth v. United States Mtg. & T. Co., 13 Wash. 73, 42 Pac. 523; State ex rel. Warren v. Ayer, 17 Wash. 127, 49 Pac. 226; Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

Fact of Death: See Remington's Digest, Ex. & Ad., § 2; Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863 (reversed in 154 U. S. 34, 38 L. Ed. 896, 14 Sup. Ct. 1108); State ex rel. Baldwin v. Superior Court, 11 Wash. 111, 39 Pac. 818.

Fact of Intestacy: See Remington's Digest, Ex. & Ad., § 2-1; Guye's Estate, In re, 54 Wash. 264, 103 Pac. 25, 132 Am. St. Rep. 1111.

Status and acts of one appointed executor or administrator who was ineligible. 14 A. L. R. 619.

What constitutes renunciation of trust by executor. 20 Ann. Cas. 836; Ann. Cas. 1918D, 459.

Who may be executor of will. Ann. Cas. 1913B, 1162.

Right of executor to retract renunciation of trust. Ann. Cas. 1916D, 1301.

§ 1418. Objections to Executors Named.

Any person interested in a will may file objections in writing to the granting of letters testamentary to the persons named as executors, or any of them, and the objection shall be heard and determined by the court. [L. '17, p. 654, § 48.]

§ 1419. Community Property, How Administered.

A surviving spouse shall be entitled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse, for such time and in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or that he or she has in writing waived the right to administer upon such community property. [L. '17, p. 654, § 49.]

Cited in 110 Wash. 632.

§ 1420. Minority or Absence of Executor—Removal of Disqualification.

If the executor be a minor or absent from the state, letters of administration with the will annexed shall be granted, during the time of such minority or absence, to some other person unless there be another executor who shall accept the trust, in which case the estate shall be administered by such other executor until the disqualification shall be removed, when such minor, having arrived at full age, or such absentee, having returned, shall be admitted as joint executor with the former. [L. '17, p. 654, § 50.]

§ 1421. Revocation of Letters by Discovery of Will.

If after letters of administration are granted a will of the deceased be found and probate thereof be granted, the letters shall be revoked

and letters testamentary or of administration with the will annexed, shall be granted. [L. '17, p. 655, § 51.]

§ 1422. Annulment of Letters.

The court appointing any executor or administrator shall have authority for any cause deemed sufficient, to cancel and annul such letters and appoint other executors or administrators in the place of those removed. [L. '17, p. 655, § 52.]

Power of court to remove executor or administrator. **Ann. Cas.** 1915D, 284.

What effects removal of executor or administrator. 8 **A. L. R.** 175.

Change of residence to another state as disqualifying personal representative from acting. 3 **Ann. Cas.** 991.

Effect of insanity or mental incompetency of executor or administrator. 45 **L. R. A. (N. S.)** 1073.

§ 1423. Effect of Death of Executor.

No executor of an executor shall, as such, be authorized to administer upon the estate of the first testator, but on the death of the sole or surviving executor of any last will, letters of administration with the will annexed, on the estate of the first testator left unadministered, shall be issued. [L. '17, p. 655, § 53.]

§ 1424. Powers of Executor—Associates Disqualified.

When any of the executors named shall not qualify or having qualified shall become disqualified or be removed, the remaining executor or executors shall have the authority to perform every act and discharge every trust required by the will, and their acts shall be effectual for every purpose. [L. '17, p. 655, § 54.]

§ 1425. Administrators With Will Annexed—Authority.

Administrators with the will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose. [L. '17, p. 655, § 55.]

§ 1426. Execution of Letters.

Letters testamentary and of administration with the will annexed shall be signed by the clerk of the court, and under the seal of the court, and a copy of the will shall be attached to the letters. [L. '17, p. 655, § 56.]

§ 1427. Record and Certification of Letters.

The clerk shall record, in a well-bound book kept for that purpose, all letters testamentary and of administration before they are delivered to the executors or administrators, and shall certify on such letters that they have been so recorded. [L. '17, p. 655, § 57.]

§ 1428. Copies as Evidence.

Copies of such letters, or copies of the records thereof, certified by the clerk, and under the seal of the superior court, shall be received as evidence in any court in this state. [L. '17, p. 656, § 58.]

§ 1429. Form of Letters Testamentary.

Letters testamentary to be issued to executors under the provisions of this chapter may be in the following form:

State of Washington, County of —.

In the superior court of the county of —.

Whereas, the last will of A B, deceased, was, on the — day of —, A. D., —, duly exhibited, proven, and recorded in our said superior court, a copy of which is hereto annexed; and whereas, it appears in and by said will that C D is appointed executor thereon, and, whereas, said C D has duly qualified, now, therefore, know all men by these presents, that we do hereby authorize the said C D to execute said will according to law.

Witness my hand and the seal of said court this — day of —, A. D. 19—. [L. '17, p. 656, § 59.]

§ 1430. Form With Will Annexed.

Letters of administration with the will annexed shall be in substantially the same form as provided for letters testamentary. [L. '17, p. 656, § 60.]

§ 1431. Persons Entitled to Letters.

Administration of the estate of the person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:

(1) The surviving husband or wife, or such person as he or she may request to have appointed.

(2) The next of kin in the following order: 1, child or children; 2, father or mother; 3, brothers or sisters; 4, grandchildren.

(3) One or more of the principal creditors.

(4) If the persons so entitled shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin or they waive their right, or if there be no principal creditor or creditors, then the court may appoint any suitable person to administer such estate. [L. '17, p. 656, § 61.]

Cited in 110 Wash. 632; 112 Wash. 200.

Right to Appointment as Administrator: See Remington's Digest, Ex. & Ad., §§ 8—12. **In General:** McLean v. Roller, 33 Wash. 166, 73 Pac. 1123; State ex rel. Mann v. Superior Court, 52 Wash. 149, 100 Pac. 198.

See, also, Fellin's Estate, In re, 108 Wash. 626, 185 Pac. 604.

§ 9. — Heirs and Next of Kin: Stern v. Sill, 39 Wash. 557, 81 Pac. 1007; Hoss' Estate, In re, 59 Wash. 360, 109 Pac. 1071.

See, also, Utter's Estate, In re, 112 Wash. 197, 191 Pac. 836.

§ 10. — Husband or Wife: Lawrence v. Bellingham Bay etc. R. Co., 4 Wash.

664, 30 Pac. 1099; Hill's Estate, In re, 6 Wash. 285, 33 Pac. 585; Buchser v. Buchser, 72 Wash. 675, 131 Pac. 193, 132 Pac. 239.

§ 11. — Creditors: Sullivan's Estate, In re, 25 Wash. 430, 65 Pac. 793; Farnham's Estate, In re, 41 Wash. 570, 84 Pac. 602; Hoss' Estate, In re, 59 Wash. 360, 109 Pac. 1071.

§ 12. — Nomination by Person Entitled to Administer: McLean v. Roller, 33 Wash. 166, 73 Pac. 1123; Larson v. Stewart, 69 Wash. 223, 124 Pac. 382, Ann. Cas. 1914A, 1011.

See, also, Utter's Estate, In re, 112 Wash. 197, 191 Pac. 836.

Renunciation of Right to Administer: See Remington's Digest, Ex. & Ad., § 14;

Hill's Estate, In re, 6 Wash. 285, 33 Pac. 585; Sullivan's Estate, In re, 25 Wash. 430, 65 Pac. 793; Sutton's Estate, In re, 31 Wash. 340, 71 Pac. 1012; McLean v. Roller, 33 Wash. 166, 73 Pac. 1123.

Operation and Effect of Appointment: See Remington's Digest, Ex. & Ad., §§ 21, 22; Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863; McKenna v. Cosgrove, 41 Wash. 332, 83 Pac. 240; Koloff v. Chicago, Mil. & P. S. R. Co., 71 Wash. 543, 129 Pac. 398; Wagner v. Alderson, 91 Wash. 157, 157 Pac. 476.

Selection of administrator from among members of class equally entitled. 1 A. L. R. 1245.

Right of person entitled to administer estate to nominate an administrator to the exclusion of the person next entitled to appointment. 17 Ann. Cas. 948; Ann. Cas. 1914A, 1014; 22 L. R. A. (N. S.) 1161.

Who is creditor entitled to letters of administration. Ann. Cas. 1915A, 55.

§ 1432. Application for Letters.

Application for letters of administration shall be made by petition in writing, signed and verified by the applicant or his attorney, and filed with the court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and state, if known, the names, ages and residence of the heirs of the deceased and that the deceased died without a will. [L. '17, p. 657, § 62.]

Cited in 112 Wash. 199.

Application: See Remington's Digest, Ex. & Ad., §§ 16—19. **Petition in General:** McLean v. Roller, 33 Wash. 166, 73 Pac. 1123; Stern v. Sill, 39 Wash. 557, 81 Pac. 1007; Wilkie v. Bailey, 74 Wash. 241, 133 Pac. 388.

An administrator, upon final distribution must, under this section, furnish the names and places of residence of the heirs to the best of his ability; and hence may allege that certain claimants are not heirs, especially when he is personally

interested in the estate: State ex rel. Myer v. Clifford, 78 Wash. 555, 139 Pac. 650.

§ 17. — **Allegation of Residence:** Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863.

§ 18. — **Verification:** McCoy v. Ayres, 2 W. T. 203, 2 Pac. 273.

§ 19. — **Review:** State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375; Sutton's Estate, In re, 31 Wash. 340, 71 Pac. 1012; Farnham's Estate, In re, 41 Wash. 570, 84 Pac. 602.

§ 1433. Notice of Hearing.

When a petition for letters of administration or for letters of administration with the will annexed shall be filed, the clerk must give notice thereof, by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant and the time at which the petition will be heard. Such notice shall be given at least ten days before the time fixed for such hearing, and the clerk shall have authority to fix the time of such hearing: Provided, however, no notice of hearing need be given or posted if the petition be presented by or on behalf of the surviving husband or wife, and on the presentation of such petition by or on behalf of the surviving husband or wife, the court may at once make appointment and cause letters of administration to be issued: Provided, further, that if there be a surviving spouse and the petition is presented by anyone other than the surviving spouse prior to forty days after the death of the intestate, notice to such surviving spouse shall be given as hereinbefore provided. [L. '17, p. 657, § 63.]

Proof of the posting of notices of the administration of an estate is sufficient where the person posting the same makes affidavit that the notices have been posted in three public places, although the affi-

davit does not specifically point out the places of such posting: Scott v. McNeal, 5 Wash. 309, 31 Pac. 873, 34 Am. St. Rep. 863.

§ 1434. Special Notice to Heirs, Legatees or Devisees.

At any time after the issuance of letters testamentary or of administration upon the estate of any decedent, any person interested in said estate as heir, devisee or legatee, or attorney for such heir, devisee or legatee, may serve upon the executor or administrator (or upon the attorney for such executor or administrator) and file with the clerk of the court wherein the administration of such estate is pending, a written request stating that he desires special notice of any or all of the following named matters, steps or proceedings in the administration of said estate, to wit:

- (1) Filing of petitions for sales, leases or mortgages of any property of the estate.
- (2) Filing of accounts.
- (3) Filing of petitions for distribution.
- (4) Petitions by the executor or administrator for family allowances and homesteads.

Such request shall state the postoffice address of such heir, devisee or legatee, or his attorney, and thereafter a brief notice of the filing of any of such petitions or accounts, except petitions for sale of perishable property, or other personal property which will incur expense or loss by keeping, shall be addressed to such heir, devisee or legatee, or his attorney, at his stated postoffice address, and deposited in the United States postoffice, with the postage thereon prepaid, at least five days before the hearing on such petition or account; or personal service of such notices may be made on such heir, devisee or legatee, or attorney, not less than five days before such hearing, and such personal service shall be equivalent to such deposit in the postoffice, and proof of mailing or of personal service must be filed with the clerk before the hearing of such petition or account. If upon the hearing it shall appear to the satisfaction of the court that the said notice has been regularly given, the court shall so find in its order or judgment, and such judgment shall be final and conclusive. [L. '17, p. 657, § 64.]

Cited in 108 Wash. 327.

§ 1435. Form of Letters of Administration.

Letters of administration shall be signed by the clerk, and be under the seal of the court, and may be substantially in the following form:

State of Washington, County of —

Whereas, A. B., late of — on or about the — day of — A. D., — died intestate, leaving at the time of his death, property in this state subject to administration: Now, therefore, know all men by these presents, that we do hereby appoint — administrator upon said estate, and whereas said administrator has duly qualified, hereby authorize him to administer the same according to law.

Witness my hand and the seal of said court this — day of —, A. D., 19—. [L. '17, p. 658, § 65.]

§ 1436. Oath.

Before letters testamentary or of administration are issued to the executor or administrator, he must take and subscribe an oath, before

some person authorized to administer oaths, that he will perform, according to law, the duties of his trust as executor or administrator, which oath must be recorded. [L. '17, p. 659, § 66.] •

§ 1437. Bond—Increase or Reduction.

Every person to whom letters testamentary or of administration are directed to issue must, before receiving them, execute a bond to the state of Washington, except as hereinafter provided, with such surety, or sureties, as the court may judge sufficient, which bond shall be in a sum to be fixed by the court, and which bond must be conditioned that the executor or administrator shall faithfully execute the duties of the trust according to the law, and such bond shall be approved by the court. The court may at any time and for any reason require the executor or administrator to give additional bonds, the same to be conditioned and to be approved as above provided: Provided, the court may allow a reduction of the bond upon proper showing. [L. '17, p. 659, § 67.]

LIABILITIES ON ADMINISTRATION BONDS: See Remington's Digest, Ex. & Ad., § 175. **Actions, Leave of Court:** Bartels v. Grove, 4 Wash. 632, 30 Pac. 675.

Right to bring suit on bond of administrator in state other than that

in which he was appointed. **Ann. Cas.** 1913B, 348; 35 **L. R. A. (N. S.)** 334.

Effect of unauthorized provisions in bond of personal representative. **L. R. A.** 1917B, 990.

§ 1438. Sureties—Citation and Examination—Costs.

Before the judge approves any bond required under this chapter, and after its approval, he may, of his own motion, or upon the motion of any person interested in the estate, supported by affidavit that the sureties, or some one or more of them, are not worth as much as they have justified to, order a citation to issue, requiring such sureties to appear before him at a designated time and place, to be examined touching their property and its value; and the judge must, at the same time, cause notice to be issued to the executor or administrator, requiring his appearance on the return of the citation, and on its return he may examine the sureties and such witnesses as may be produced touching the property of the sureties and its value; and if upon such examination he is satisfied that the bond is insufficient he must require sufficient additional security. If the bond and sureties are found by the court to be sufficient, the costs incident to such hearing shall be taxed against the party instituting such hearing. As a part of such costs the sureties appearing shall be allowed such fees and mileage as witnesses are allowed in civil proceedings: Provided, that when the citation herein referred to is issued on the motion of the court, no costs shall be imposed. [L. '17, p. 659, § 68.]

§ 1439. Waiver of Bond by Will.

When it is expressly provided in the will that no bonds shall be required of the executor, letters testamentary may issue and sale of real estate be made and confirmed without any bond, unless the court for good cause requires one to be executed; but the executor may at any time afterwards, if it appear from any cause necessary or proper, be required to file a bond, as in other cases. [L. '17, p. 660, § 69.]

§ 1440. Additional Bond.

Any person interested may at any time by verified petition to the court, or otherwise, complain of the sufficiency of any bond or sureties thereon, and the court may upon such petition, or upon its own motion, and with or without hearing upon the matter, require the executor or administrator to give a new, or additional bond, or bonds, and in all such matters the court may act in its discretion and make such orders and citations as to it may seem right and proper in the premises. [L. '17, p. 660, § 70.]

§ 1441. Sureties—Persons Excluded.

No judge of the superior court, no sheriff, clerk of a court, or deputy of either, and no attorney at law shall be taken as surety on any bond required to be taken in any proceeding in probate. [L. '17, p. 660, § 71.]

§ 1442. Record of Bonds.

The clerk shall record in a book kept for that purpose all bonds given by executors and administrators, and preserve the originals in regular file. [L. '17, p. 660, § 72.]

§ 1443. Defective Bonds—Successive Recoveries.

No bond required under the provisions of this chapter, and intended as such bond, shall be void for want of form, recital or condition; nor shall the principal or surety on such account be discharged, but all the parties thereto shall be held and bound to the full extent contemplated by the law requiring the same, to the amount specified in such bond. In all actions on such defective bond the plaintiff may state its legal effect in the same manner as though it were a perfect bond. The bond shall not be void upon the first recovery, but may be sued and recovered upon, from time to time, by any person aggrieved in his own name, until the whole penalty is exhausted. [L. '17, p. 660, § 73.]

Leave of court as prerequisite to action on bond of executor or administrator.
2 A. L. R. 563.

§ 1444. Revocation of Letters—Citation and Hearing.

Whenever the court has reason to believe that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such executor or administrator, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after citation and hearing to revoke such letters. The manner of the citation and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such executor or administrator shall at once cease, and it shall be the duty of the court to immediately appoint some other executor or administrator, as in this act provided. [L. '17, p. 661, § 74.]

REVOCATION OF LETTERS: See Hazelton v. Bogardus, 8 Wash. 102, 35 Remington's Digest, Ex. & Ad., §§ 23—28. Pac. 602.
Termination of Authority in General:

§ 24. **Revocation of Letters:** State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375; Murphy v. Murphy, 42 Wash. 142, 84 Pac. 646.

§ 25. **Resignation and Discharge:** State ex rel. Reser v. Superior Court, 13 Wash. 25, 42 Pac. 630.

§ 26. **Removal—Grounds:** Hill's Estate, In re, 6 Wash. 285, 33 Pac. 585; Dietrich's Estate, In re, 39 Wash. 520, 81 Pac. 1061; Hooper's Estate, In re, 76 Wash. 72, 135 Pac. 813.

See, also, Fick's Estate, In re, 111 Wash. 318, 190 Pac. 1008.

§ 27. — **Proceedings:** Dietrich's Estate, In re, 39 Wash. 520, 81 Pac. 1061.

An application to revoke letters of administration and appoint the applicant must be made on notice, although the statute does not clearly so provide: Fellin's Estate, In re, 108 Wash. 626, 185 Pac. 604.

§ 28. — **Review:** State ex rel. Richardson v. Superior Court, 28 Wash. 677, 69 Pac. 375.

Revocation of letters of administration upon discovery of will. 49 L. R. A. (N. S.) 894; 9 Ann. Cas. 962; Ann. Cas. 1917B, 1128.

§ 1445. **Hearings in Chambers.**

The applications and acts authorized by the foregoing section in this chapter may be heard and determined in court or at chambers. All orders made therein must be entered upon the minutes of the court. [L. '17, p. 661, § 75.]

§ 1446. **Powers of Remaining Executors.**

If there be more than one executor or administrator of an estate, and the letters to part of them be revoked or surrendered, or a part die or in any way become disqualified, those who remain shall perform all the duties required by law. [L. '17, p. 661, § 76.]

§ 1447. **Administrator de Bonis Non.**

If the executor or administrator of an estate shall die, resign, or the letters be revoked before the settlement of the estate, letters of administration of the goods remaining unadministered shall be granted to those to whom administration would have been granted if the original letters had not been obtained, or the person obtaining them had renounced administration, and the administrator de bonis non shall perform the like duties and incur the like liabilities as the former executors or administrators. [L. '17, p. 661, § 77.]

Administrators de Bonis Non: See Remington's Digest, Ex. & Ad., § 46; Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765; Denton v. Schneider, 80 Wash. 506, 142 Pac. 9; Griffith v. James, 91 Wash. 607, 158 Pac. 251.

Where an administrator de bonis non completes the administration commenced by a deceased executrix and also administers her estate, the statutory fees or commissions on final accounting should be prorated between the two estates, and he should not receive commissions on the value of household goods that did not come into his possession, nor upon the interest of the deceased executrix in corporate stock that was never freed from the debts of the estate or distributed: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

An administrator de bonis non is not

responsible on his final accounting for the amount of an unexplained penciled memorandum "money \$631.49" in the inventory, which was a duplicate of the inventory theretofore filed, the only fair inference from the record being that it was money realized from the other property inventoried: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

Right of administrator with will annexed to execute power conferred on testamentary executor. 16 Ann. Cas. 329, 29 L. R. A. (N. S.) 364; 40 L. R. A. (N. S.) 208; 50 L. R. A. (N. S.) 609.

Appointment of administrator de bonis non after final settlement of estate. 5 Ann. Cas. 497.

What assets pass to administrator de bonis non. 40 L. R. A. 33.

§ 1448. Accounting on Death or Resignation.

If any executor or administrator resign, or his letters be revoked, or he die, he or his representatives shall account for, pay, and deliver to his successor or to the surviving or remaining executors or administrators, all money and property of every kind, and all rights, credits, deeds, evidences of debt, and papers of every kind, of the deceased, at such time and in such manner as the court shall order on final settlement with such executor or administrator or his legal representatives. [L. '17, p. 662, § 78.]

§ 1449. Delinquent Executors—Proceedings Against.

The succeeding administrator, or remaining executor or administrator, may proceed by law against any delinquent former executor or administrator, or his personal representatives, or the sureties of either, or against any other person possessed of any part of the estate. [L. '17, p. 662, § 79.]

§ 1450. Limitation on Action Against Sureties.

All actions against sureties shall be commenced within six years after the revocation or surrender of letters of administration or death of the principal. [L. '17, p. 662, § 80.]

X.**SPECIAL ADMINISTRATORS.****§ 1451. Appointment of Special Administrator.**

When, by reason of an action concerning the proof of a will, or from any other cause, there shall be a delay in granting letters testamentary or of administration, the judge may, in his discretion, appoint a special administrator (other than one of the parties) to collect and preserve the effects of the deceased; and in case of an appeal from the decree appointing such special administrator, he shall, nevertheless, proceed in the execution of his trust until he shall be otherwise ordered by the appellate court. [L. '17, p. 662, § 81.]

Under a section authorizing the appointment of a special administrator other than one of the parties, the executor of the will is disqualified, being a "party"

within the meaning of the statute: *Hartley v. Lord*, 38 Wash. 432, 80 Pac. 554.

Appointment and powers of administrators pendente lite. 6 Ann. Cas. 263.

§ 1452. Bond.

Every such administrator shall, before entering on the duties of his trust, give bond, with sufficient surety or sureties, in such sum as the judge shall order, payable to the state of Washington, with condition as required of an executor or in other cases of administration. [L. '17, p. 663, § 82.]

§ 1453. Powers and Duties.

Such special administrator shall collect all the goods, chattels, and debts of the deceased, and preserve the same for the executor or administrator who shall thereafter be appointed; and for that purpose may commence and maintain suits as an administrator, and may also sell such

perishable and other goods as the court shall order sold, and make family allowances under the order of the court, and he shall be allowed such compensation for his services as the said court shall deem reasonable. [L. '17, p. 663, § 83.]

§ 1454. Succession by Executor or Administrator.

Upon granting letters testamentary or of administration the power of the special administrator shall cease, and he shall forthwith deliver to the executor or administrator all the goods, chattels, money and effects of the deceased in his hands, and the executor or administrator may be admitted to prosecute any suit commenced by the special administrator, in like manner as an administrator de bonis non is authorized to prosecute a suit commenced by a former executor or administrator. [L. '17, p. 663, § 84.]

§ 1455. Nonliability to Creditors.

Such special administrator shall not be liable to an action by any creditor of the deceased, and the time for limitation of all suits against the estate shall begin to run from the time of granting letters testamentary or of administration in the usual form, in like manner as if such special administration had not been granted. [L. '17, p. 663, § 85.]

§ 1456. Rendition of Account.

The special administrator shall also render an account, under oath, of his proceedings, in like manner as other administrators are required to do. [L. '17, p. 663, § 86.]

XI.

QUALIFICATIONS OF EXECUTORS AND ADMINISTRATORS.

§ 1457. Qualifications—Persons Disqualified.

The following persons are not qualified to act as executors or administrators. Corporations, nonresidents of this state, minors, persons of unsound mind, or who have been convicted of any felony or of a misdemeanor involving moral turpitude: Provided, that trust companies regularly organized under the laws of this state and national banks when authorized so to do may act as administrators or guardians of the estate of minors or other incompetents upon petition of any person having a preference right to such appointment and may act as executors or guardians when so appointed by will. But no trust company or national bank shall be entitled to qualify as such executor or guardian under any will hereafter drawn by it, or its agents or employees, and no salaried attorney of any such company shall be allowed any attorney fee for probating any such will, or in relation to the administration or settlement of any such estate, and no part of any attorney fee shall inure, directly or indirectly, to the benefit of any trust company or national bank. And when any person to whom letters testamentary or of administration have been issued becomes disqualified to act because of leaving the state, becoming of unsound mind, or being convicted of any crime or misdemeanor involving moral turpitude, the court having jurisdiction shall revoke his or her letters. Provided, a person named as executor in any last will and

testament may be appointed to act as such executor whether he be a resident of this state or not: Provided further, that such nonresident executor shall file a bond to be approved by the court and appoint an agent or attorney in the county where such estate is being probated, upon whom service of all papers may be made; such appointment to be in writing and filed by the clerk with other papers of such estate. [L. '17, p. 663, § 87.]

Cited in 112 Wash. 200.

Qualifications of Administrator: See Remington's Digest, Ex. & Ad., § 13; Smith's Estate, In re, 4 Wash. 702, 30 Pac. 1059, 17 L. R. A. 573; Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841.

A finding that a brother was not entitled to administer an estate because he was a nonresident is sustained, where he

came to this state on learning of his brother's death, and had resided here but five days when he filed his application: Fellin's Estate, In re, 108 Wash. 626, 185 Pac. 604.

Right of nonresident to act as administrator. 3 Ann. Cas. 988; Ann. Cas. 1912A, 747; 1 L. R. A. (N. S.) 341.

XII.

PARTNERSHIPS.

§ 1458. Partnership Property—Inventory—Rights of Surviving Partner.

The executor or administrator of the estate of a deceased person who was a member of a copartnership, shall include in the inventory, in a separate schedule, the whole of the property of such copartnership; and the appraisers shall estimate the value thereof and also the value of such deceased person's individual interest in the partnership property.

The whole of the partnership property shall be administered by such executor or administrator, unless the surviving partner shall within five days from the filing of the inventory, or such further time as the court may allow, apply for the administration thereof. If he so apply, he shall be entitled to administer the partnership property if the court find him to be qualified. If letters of administration be issued to such partner, he shall give such bond as the court may require. He shall be denominated the administrator of the partnership and shall give such notice to the partnership creditors as general administrators are required to give and shall settle the partnership estate in the same manner as is or shall be provided for the settlement of estates of deceased persons except he shall account to the general executor or administrator for the interest of the deceased in the partnership property. [L. '17, p. 664, § 88.]

This section merely fixes a limit within which the application may be made and does not prohibit consideration of an application made before the filing of the inventory: State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147.

The right of partnership creditors to enforce their claims against surviving partners being postponed under this section, until after the settlement of the deceased partner's estate, the running of the statute of limitations against such claims would be suspended during such period: Brigham-Hopkins Co. v. Gross, 20 Wash. 218, 54 Pac. 1127; Brigham-Hopkins Co. v. Gross, 30 Wash. 277, 70 Pac. 480.

Rights and Liabilities of Surviving

Partner: See Remington's Digest, Partners, §§ 74—77; Barlow v. Coggan, 1 W. T. 257; Dyer v. Morse, 10 Wash. 492, 39 Pac. 138, 28 L. R. A. 89; Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593; State ex rel. Bogey v. Neal, 29 Wash. 391, 69 Pac. 1103; State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147.

When the remedy by appeal is inadequate and certiorari lies to review an order refusing to appoint an administrator of partnership property: State ex rel. Keasal v. Superior Court, 76 Wash. 291, 136 Pac. 147.

Right of heir in partnership realty on death of partner as against personal representative of latter.

Ann. Cas. 1912D, 1207; 27 **L. R. A.** 352.

Power of personal representative of deceased partner to carry on business. 40 **L. R. A. (N. S.)** 201.

Rights of executor or administrator of deceased partner as to partnership real estate. 27 **L. R. A.** 340; 28 **L. R. A.** 99, 105, 136.

Rights of surviving members and of estate of deceased member of law firm in respect to business unfinished at time of latter's death. 5 **A. L. R.** 1290; 1 **Ann. Cas.** 401; 66 **L. R. A.** 821.

Power of surviving partner to dispose of goodwill of business. 5 **A. L. R.** 1183.

§ 1459. Purchase of Interest by Survivor—Protection Against Liabilities.

The surviving partner, whether he be administrator or not, shall have the right at any time to petition the court to purchase the interests of such deceased in any or all of the personal property of the partnership. Upon such petition being presented it shall be the duty of the court, in such manner as it may see fit, to learn and by order to fix the value of the interest of the deceased over and above all partnership debts and obligations, in such partnership personal property, and the terms and conditions upon which such surviving partner may purchase, and thereafter such surviving partner shall have the preference right for such length of time as the court may fix, to purchase the interest of such deceased partner at the price and upon the terms and conditions fixed by the court.

It shall be the duty of the court to make such orders as it may deem proper or necessary to protect the estate of the deceased against any liability for partnership debts or obligations. [L. '17, p. 665, § 89.]

§ 1460. Survivor to Operate Business.

The court shall have authority, in instances where it is deemed advisable, to authorize the administrator of the partnership property to continue to operate any going business pending the settlement of the partnership estate or the purchase by the surviving partner of the interest of the deceased partner. [L. '17, p. 666, § 90.]

§ 1461. Survivor Failing to Act.

In case the surviving partner is not appointed administrator of the partnership property, the administration thereof shall devolve upon the executor or administrator and the court shall have power to require the surviving partner to deliver the partnership property and evidences thereof to the administrator or executor. [L. '17, p. 666, § 91.]

XIII.

SETTLEMENT OF ESTATES WITHOUT ADMINISTRATION.

§ 1462. Settlement Without Court Intervention—Order of Distribution—Mismanagement—Citation.

In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that such estate shall be settled without the intervention of any court or courts, and where it duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the court on the filing of the inventory, it shall not be necessary to take out letters testamentary or of

administration, except to admit the will to probate and to file a true inventory of all the property of such estate and give notice to creditors and to the state board or person having charge of the collection of inheritance tax, in the manner required by existing laws. After the probate of any such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the last will and testament shall so provide. But when the estate is ready to be closed the court, upon application, shall have authority and it shall be its duty, to make and cause to be entered a decree finding and adjudging that all debts have been paid, finding and adjudging also the heirs and those entitled to take under the will and distributing the property to the persons entitled to the same, such decree to be made after notice given as provided for like decrees in the estates of persons dying intestate: Provided, however, in all cases, if the party named in such will as executor shall decline to execute the trust or shall die or be otherwise disabled for any cause from acting as such executor, then letters testamentary or of administration shall issue and the estate be settled as in other cases: And provided further, if the person named in the will shall fail to execute the trust faithfully and to take care and promote the interest of all parties, then, upon petition of a creditor of such estate, or of any of the heirs, or of any person on behalf of any minor heir, it shall be the duty of the court to cite such person having the management of such estate to appear before such court, and if, upon hearing of such petition it shall appear that the trust in such will is not faithfully discharged, and that the parties interested, or any of them have been or are about to be damaged by such actual doings of the executor, then, in the discretion of the court, administration may be had and required as is now required in the administration of estates, and in all such cases the costs of the citation and hearing shall be charged against the party failing and neglecting to execute the trust as required in such will. [L. '17, p. 666, § 92.]

Cited in 102 Wash. 263; 106 Wash. 580; 107 Wash. 89.

Withdrawing Estate from Administration: See Remington's Digest, Ex. & Ad., § 3; Newport v. Newport, 5 Wash. 114, 31 Pac. 428; Miller v. Borst, 11 Wash. 260, 39 Pac. 662; State ex rel. Cox v. Superior Court, 21 Wash. 575, 59 Pac. 483; Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; MacDonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; State ex rel. Phinney v. Superior Court, 21 Wash. 186, 57 Pac. 337; Bayer v. Bayer, 83 Wash. 430, 145 Pac. 433.

Where trustees of the property of an estate, instead of executors, have been appointed by a will, the probate court has no jurisdiction of the questions involving the management of the estate, but the same are cognizable in equity: Seattle v. McDonald, 26 Wash. 98, 66 Pac. 145; Moore v. Kirkman, 19 Wash. 605, 54 Pac. 24; McDonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Smith v. Smith, 15 Wash. 239, 46 Pac. 249.

This section making provision for a final accounting by trustees under a non-

intervention will governs every case in which the trust was not fully executed prior to the time the act took effect, notwithstanding Rem. Code, section 1444, provided for no such accounting: Cornett's Estate, In re, 102 Wash. 254, 173 Pac. 44.

The will is not a "nonintervention" will unless the intention to dispense with administration be shown by express words or necessary implication: Shufeldt v. Hughes, 55 Wash. 246, 104 Pac. 253.

Creditors of estates under nonintervention wills must present claims, in view of this section, requiring such executors to give notice to creditors and to pay claims within one year thereafter, and Id., p. 673, § 107, requiring every executor to give notice to creditors to present claims within six months, and barring all claims not so presented: First Security & Loan Co. v. Englehart, 107 Wash. 86, 181 Pac. 13.

The nonintervention will law does not relate merely to the procedure, but vests the title in the executors, as trustees (irrespective of the terms used, and inde-

pendent of any participation of the court, except in the case of mismanagement), and hence the Law of 1897, chapter 98, section 2, requiring any such executor to file an inventory within thirty days and providing for the settlement of the estate by the court if it is insolvent, is unconstitutional as impairing vested rights: *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337.

This section has no application to the proceeds or avails of life insurance made payable to the deceased's estate, executors or administrators; in view of the later act, section 569, exempting the proceeds of life insurance policies from all liability for any debt: *German-Amer. State Bank v. Godman*, 83 Wash. 231, 145 Pac. 221.

The presentation of a claim to the court is not a condition precedent to an action against executors under a nonintervention will, in view of Rem. Code, § 1444, and this, notwithstanding the proviso to the section to the effect that all claims must be paid within one year after notice to creditors: *Schubach v. Redelsheimer*, 92 Wash. 124, 158 Pac. 739.

Insufficient Grounds for Removal of Trustees: *Hooper's Estate*, In re, 76 Wash. 72, 135 Pac. 813.

The superior court has jurisdiction to entertain an application by the executor for an order of distribution of the estate which was in effect a construction of the will and within its general jurisdiction, in view of a trustee's right to maintain an action for directions, and the power of the court to direct and control trusts: *Bayer v. Bayer*, 83 Wash. 430, 145 Pac. 433.

Power to Convey Real Estate Without Order of Court: See *Fulmer v. Gable*, 73 Wash. 684, 132 Pac. 641.

Under Rem. Code, § 1448, creditors must present their claims to the executor of a nonintervention will within one year after publication of notice to creditors, as in other cases, or they will be barred: *Foley v. McDonnell*, 48 Wash. 272, 93 Pac. 321.

When a complaint for partition against an executrix of a nonintervention will is insufficient as a claim for equitable relief, under this section: *Bishop v. Locke*, 92 Wash. 90, 158 Pac. 997.

§ 1463. Powers of Nonintervention Executors.

Executors acting under wills such as are mentioned in the last preceding section shall have power, after the filing of an inventory of the estate, if the said estate has been adjudged solvent, to mortgage, lease, sell and convey the real and personal property of the testator without an order of the court for that purpose and without notice, approval or confirmation, and in all other respects administer and settle the estate without the intervention of the court. [L. '17, p. 667, § 93.]

§ 1464. Right to Possession and Management.

Every executor or administrator shall, after having qualified, by giving bond as hereinbefore provided, have a right to the immediate possession of all the real as well as personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled or delivered over, by order of the court, to the heirs or devisees, and shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his control. [L. '17, p. 667, § 94.]

XIV.

THE INVENTORY AND EFFECTS OF DECEASED PERSONS.

§ 1465. Inventory of Estate—Appraisement.

Every executor or administrator shall make and return, upon oath, into the court, within one month after his appointment, a true inventory of all of the property of the estate which shall have come into his hands, and within thirty days after filing such inventory he shall make application to the court to appoint three disinterested persons to appraise the property so inventoried, and it shall be the duty of the court to appoint

such appraisers. Such appraisers shall receive as compensation for their services each the sum of three dollars (\$3) per day and mileage. If any part of the estate shall be in another county than that in which letters are issued, appraisers residing in such county may be appointed by the court having jurisdiction of the case, or, if most advisable, the same appraisers may act: Provided, that the court may appoint persons to appraise the estate at the time or any time after the appointment of the administrator: And provided further, that where it is shown by the filing of such inventory, or other proof, to the satisfaction of the court, that the whole estate consists of personal property of less value than two hundred and fifty dollars (\$250) exclusive of moneys, drafts, checks, bonds, or other securities of fixed value, an appraisalment may be dispensed with in the discretion of the court. [L. '19, p. 51, § 1. Cf. L. '17, p. 668, § 95.]

ASSETS, APPRAISAL AND INVENTORY: See Remington's Digest, Ex. & Ad., §§ 30—36. **Interests in Public Lands:** Burch v. McDaniel, 2 W. T. 58, 3 Pac. 586; Towner v. Rodegob, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936.

§ 31. Property Held in Fiduciary Capacity: Smith v. Smith, 15 Wash. 239, 46 Pac. 249; Belt's Estate, In re, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916; Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012; Sponogle v. Sponogle, 86 Wash. 649, 151 Pac. 43.

§ 33. — Additional or Supplemental

Inventory: Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

§ 35. — Operation and Effect: Horton v. Barto, 17 Wash. 675, 50 Pac. 587; Smith's Estate, In re, 18 Wash. 129, 51 Pac. 348; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107.

§ 36. — Failure to Make: Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; Martin's Estate, In re, 82 Wash. 226, 144 Pac. 42.

Right to appeal from order relating to inventory of deceased's estate. Ann. Cas. 1913C, 860.

§ 1466. Oath and Duties of Appraisers.

Before proceeding to the discharge of their duties the appraisers shall take and subscribe an oath, before any officer authorized to administer oaths, to be attached to the inventory, that they will honestly and impartially appraise the property which shall be exhibited to them, according to the best of their knowledge and ability; they shall proceed to estimate and appraise the property, and set down each article separately, with the value thereof in dollars and cents, in figures, opposite the respective articles: Provided, however, household articles need not be separately mentioned. The inventory shall contain all the estate of the deceased, real and personal, a statement of all credits, partnership and other interests, bonds, mortgages, notes, moneys, and other securities for the payment of money belonging to the deceased, specifying the name of the debtor in each security, the date, the sum originally payable, the indorsements thereon, if any, and their dates, and the sum which, in the judgment of the appraisers, may be collectible on each debt, interest or security. [L. '17, p. 668, § 96.]

§ 1467. Claims Against Personal Representatives.

The naming of any person as executor in a will, or the appointment of any person as administrator, shall not operate as a discharge from any just claim which the testator or intestate had against the executor or administrator, but the claim shall be included in the inventory and the executor and administrator shall be liable to the same extent as he would have been had he not been appointed executor or administrator. [L. '17, p. 669, § 97.]

§ 1468. Discharge of Testator's Debt a Specific Bequest.

The discharge or bequest in a will of any debt or demand of the testator against any executor named in his will or against any person shall not be valid against the creditors of the deceased, but shall be construed as a specific bequest of such debt or demand, and the amount thereof shall be included in the inventory, and shall, if necessary, be applied in payment of his debts; if not necessary for that purpose, it shall be paid in the same manner and proportions as other specific legacies. [L. '17, p. 669, § 98.]

§ 1469. Failure to Return Inventory—Revocation of Letters.

If any executor or administrator shall neglect or refuse to return the inventory within the period prescribed, or within such further time, not exceeding three months, as the court may allow, the court may revoke the letters testamentary or of administration; and the executor or administrator shall be liable on his bond to any party interested for the injury sustained by the estate through his neglect. [L. '17, p. 669, § 99.]

This section is directory instead of mandatory, and the authority of the court to remove in case of a failure of the executor to comply rests in its sound legal discretion: *Clancy v. McElroy*, 30 Wash. 567, 70 Pac. 1095.

§ 1470. Additional Inventory—Further Assets.

Whenever property not mentioned in any inventory shall come to the knowledge and possession of the executor or administrator, he shall cause the same to be appraised in the manner prescribed in this act, and an additional inventory to be returned, subscribed and sworn to as is provided in this act, as soon as practicable after the discovery thereof, and the making of such inventory may be enforced, after notice, by attachment to which may be added the revocation of the letters. [L. '17, p. 669, § 100.]

§ 1471. Liability for Embezzlement.

If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall stand chargeable, and be liable to the executor or administrator of the estate, in the value of the property so embezzled or alienated, together with any damage occasioned thereby, to be recovered for the benefit of the estate. [L. '17, p. 670, § 101.]

One innocently coming into the possession of property under claim of ownership by an alleged gift from the deceased is not liable for double damages under Rem.

Code, § 1460, superseded by this section: *Jackson v. Lamar*, 67 Wash. 385, 121 Pac. 857.

§ 1472. Concealed or Embezzled Property—Proceedings for Discovery.

The court shall have authority to bring before it any person or persons suspected of having in his possession or having concealed, embezzled, conveyed or disposed of any of the property of the estate, or who has in his possession or within his knowledge any conveyances, bonds, contracts, or other writings which contain evidence of or may tend to establish the right, title, interest or claim of the deceased in and to any property. If

such person be not in the county in which the letters were granted, he may be cited and examined either before the court of the county where found or before the court issuing the order of citation, and if he be found innocent of the charges he shall be entitled to recover costs of the estate, which costs shall be fees and mileage of witnesses, statutory attorney's fees, and such per diem and mileage for the person so charged as allowed to witnesses in civil proceedings. Such party may be brought before the court by means of citation such as the court may choose to issue, and if he refuse to answer such interrogatories as may be put to him touching such matters, the court may commit him to the county jail, there to remain until he shall be willing to make such answers. [L. '17, p. 670, § 102.]

The provision that all interrogatories shall be in writing and signed by the party examined does not require that interrogatories be prepared in toto before the hearing, but the court may re-

quire the matter to proceed summarily by questions reduced to writing and answered in writing in the presence of the court: *Main v. Hadfield*, 41 Wash. 504, 84 Pac. 12.

XV.

PROVISIONS FOR THE SUPPORT OF THE FAMILY.

§ 1473. Provisions in Lieu of Homestead and Exemptions.

If it shall be made to appear to the satisfaction of the court that no homestead has been claimed in the manner provided by law, either prior or subsequent to the death of the person whose estate is being administered, then the court, upon such notice as may be determined by the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, and upon petition for that purpose, shall award and set off to the surviving spouse, if any, property of the estate, either community or separate, not exceeding the value of three thousand dollars (\$3,000), exclusive of any mortgage or mechanic's, laborer's or materialmen's or vendor's liens upon the property so set off, which property so set off shall include the home and household goods, if any, and such award shall be made by an order or judgment of the court and shall vest the absolute title, and thereafter there shall be no further administration upon such portion of the estate so set off, but the remainder of the estate shall be settled as other estates. The order or judgment of the court making the award or awards provided for in this section shall be conclusive and final, except on appeal and except for fraud. The awards in this section provided shall be in lieu of all homestead provisions of the law and of exemptions. [L. '17, p. 670, § 103.]

Cited in 104 Wash. 516—518, 519; 108 Wash. 326—331; 109 Wash. 556, 559; 111 Wash. 319, 320.

Rights of Surviving Husband: See Remington's Digest, Home., § 21; *Wortman v. Vorhies*, 14 Wash. 152, 44 Pac. 129; *Feas' Estate*, In re, 30 Wash. 51, 70 Pac. 270; *Moyses v. Nyboe*, 90 Wash. 257, 155 Pac. 1036.

This section enlarging the homestead rights of each spouse upon the death of the other does not entitle a surviving

wife to a homestead in the undivided half of community property that had not been selected as a homestead in the husband's lifetime, and had become vested in his heirs by descent prior to the taking effect of the act of 1917; since it would impair vested rights: *Bloor's Estate*, In re, 109 Wash. 554, 187 Pac. 396.

Under this section the judgment cannot be attacked by motion to vacate it after time for appeal has expired, where the court had jurisdiction of the parties and

subject matter and there was no claim of fraud: *Hamilton's Estate*, In re, 108 Wash. 326, 184 Pac. 337.

Homestead Rights of Surviving Wife: See *Remington's Digest*, Home., § 22; *Eyres' Estate*, In re, 7 Wash. 291, 34 Pac. 831; *Anderson v. Stadlmann*, 17 Wash. 433, 49 Pac. 1070; *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155; *Murphy's Estate*, In re, 46 Wash. 574, 90 Pac. 916; *Fairfax v. Walters*, 66 Wash. 583, 120 Pac. 81; *Clark v. Baker*, 76 Wash. 110, 135 Pac. 1025.

See, also, *Bloor's Estate*, In re, 109 Wash. 554, 187 Pac. 396.

Rights of Children or Heirs: See *Remington's Digest*, Home., § 23; *Stewin v. Thrift*, 30 Wash. 36, 75 Pac. 116; *Hedemark's Estate*, In re, 77 Wash. 525, 137 Pac. 1031.

See, also, *Bloor's Estate*, In re, 109 Wash. 554, 187 Pac. 396.

Rem. Code, § 1464, did not place any limitation on the power of sale, and an order setting the estate apart vests full title: *Scott v. Stark*, 75 Wash. 610, 135 Pac. 643.

Rem. Code, § 1464, was not impliedly repealed by section 528 et seq., providing for the selection by the surviving spouse of a homestead of the value of \$1,000 out of the real property of the deceased; since the acts are not repugnant and repeals by implication are not favored: *Scott v. Stark*, 75 Wash. 610, 135 Pac. 643.

A contract between a husband and wife providing that upon the death of either, the survivor shall not receive any right or interest in the separate property of the other, is to be strictly construed, and

does not prevent a widow from taking advantage of this section, since, in the case of real property, the wife's interest could be conveyed only by deed: *Scott v. Stark*, 75 Wash. 610, 135 Pac. 643.

Although Rem. Code, § 1464, restricting a widow's allowance to \$1,000 was repealed by the probate code of 1917 without saving existing rights, this and the next section, making the allowance \$3,000 will be treated as a rewriting or amendment of existing laws, in view of section 1589, *infra*: *Lavenberg's Estate*, In re, 104 Wash. 515, 177 Pac. 328.

A nonresident widow is entitled to the allowance of \$3,000, under this and the next section; since the law is not strictly a homestead or exemption law, but is based on charity to prevent dependency and is to be liberally construed; the widow being in no sense a contending party as to creditors: *Lavenberg's Estate*, In re, 104 Wash. 515, 177 Pac. 328.

Effect of election to take under will on right of widow to fixed statutory allowance, or allowance for support. 4 **A. L. R.** 391.

Right of nonresident widow to statutory allowance for support. 21 **L. R. A.** 241.

Widow's right to allowance for support out of personal assets of estate of deceased husband who was a nonresident. 11 **L. R. A. (N. S.)** 361.

Effect of voluntary separation on right to widow's allowance. Ann. Cas. 1916C, 866.

Widow's right to year's support or allowance out of insurance money. 46 **L. R. A. (N. S.)** 788.

§ 1474. Homestead Awarded—Additional Provisions.

In event a homestead has been, or shall be selected in the manner provided by law, whether the selection of such homestead result in vesting the complete or partial title in the survivor, it shall be the duty of the court, upon petition of any person interested, and upon being satisfied that the value thereof does not exceed two thousand dollars (\$2,000), exclusive of mortgages, mechanic's, laborer's, materialmen's or vendor's liens thereon, to enter a decree, upon such notice as the court may determine, setting off and awarding such homestead to the survivor, thereby vesting the title thereto in fee simple in the survivor. In addition thereto, the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration have been paid or provided for, shall set off and award to such survivor, other property, either separate, or community, not to exceed one thousand dollars (\$1,000) in value, exclusive of all such liens. If the value of the homestead, exclusive of all such liens, be less than two thousand dollars (\$2,000), the court shall set off and award additional property, either separate or community, in lieu of such deficiency, so that the value of the homestead, ex-

clusive of all such liens, when added to the value of the other property awarded, exclusive of all such liens, shall equal three thousand dollars (\$3,000). Said decree shall particularly describe the said homestead and other property so awarded, and such homestead and other property so awarded shall not be subject to further administration, and such decree shall be conclusive and final, except on appeal, and except for fraud, and such awards shall be in lieu of all further homestead rights and of all exemptions: Provided, that the awards in this and the next preceding section provided for, shall not be taken from separate property of the deceased, which is otherwise disposed of by will, where there is no minor child living as the issue of the surviving spouse and the deceased. [L. '17, p. 671, § 104.]

Cited in 104 Wash. 516—518, 519.

Proceedings for Selection and Allotment: See Remington's Digest, Home., § 25; Lloyd's Estate, In re, 34 Wash. 84, 74 Pac. 1061; Stewart v. Fitzsimmons, 86 Wash. 55, 149 Pac. 659.

The former statute authorizing the setting aside of a homestead to a widow by the probate court, from the community real property did not require the appointment of appraisers to determine the value: Smith v. Ferry, 43 Wash. 460, 86 Pac. 658.

§ 1475. Provision for Minor Children.

If there be no surviving spouse, the court shall award and set aside to the minor child or children, if any, and in such proportions as he considers proper, property of the estate as the court may consider necessary for the care and support of said minor or minors until they become of legal age, not exceeding in value the sum of three thousand dollars (\$3,000). [L. '17, p. 672, § 105.]

§ 1476. Further Allowance for Maintenance.

In addition to the awards herein provided for, the court may make such further reasonable allowance of cash out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate, and any such allowance shall be paid by the executor or administrator in preference to all other charges, except funeral charges, expenses of last sickness and expenses of administration. [L. '17, p. 672, § 106.]

ALLOWANCES TO SURVIVING WIFE, HUSBAND OR CHILDREN: See Remington's Digest, Ex. & Ad., §§ 58—64. **Maintenance and Support:** Murphy's Estate, In re, 30 Wash. 9, 70 Pac. 109; Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116; Bell's Estate, In re, 70 Wash. 498, 127 Pac. 100.

§ 59. **Persons Entitled:** State ex rel. McLaughlin v. Lichtenberg, 4 Wash. 231, 29 Pac. 999; Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17; Gorkow's Estate, In re, 20 Wash. 563, 56 Pac. 335; Murphy's Estate, In re, 30 Wash. 9, 70 Pac. 109; State ex rel. Speckart v. Superior Court, 48 Wash. 141, 92 Pac. 942; Bowen's Estate, In re, 95 Wash. 82, 163 Pac. 379.

See, also, Lavenberg's Estate, In re, 104 Wash. 515, 177 Pac. 328.

§ 60. — **Nonresidents:** Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17.

See, also, Lavenberg's Estate, In re, 104 Wash. 515, 177 Pac. 328.

§ 61. — **Misconduct of Wife:** Drasdo's Estate, In re, 36 Wash. 478, 78 Pac. 1022.

§ 62. **Allowance by Court:** Murphy's Estate, In re, 20 Wash. 9, 70 Pac. 109; Stewin v. Thrift, 30 Wash. 36, 70 Pac. 116; Fairfax v. Walters, 66 Wash. 583, 120 Pac. 81; Guye's Estate, In re, 63 Wash. 167, 114 Pac. 1041; German-Amer. State Bank of Ritzville v. Godman, 83 Wash. 231, 145 Pac. 221.

See, also, Hamilton's Estate, In re, 108 Wash. 326, 184 Pac. 337; Fick's Estate, In re, 111 Wash. 318, 190 Pac. 1008.

§ 63. Increase or Further Allowance: Griesemer v. Boyer, 13 Wash. 171, 43 Pac. 17.

§ 64. Improper or Excessive Allowance: Drasdo's Estate, In re, 36 Wash. 478, 78 Pac. 1022.

XVI.

CLAIMS AGAINST ESTATE.

§ 1477. Notice to Creditors—Limitation.

Every executor or administrator shall, immediately after his appointment, cause to be published in some newspaper printed in the county, if there be one, if not, then in such newspaper as may be designated by the court, a notice that he has been appointed and has qualified as such executor or administrator, and therewith a notice to the creditors of the deceased, requiring all persons having claims against the deceased to serve the same on the executor or administrator or his attorney of record, and file with the clerk of the court, together with proof of such service, within six months after the date of the first publication of such notice. Such notice shall be published not less than once in each week for three successive weeks, or for such further time as the court may direct. If a claim be not filed within the time aforesaid, it shall be barred. Proof by affidavit of the publisher of the publication of such notice shall be filed with the court: Provided, however, in cases where all the property is awarded to the widow, husband or children as in this act provided, the notice to creditors herein provided for may be omitted. [L. '17, p. 672, § 107.]

Cited in 107 Wash. 90; 110 Wash. 639; 112 Wash. 648; 113 Wash. 494.

ALLOWANCE AND PAYMENT OF CLAIMS—LIABILITIES OF ESTATE: See Remington's Digest, Ex. & Ad., §§ 65—68, 71.

§ 65. Personal Contracts: Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027; Stone v. Bayley, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N. S.) 429.

§ 66. Joint Contracts: Megrath v. Gilmore, 15 Wash. 556, 46 Pac. 1032.

§ 67. Services Rendered to Decedent: Ah How v. Furth, 13 Wash. 550, 43 Pac. 639; Pelton v. Smith, 50 Wash. 459, 97 Pac. 460; Olsen v. Hagan, 102 Wash. 321, 172 Pac. 1173.

See, also, Masterson's Estate, In re, 108 Wash. 307, 183 Pac. 93.

§ 68. Taxes: Hanford v. Davies, 1 Wash. 476, 25 Pac. 329.

COSTS.—Under this act providing an orderly method for the presentation and payment of claims against estates, the same must be followed and claim presented for a judgment for costs, rendered against an administratrix in her action brought against the claimant: Richardson's Estate, In re, 97 Wash. 488, 166 Pac. 776.

Notice to Creditors: See Remington's Digest, Ex. & Ad., § 80; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254;

Moore v. Kirkman, 19 Wash. 605, 54 Pac. 24; Macdonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841; Strand v. Stewart, 51 Wash. 685, 99 Pac. 1027; Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 Pac. 372.

The statutes of limitation are not extended, in case of the death of a debtor, by provisions requiring notice to creditors and the presentment of claims within one year thereafter, as the latter sections give that right only to claims not already barred by the general statute of limitations: Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482.

Presentation: See Remington's Digest, Ex. & Ad., §§ 81-1—84; Meikle v. Cloquet, 44 Wash. 513, 87 Pac. 841; State ex rel. Mann v. Superior Court, 52 Wash. 149, 100 Pac. 198; Gray v. Hickey, 94 Wash. 370, 162 Pac. 564; King's Estate, In re, 102 Wash. 299, 172 Pac. 1167.

See, also, Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784; Baumgartner v. Moffatt, 113 Wash. 493, 194 Pac. 392.

§ 82. Effect of Presentation: Frew v. Clark, 34 Wash. 561, 76 Pac. 85; MacKenzie v. Steeves, 98 Wash. 17, 167 Pac. 50.

§ 83. Failure to Present—Effect in General: Seamon v. Ward, 1 Wash. 179, 23 Pac. 439; Reed v. Miller, 1 Wash. 426, 25 Pac. 334; Donnerberg v. Oppenheimer,

15 Wash. 290, 46 Pac. 254; Megrath v. Gilmore, 15 Wash. 558, 46 Pac. 1032; Foley v. McDonnell, 48 Wash. 272, 93 Pac. 321.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

§ 84. — **Excuses:** Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482.

Time for Presentation: See Remington's Digest, Ex. & Ad., § 78; Scammon v. Ward, 1 Wash. 179, 23 Pac. 439; Barto v. Stewart, 21 Wash. 605, 59 Pac. 480; Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765; Strand v. Stewart, 51 Wash. 685, 99 Pac. 1027; Harvey v. Pocock, 92 Wash. 625, 159 Pac. 771; Olser v. Hagan, 102 Wash. 321, 172 Pac. 1173.

The statute of nonclaim is mandatory and requires that claims against estates be presented within six months: First Security & Loan Co. v. Englehart, 107 Wash. 86, 181 Pac. 13.

Under this section claims presented and allowed within six months, not filed with the clerk of the court until three months after the statutory six months period had expired, are barred and it is error to order their payment: Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

Where claims against an estate were allowed within the six months period for presenting claims, it will be presumed that they were filed before they were allowed, although there was no record of the time: Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

Exceptions to and interruptions of statutes of nonclaim. 3 **Ann. Cas.** 576.

Institution of suit as sufficient presentation of claim against decedent's estate to remove bar of statute of nonclaim. 14 **Ann. Cas.** 931.

Waiver or tolling of statute of nonclaims by personal representative. **L. R. A.** 1915B, 1042; **Ann. Cas.** 1912A, 6.

Contingency of claim against decedent's estate as affecting time of presentation. 58 **L. R. A.** 82.

Effect of conduct of personal representative preventing filing of claim against estate within time allowed by the statute of nonclaims. 11 **A. L. R.** 246.

Filing claim as an unsecured one as a waiver of mortgage or other lien. 2 **A. L. R.** 1132.

§ 1478. Affidavit of Claimant.

Every claim served and filed as above provided shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the claimant. [L. '17, p. 673, § 108.]

Cited in 107 Wash. 92.

Statement and Verification of Claim: See Remington's Digest, Ex. & Ad., § 81; Donnerberg v. Oppenheimer, 15 Wash. 290, 46 Pac. 254; McFarland v. Fairlamb, 18 Wash. 601, 52 Pac. 239; First Nat. Bank of Olympia v. Root, 19 Wash. 111, 52 Pac. 521; Ash v. Clarke, 32 Wash. 390, 73 Pac. 351; Brownfield v. Holland, 63 Wash. 86, 114 Pac. 890; Harvey v.

Pocock, 92 Wash. 625, 159 Pac. 771; Harvey v. Pocock, 100 Wash. 263, 170 Pac. 545; Empson v. Fortune, 102 Wash. 16, 172 Pac. 873.

Under this section requiring every claim filed to be supported by affidavit, an unsupported claim is ineffectual: First Security & Loan Co. v. Englehart, 107 Wash. 86, 181 Pac. 13.

§ 1479. Allowance and Rejection of Claims—Failure to Act.

When a claim, accompanied by the affidavit required in the preceding section has been served and filed, it shall be the duty of the executor or administrator to indorse thereon his allowance or rejection, with the day and date thereof. If he allow the claim, it shall be presented to the judge of the court, who shall in the same manner indorse on it his allowance or rejection. If the executor or administrator reject the claim in whole or in part, he shall notify the claimant forthwith of said rejection and file in the office of the clerk an affidavit showing such notification and the date thereof. Such notification shall be by personal service or registered mail.

If the executor or administrator shall neglect for the period of sixty days after service upon him or his attorney to act upon any such claim,

the claimant may take the matter up before the court and the court may require the executor or administrator to act on such claim and in its discretion may impose costs and attorney's fees. [L. '17, p. 673, § 109.]

Cited in 112 Wash. 104; 113 Wash. 494.

Effect of Allowance or Disallowance: See Remington's Digest, Ex. & Ad., § 86; Reese v. Murnane, 5 Wash. 373, 31 Pac. 1027; Nash v. Wakefield, 30 Wash. 851,

71 Pac. 35; Lauridsen v. Lewis, 50 Wash. 605, 97 Pac. 663; Gray v. Hickey, 94 Wash. 370, 162 Pac. 564; Parkes' Estate, In re, 101 Wash. 659, 172 Pac. 908.

See, also, Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

§ 1480. Effect of Allowance of Claim.

Every claim which has been allowed by the executor or the administrator and the said judge, shall be ranked among the acknowledged debts of the estate to be paid in the course of administration. [L. '17, p. 674, § 110.]

Judgment and Enforcement: See Remington's Digest, Ex. & Ad., §§ 154, 155; Hill v. Lowman, 15 Wash. 503, 46 Pac. 1042; Spokane v. Costello, 57 Wash. 183, 106 Pac. 764; Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

A finding that two claims had been filed, allowed and paid cannot be sustained where the record fails to show

either of them, and they had never been filed: Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

An order approving an administrator's final account showing the payment of certain allowed claims, is sufficient as an allowance of the claims by the court: Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

§ 1481. Judge as Creditor of Estate.

Any judge of a court may present a claim against the estate of any decedent for allowance; and if the executor or administrator allows such claim, he shall, in writing, designate some other judge of the superior court, who shall have the same power to allow or reject it as he would have, had letters issued in his court; and the claimant shall have, in the event of his claim being rejected, all the rights incident to any other creditor against the estate. [L. '17, p. 674, § 111.]

§ 1482. Suit on Rejected Claims.

When a claim is rejected by either the executor, administrator, or the court, the holder must bring suit in the proper court against the executor or administrator within thirty days after notification of the rejection, otherwise the claim shall be forever barred. [L. '17, p. 674, § 112.]

Review or Suit: See Remington's Digest, Ex. & Ad., § 85; Wilkins v. Wilkins, 1 Wash. 87, 23 Pac. 411; Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593; Thompson v. Jackson, 85 Wash. 330, 148 Pac. 5.

Time to Sue and Limitations: See Remington's Digest, Ex. & Ad., § 149; Bartels v. Gove, 4 Wash. 632, 30 Pac. 675; Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502; Gleason v. Hawkins, 32 Wash. 464, 73 Pac. 533; Bank of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482; Farmers & Merchants' Bank v. Lilly, 66 Wash. 309, 119 Pac. 749.

See, also, Burnham v. Rowley, 111 Wash. 656, 191 Pac. 811.

The act requiring suits on claims against estates of decedents within three months after rejection of the claims does not apply by analogy to claims against the estate of an incompetent person, and the same are not barred three months after rejection: Clough v. Monro, 86 Wash. 507, 150 Pac. 1190.

DISPUTED CLAIMS: See Remington's Digest, Ex. & Ad., §§ 87—91.

§ 87. Persons Who may Contest Claims: Wallace v. Grant, 27 Wash. 130, 67 Pac. 578; Seattle Nat. Bank v. Dickinson, 72 Wash. 403, 130 Pac. 372.

§ 88. Trial by Probate Court—Jurisdiction: Winston v. Crowe, 28 Wash. 65, 68 Pac. 174.

In the settlement of an estate in probate, the court has no jurisdiction to determine the title to property between outside parties in no way affecting the interests of the estate: *Decker's Estate*, In re, 105 Wash. 221, 177 Pac. 718.

§ 89. — **Proceedings:** *Sullivan's Estate*, In re, 36 Wash. 217, 78 Pac. 945; *Blattner's Estate*, In re, 92 Wash. 48, 158 Pac. 1015; *Zuhn v. Horst*, 100 Wash. 359, 170 Pac. 1033; *Parkes' Estate*, In re, 101 Wash. 659, 172 Pac. 908.

§ 1483. Outlawed Claims.

No claim shall be allowed by the executor, administrator, or court which is barred by the statute of limitations. [L. '17, p. 674, § 113.]

Cited in 113 Wash. 494.

§ 1484. Necessity of Presentation.

No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented as herein provided. [L. '17, p. 674, § 114.]

Cited in 105 Wash. 589, 590.

PRESENTATION AND ALLOWANCE—Necessity for Presentation in General: See *Remington's Digest*, Ex. & Ad., § 72; *McFarland v. Fairlamb*, 18 Wash. 601, 52 Pac. 239; *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24; *Macdonald's Estate*, In re, 29 Wash. 422, 69 Pac. 1111; (overruling *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697); *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395; *Seattle Nat. Bank v. Dickinson*, 72 Wash. 403, 103 Pac. 372; *Plath v. Mullins*, 87 Wash. 403, 151 Pac. 811; *Hart v. Bogle*, 88 Wash. 125, 152 Pac. 1010; *Harvey v. Pocock*, 92 Wash. 625, 159 Pac. 771; *Empson v. Fortune*, 102 Wash. 16, 172 Pac. 873.

See, also, *Parkes' Estate*, In re, 105 Wash. 586, 178 Pac. 830.

— **Necessity—Pending suit:** *Wynne v. Harvey*, 109 Wash. 1, 186 Pac. 310.

— **Under nonintervention wills:** *First Security & Loan Co. v. Englehart*, 107 Wash. 86, 181 Pac. 13.

— **Rights of action against—Personal or representative capacity:** *Fisher v. McNeely*, 110 Wash. 283, 188 Pac. 478.

— **Necessity—Settlement of estate between heirs and creditors:** *Lambrecht's Estate*, In re, 112 Wash. 645, 192 Pac. 1018.

— **Necessity for presentation—Filing:** *Baumgartner v. Moffat*, 113 Wash. 493, 194 Pac. 392.

Claims Which must be Presented: See *Remington's Digest*, Ex. & Ad., §§ 74—77. **In General:** *Barlow v. Coggan*, 1 W. T. 257; *Casey v. Ault*, 4 Wash. 167, 29 Pac.

§ 90. **Evidence:** *Zonig v. Boehme*, 60 Wash. 500, 111 Pac. 566; *Zuhn v. Horst*, 100 Wash. 359, 170 Pac. 1033.

§ 91. **Review:** *Strong v. Eldridge*, 8 Wash. 595, 36 Pac. 696; *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697; *Nash v. Wakefield*, 30 Wash. 556, 71 Pac. 33; *Sullivan's Estate*, In re, 36 Wash. 217, 78 Pac. 945.

Right to appeal from order refusing or allowing claim against decedent's estate. *Ann. Cas.* 1913C, 860.

1048; *Crowe & Co. v. Adkinson Construction Co.*, 67 Wash. 420, 121 Pac. 841, *Ann. Cas.* 1913D, 273; *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395; *Butterworth v. Bredemeyer*, 89 Wash. 677, 155 Pac. 152; *Gray v. Hickey*, 94 Wash. 370, 162 Pac. 564.

§ 75. — **Contingent, Equitable or Unliquidated Claims:** *Ong v. Whippel*, 3 W. T. 233, 3 Pac. 898; *Neis v. Farquharson*, 9 Wash. 508, 37 Pac. 697 (overruled); *Barto v. Stewart*, 21 Wash. 605, 59 Pac. 480; *Griffin v. Warburton*, 23 Wash. 231, 62 Pac. 765.

§ 76. — **Claims not Maturing in Time for Filing:** *Macdonald's Estate*, In re, 29 Wash. 422, 69 Pac. 1111.

§ 77. — **Claims Secured by Mortgage:** *Scammon v. Ward*, 1 Wash. 179, 23 Pac. 439; *Reed v. Miller*, 1 Wash. 426, 25 Pac. 334; *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533; *Macdonald v. O'Shea*, 58 Wash. 169, 108 Pac. 436, *Ann. Cas.* 1912A, 417; *Spark's Estate*, In re, 101 Wash. 462, 172 Pac. 545.

Provision in will for payment of debt as dispensing with necessity of presenting or proving claim. 15 *Ann. Cas.* 624.

Presentation of claim as condition precedent to action to foreclose mechanic's lien against decedent's estate. *Ann. Cas.* 1913D, 275.

Presentation of claim for mortgage debt against decedent's estate as condition precedent to enforcement of mortgage. *Ann. Cas.* 1917B, 156, 164.

§ 1485. Limitation Tolled by Vacancy.

The time during which there shall be a vacancy in the administration shall not be included in any limitations herein prescribed. [L. '17, p. 674, § 115.]

§ 1486. Actions Pending at Death—Substitution.

If any action be pending against the testator or intestate at the time of his death, the plaintiff shall within ninety days after first publication of notice to creditors, serve on the executor or administrator a motion to have such executor or administrator, as such, substituted as defendant in such action, and, upon the hearing of such motion, such executor or administrator shall be so substituted, unless, at or prior to such hearing, the claim of plaintiff, together with costs, be allowed by the executor or administrator and the court. After the substitution of such executor or administrator, the court shall proceed to hear and determine the action as in other civil cases. [L. '17, p. 674, § 116.]

Cited in 102 Wash. 159, 160.

This section applies to actions pending in the superior court, and does not repeal section 1743, *infra*, relating to substitutions in the supreme court upon the death of party after final judgment in the superior court: *Mohney v. Davis*, 102 Wash. 158, 171 Pac. 919.

Suit Already Pending: See *Remington's Digest*, Ex. & Ad., § 73; *Reed v. Miller*, 1 Wash. 426, 25 Pac. 334; *Strong v. Eldridge*, 8 Wash. 895, 36 Pac. 696; *Mcgrath v. Gilmore*, 15 Wash. 558, 46 Pac. 1032; *First Nat. Bank v. Cunningham*, 72 Wash. 532, 130 Pac. 1148.

§ 1487. Partial Allowance of Claim.

Whenever any claim shall have been filed and presented to an executor or administrator and the court, and a part thereof shall be allowed, the amount of such allowance shall be stated in the indorsement. If the creditor shall refuse to accept the amount so allowed in satisfaction of his claim, he shall recover no costs in any action he may bring against the executor or administrator, unless he shall recover a greater amount than that offered to be allowed, exclusive of interest and costs. [L. '17, p. 675, § 117.]

§ 1488. Judgment Against Executor—Effect.

The effect of any judgment rendered against any executor or administrator shall be only to establish the amount of the judgment as an allowed claim. [L. '17, p. 675, § 118.]

Under this section, creditors whose claims have been allowed and established, have no such right to, or lien upon, chattels mortgaged by the deceased as to be entitled to question the validity of the mortgage as between the parties thereto: *Spokane Merchants' Assn. v. First National Bank of Colville*, 86 Wash. 367, 150 Pac. 434, L. R. A. 1918A, 323.

Where executors are liable in their representative capacity, the judgment must provide for payment in due course of administration, and not by execution: *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012.

This section applies only to judgments rendered against the deceased in his life time, and not to a judgment of affirmance against the administratrix after she was substituted as appellant: *Wynne v. Harvey*, 109 Wash. 1, 186 Pac. 310.

Where, pending appeal, the judgment debtor died and the administratrix was substituted, judgment of affirmance was against the administratrix in her representative capacity, and the claim need not be presented within one year, in view of this section: *Wynne v. Harvey*, 109 Wash. 1, 186 Pac. 310.

§ 1489. Judgment Against Decedent—Presentation—Lien.

When any judgment has been rendered against the testator or intestate in his lifetime, no execution shall issue thereon after his death, but it shall be presented to the executor or administrator, as any other claim, but need not be supported by the affidavit of the claimant, and if justly due and unsatisfied, shall be paid in due course of administration: Provided, however, that if it be a lien on any property of the deceased, the same may be sold for the satisfaction thereof, and the officer making the sale shall account to the executor or administrator for any surplus in his hands. [L. '17, p. 675, § 119.]

Cited in 109 Wash. 7, 9.

§ 1490. Claims of Personal Representatives.

If the executor or administrator is himself a creditor of the testator or intestate, his claim, duly authenticated by affidavit, shall be filed and presented for allowance or rejection to the judge of the court, and its allowance by the judge shall be sufficient evidence of its correctness. This section shall apply to nonintervention and all other wills. [L. '17, p. 675, § 120.]

Cited in 105 Wash. 588.

Claims of Executors or Administrators:
Kuhn's Appeal, 4 Wash. 534, 30 Pac. 643.

No contest can be waived by an executor on presentation of his claim against the estate until a rejection of the claim by the judge, and then only by suit on the rejected claim, for the bringing of which the executor must resign: Parkes' Estate, In re, 105 Wash. 586, 178 Pac. 830.

Estate, In re, 105 Wash. 586, 178 Pac. 830.

A petition filed by the executor of an estate, seeking to establish a claim in his favor against the estate, if treated as a complaint, is demurrable where it contains no allegation that a verified claim therefor was filed and presented to the judge as required by this section, which is mandatory: Parkes' Estate, In re, 105 Wash. 586, 178 Pac. 830.

§ 1491. Resignation or Removal—Notice.

In case of resignation or removal for any cause of any executor or administrator, and the appointment of another or others, after notice has been given by publication as required by law, by such executor or administrator first appointed, to persons to file their claims against the estate, it shall be the duty of the judge of the court to cause notice of such resignation or removal and such new appointment to be published two successive weeks in the same newspaper in which the original notice was published, if the publication of such paper is at the time continued, and if not, then in some other newspaper published in the county, or if there be no newspaper published in such county, then in a newspaper published in the state and of general circulation in the county, but the time between the resignation or removal and such publication shall be deducted from the time within which claims shall be filed unless such time shall have expired before such resignation or removal. [L. '17, p. 675, § 121.]

XVII.**SALES AND MORTGAGES BY EXECUTORS AND ADMINISTRATORS.****§ 1492. Authority for Sale or Mortgage.**

The court may order real or personal property sold or mortgaged for the purposes hereinafter mentioned but no sale or mortgage of any prop-

erty of an estate shall be made except under an order of the court, unless otherwise provided by law. [L. '17, p. 676, § 122.]

§ 1493. Personal Property Sale—Mortgage or Pledge of.

The court may at any time order any personal property of the estate sold for the preservation of such property or for the payment of the debts of the estate or the expenses of administration or for the purpose of discharging any obligation of the estate or for any other reason which may to the court seem right and proper, and such order may be made either upon or without petition therefor, and such sales may be either at public auction or private sale and with or without notice of such sale, as the court may determine, and upon such terms and conditions as the court may decide upon. No notice of petition for sale of any personal property need be given, except as provided in section 1434 hereof, unless the court expressly orders such notice.

Where personal property is sold prior to appraisement, the sale price shall be deemed the value for appraisal. Personal property may be mortgaged or pledged for the same reasons and purposes, and in the same manner as is hereinafter provided for real property. [L. '17, p. 676, § 123.]

SALE OF PERSONAL PROPERTY:
See Remington's Digest, Ex. & Ad., §§ 56, 57; Brewster v. Baxter, 2 W. T. 135, 3 Pac. 844.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

A widow interested in an estate, whose offer for a tractor sold by the executors was ten dollars less than the bid of the purchaser to whom sale was made, cannot object to the sale, either as a prospective purchaser or on account of her interest in the estate, where the sale was fairly con-

ducted and as open to her as to the purchaser and brought more than the appraised value: Finn's Estate, In re, 105 Wash. 532, 178 Pac. 449.

Under Rem. Code, § 1497, superseded by this section, it is discretionary to authorize a temporary continuance of the decedent's business: Ennis' Estate, In re, 96 Wash. 352, 165 Pac. 119.

Validity as against estate of pledge of personalty by executor or administrator. **Ann. Cas.** 1912C, 979.

§ 1494. Real Property—Sale or Mortgage—Petition—Notice—Hearing.

Whenever it shall appear to the satisfaction of the court that any portion or all of the real property should be sold or mortgaged for the purpose of raising money to pay the debts and obligations of the estate, the expenses of administration, inheritance tax or for the support of the family, the court may order the sale or mortgage of such portion of the real property as appears to the court necessary for the purpose aforesaid. It shall be the duty of the executor or administrator to present a petition to the court giving a description of all the property of the estate and its character, the amount of the debts, expenses and obligations of the estate and such other things as will tend to assist the court in determining the necessity for the sale or mortgage and the amount thereof. Unless the court shall by order expressly so provide, no notice of the hearing of such petition for sale or mortgage need be given, except as provided in section 1434 hereof; if, however, the court should order notice of such hearing, it shall determine upon the kind, character and time thereof. At the hearing of such petition the court may have brought before it such testimony or information as it may see fit to receive, for the purpose of determining whether it should order any of the property of the estate sold or mortgaged. The absence of any allegation in the petition shall

not deprive the court of jurisdiction to order said sale or mortgage, and the court may, if it see fit, order such sale or mortgage or both without any petition having been previously presented. [L. '17, p. 677, § 124.]

SALES AND CONVEYANCES UNDER ORDER OF COURT—WHEN AUTHORIZED: See Remington's Digest, Ex. & Ad., §§ 106, 107, 111—114. **Nature of Remedy:** Dooley v. Russell, 10 Wash. 195, 38 Pac. 1000.

§ 107. **For Purposes of Administration in General:** Hanford v. Davis, 1 Wash. 476, 25 Pac. 329; Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

§§ 111, 112. **Effect of Testamentary Provisions:** English-McCaffery Logging Co. v. Clowe, 29 Wash. 721, 70 Pac. 138; McKenna v. Cosgrove, 41 Wash. 332, 83 Pac. 240.

§ 113. — **Interests in Public Lands:** Burch v. McDaniel, 2 W. T. 58, 3 Pac. 586.

§ 114. — **Lands Subject to Interest of Surviving Spouse:** Lloyd's Estate, In re, 34 Wash. 84, 74 Pac. 1061.

APPLICATION AND ORDER: See Remington's Digest, Ex. & Ad., §§ 115—121.

§ 115. **Jurisdiction:** Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; Furth v. United States Mtg. Co., 13 Wash. 73, 42 Pac. 523.

§ 116. **Time for Application:** Scammon v. Ward, 1 Wash. 179, 23 Pac. 439.

§ 117. **Petition or Other Application:** Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

See, also, Gordon v. Hillman, 109 Wash. 223, 186 Pac. 651.

The court cannot order an administrator to execute a deed of community property in compliance with a judgment without any administrator's petition or notice to minor heirs, and the deed executed by him individually and as administrator is ineffectual to pass title to one-half of the property: Gordon v. Hillman, 109 Wash. 223, 186 Pac. 651.

§ 118. — **Insufficiency of Personality:** Prefontaine v. McMicken, 16 Wash. 16, 47 Pac. 231; McKenna v. Cosgrove, 41 Wash. 332, 83 Pac. 240; Magee v. Big Bend Land Co., 51 Wash. 406, 99 Pac. 16.

§ 119. — **Averments as to Realty:** Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602.

§ 121. **Determination as to Sufficiency of Personality:** Wallace v. Grant, 27 Wash. 130, 67 Pac. 578.

§ 1495. Order Directing Mortgage—Irregularities—Effect.

If the court should determine that it is necessary or proper, for any of the said purposes, to mortgage any or all of said property, it may make an order directing the executor or administrator to mortgage such thereof as it may determine upon, and such order shall contain the terms and conditions of such transaction and authorize the executor or administrator to execute and deliver his note or notes and secure the same by mortgage, and thereafter it shall be the duty of such executor or administrator to comply with such order. The executor or administrator shall not deliver any such note, mortgage or other evidence of indebtedness until he has first presented same to the court and obtained its approval of the form. Every mortgage so made and approved shall be effectual to mortgage and encumber all the right, title and interest of the said estate in the property described therein at the time of the death of the said decedent, or acquired by his estate, and no irregularity in the proceedings shall impair or invalidate any mortgage given under such order of the court and approved by it. [L. '17, p. 677, § 125.]

§ 1496. Order Directing Sale.

If the court should determine that it is necessary to sell any or all of the real estate for the purposes mentioned in this act, then it may make and cause to be entered an order directing the executor or administrator to sell so much of the real estate as the court may determine necessary for the purposes aforesaid. Such order shall give a particular

description of the property to be sold and the terms of such sale and shall provide whether such property shall be sold at public or private sale. The court shall order sold that part of the real estate which is generally devised, rather than any part which may have been specifically devised, but the court may, if it appears necessary, sell any or all of the real estate so devised. After the giving of such order it shall be the duty of the administrator or executor to sell such real estate in accordance with the order of the court and as in this act provided with reference to the public or private sales of real estate. [L. '17, p. 678, § 126.]

Order for Sale: See Remington's Digest, Ex. & Ad., §§ 122—126; Davis v. Ford, 15 Wash. 197, 45 Pac. 739, 46 Pac. 393; Bryant's Estate, In re, 38 Wash. 337, 80 Pac. 555; Ferguson's Estate, In re, 102 Wash. 148, 172 Pac. 813.

§ 124. — **Requisites in General:** Furth v. United States Mtg. & T. Co., 13 Wash. 73, 42 Pac. 523.

§ 125. **Restraining Sale:** Demaris v. Barker, 33 Wash. 200, 74 Pac. 362.

§ 126. **Review:** Barker's Estate, In re, 33 Wash. 79, 73 Pac. 796.

Immunity from collateral attack of order of probate court for sale of decedent's real estate. 3 Ann. Cas. 234.

§ 1497. Sales at Public Auction—Notice.

When real property is directed to be sold at public auction, notice of the time and place of such sale shall be posted in not less than three public places in the county where the property or some part thereof is situated, at least twenty days before the day of sale, and such notice shall be published in some newspaper published in said county, if there be one, and if none, then in such newspaper or newspapers as the court may by order direct, once a week for three successive weeks before such sale, in which notices the property ordered sold shall be described with proper certainty. At the time and place named in such notices for the said sale, the executor or administrator shall proceed to sell the property upon the terms and conditions ordered by the court, and to the highest and best bidder. All sales of real estate at public auction shall be made at the front door of the courthouse of the county in which the lands are, unless the court shall by order otherwise direct. [L. '17, p. 678, § 127.]

Citation or Notice: See Remington's Digest, Ex. & Ad., § 120; Ryan v. Ferguson, 3 Wash. 356, 28 Pac. 910; Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; Furth v. United States Mortg.

& T. Co., 13 Wash. 73, 42 Pac. 523; Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099. See, also, Gordon v. Hellman, 109 Wash. 223, 186 Pac. 651.

§ 1498. Postponement of Sale—Notice.

The executor or administrator, should he deem it for the best interests of all concerned, may postpone such sale to a time fixed but not to exceed twenty days, and such postponement shall be made by proclamation of the executor or administrator at the time and place first appointed for the sale; if there be an adjournment of such sale for more than three days, then it shall be the duty of the executor or administrator to cause written notice of such adjournment to be posted at the place of posting the original notices of sale in addition to making such proclamation. [L. '17, p. 679, § 128.]

§ 1499. Private Sale of Realty—Notice—Bids.

When a sale of real property is ordered to be made at private sale, notice of the same must be posted in three public places in the county

in which the property or part thereof is situated, and published in a newspaper, if there be one printed in the same county; if none, then in such newspaper as the court may direct; such notice to be posted at least two weeks and be published once a week for at least two successive weeks before the day on or after which the sale is to be made, in which the lands and tenements to be sold must be described with common certainty. The notice must state the day on or after which the sale will be made and the place where offers or bids will be received. The day last referred to must be at least fifteen days from the first publication of notice and the sale must not be made before that day, but must be made within six months thereafter. The bids or offers must be in writing, and may be left at the place designated in the notice or delivered to the executor or administrator personally, or may be filed in the office of the clerk of the court to which the return of sale must be made, at any time after the first publication of the notice and before the making of the sale. If it be shown that it will be for the best interest of the estate the court or judge may, by an order, shorten the time of notice, which shall not, however, be less than one week, and may provide that the sale may be made on or after a day less than fifteen, but not less than eight days from the first publication of the notice of sale, and the sale may be made to correspond with such order. [L. '17, p. 679, § 129.]

§ 1500. Sale must Bring Ninety Per Cent of Appraised Value—Reappraisements.

No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent of the appraised value thereof, nor unless such real estate shall have been appraised within one year immediately prior to such sale. If it has not been so appraised, or if the court is satisfied that the appraisal is too high or too low, appraisers may be appointed, and they must make an appraisal thereof in the same manner as in the case of the original appraisal of the estate, and which appraisal may be made at any time before the sale or the confirmation thereof. [L. '17, p. 680, § 130.]

§ 1501. Return of Sale—Approval—Order for Resale.

The executor or administrator making any sale of real estate, either at public or private sale, shall within ten days after making such sale file with the clerk of the court his return of such sale, the same being duly verified. At any time after the expiration of ten days from the filing of such return the court may without notice approve and confirm such sale and direct proper instruments of transfer to be executed and delivered. But if the court shall be of the opinion that the proceedings were unfair, or that the sum obtained was disproportionate to the value of the property sold, or if made at private sale that it did not sell for at least ninety per cent of the appraised value as in the preceding section provided, and that a sum exceeding said bid by at least ten per cent exclusive of the expense of a new sale, may be obtained, the court may refuse to approve or confirm such sale and may order a resale. On a resale, notice shall be given and the sale shall be conducted in all respects as though no previous sale had been made. [L. '17, p. 680, § 131.]

§ 1502. Offer of Increased Bid—Duty of Court.

If, at any time before confirmation of any such sale, any person shall present to the court or file with the clerk of the court a bid on such property for an amount equal to ten per cent higher than the bid upon which sale was made by the executor or administrator, and shall deposit with the court or the clerk not less than twenty per cent of such bid, the same to be forfeited to the estate unless such bidder shall comply with his bid, then it shall be the duty of the court to cause the former successful bidder to be informed of such increased bid and to give such former successful bidder an opportunity to raise his bid higher than the bid of said subsequent bidder, and if such former successful bidder fails within the time fixed by the court to raise his bid as aforesaid, the property may be sold to such subsequent bidder, or if such first successful bidder should raise his bid as herein provided then the property may be sold to him. [L. '17, p. 681, § 132.]

§ 1503. Order for Conveyance.

Upon the confirmation of any such sale the court shall direct the executor or administrator to make, execute and deliver instruments conveying the title to the person to whom such property may be sold, and such instruments of conveyance shall be deemed to convey all the estate, rights and interests of the testator or intestate at the death of the deceased, and any interest acquired by the estate. [L. '17, p. 681, § 133.]

§ 1504. Confirmation Conclusive as to Regularity.

No petition or allegation thereof for the sale of real estate shall be considered jurisdictional, and confirmation by the court of any sale shall be absolutely conclusive as to the regularity of all proceedings leading up to and including such sale, and no instrument of conveyance of real estate made after confirmation of sale by the court shall be open to attack upon any grounds whatsoever except for fraud, and the confirmation by the court of any such sale shall be conclusive proof that all statutory provisions and all orders of the court with reference to such sale have been complied with. [L. '17, p. 681, § 134.]

SALE AND CONFIRMATION: See Remington's Digest, Ex. & Ad., §§ 128—139. **Confirmation.** Terry v. Clothier, 1 Wash. 475, 25 Pac. 673; Bjmerland v. Eley, 15 Wash. 101, 45 Pac. 730.

§ 129. Persons Who may Question Validity: Terry v. Clothier, 1 Wash. 475, 25 Pac. 673.

§ 130. — Estoppel or Waiver: Dooly v. Russell, 10 Wash. 195, 38 Pac. 1000; Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099; Carruthers v. Whitney, 56 Wash. 327, 105 Pac. 831, 134 Am. St. Rep. 1114; Lewis v. Hill, 61 Wash. 304, 112 Pac. 373.

§ 131. Ratification of Invalid Sale: Cunningham v. Richardson, 68 Wash. 24, 122 Pac. 368; Crim's Estate, In re, 89 Wash. 395, 154 Pac. 811.

§ 133. Opening or Vacating: State ex rel. Dooly v. Superior Court, 10 Wash.

168, 38 Pac. 998; Holburte's Estate, In re, 48 Wash. 378, 93 Pac. 529; Entiat Delta Orchards Co. v. Unknown Heirs of Saska, 99 Wash. 84, 168 Pac. 1130.

§ 134. — Fraud or Inadequacy of Price: Sharp v. Greene, 22 Wash. 677, 62 Pac. 147; Hipkins v. Estes, 51 Wash. 1, 97 Pac. 1089; Crim's Estate, In re, 89 Wash. 395, 154 Pac. 811; Stewart v. Baldwin, 86 Wash. 63, 149 Pac. 662; Veysey v. Veysey, 86 Wash. 553, 151 Pac. 39.

See, also, Finn's Estate, In re, 105 Wash. 532, 178 Pac. 449.

§ 135. — Bona Fide Purchasers: Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

§ 136. Collateral Attack: McKenna v. Cosgrove, 41 Wash. 332, 83 Pac. 240; Magee v. Big Bend Land Co., 51 Wash. 406, 99 Pac. 16.

§ 137. **Title and Rights of Purchasers:** Ryan v. Ferguson, 3 Wash. 356, 28 Pac. 910.

§ 138. — **Caveat Emptor and Warranty:** Bjmerland v. Eley, 15 Wash. 101, 45 Pac. 730; Wallace v. Grant, 27 Wash. 130, 67 Pac. 578; Towner v. Rodegeb, 33 Wash. 153, 74 Pac. 50, 99 Am. St. Rep. 936; Matson v. Johnson, 48 Wash. 256, 93 Pac. 324, 125 Am. St. Rep. 924; Golden v. Pilchuck Tribe No. 42, Improved Order of Red Men, 71 Wash. 581, 129 Pac. 93.

§ 139. **Rights and Remedies of Purchasers on Avoidance of Sale:** Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

An administrator's sale for cash, confirmed by the court, transfers the equitable title to the purchaser, although the deed is not delivered and no part of the purchase price is paid: Moller v. Niagara Fire Ins. Co., 54 Wash. 439, 103 Pac. 449, 132 Am. St. Rep. 1115, 24 L. R. A. (N. S.) 807.

§ 1505. **Sale or Mortgage of Realty to Pay Legacy.**

When a testator shall have given any legacy by will that is effectual to charge real estate, and his goods, chattels, rights and credits shall be insufficient to pay such legacy, together with the debts and charges of administration, the executor or administrator, with the will annexed, may obtain an order to sell or mortgage his real estate for that purpose in the same manner and upon the same terms and conditions as prescribed in this chapter in case of a sale or mortgage for the payments of the debts. [L. '17, p. 682, § 135.]

Implied power of executor to sell real estate of testator. *Ann. Cas.* 1916D, 410.

§ 1506. **Insufficiency of Estate to Pay Debts.**

If the provision made by the will or the estate appropriated be not sufficient to pay the debts and expenses of administration and family expenses, such part of the estate as shall not have been disposed of by the will, if any, shall be appropriated for that purpose, according to the provisions of this chapter. [L. '17, p. 682, § 136.]

§ 1507. **Liability of Devises and Legacies for Debts.**

The estate, real and personal, given by the will to any legatees or devisees, shall be held liable for the payment of the debts, the expenses of administration and allowances to the family, in proportion to the value or amount of the several devises or legacies, if there shall not be other sufficient estate, except that specific devises or legacies may be exempted, if it appear to the court necessary to carry into effect the intention of the testator. [L. '17, p. 682, § 137.]

Right of personal representative to setoff, against joint debtor of estate, legacy or distributive share due to one of joint debtors. 21 *Ann. Cas.* 812.

Distributive share of heir in real estate as chargeable with heir's indebtedness to estate either as against land itself or proceeds of sale thereof. *Ann. Cas.* 1916D, 636.

§ 1508. **Contribution Among Devisees and Legatees.**

When the estate given by any will has been sold for the payment of debts and expenses, all the devisees and legatees shall be liable to contribute, according to their respective interests, to any devisee or legatee from whom the estate devised to him may be taken for the payments of the debts or expenses; and the court, when distribution is made, shall by decree for that purpose, settle the amount of the several liabilities and decree how much each person shall contribute. [L. '17, p. 682, § 138.]

Contribution as between legatees and devisees to pay testator's debts. 1 *L. R. A. (N. S.)* 461.

§ 1509. Sale of Decedent's Contract Interest in Lands.

If the deceased person at the time of his death was possessed of a contract for the purchase of lands, his interest in such lands under such contract may be sold on the application of his executor or administrator in the same manner as if he died seized of such lands; and the same proceedings may be had for that purpose as are prescribed in this act in respect to lands of which he died seized, except as hereinafter provided. [L. '17, p. 683, § 139.]

§ 1510. Purchaser's Bond to Secure Payments.

Such sale shall be made subject to all payments that may thereafter become due on such contract, and if there be any such payments thereafter to become due such sale shall not be confirmed by the court until the purchaser shall have executed a bond to the executor or administrator for his benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in lands so contracted for, in double the whole amount of the payments thereafter to become due on such contract, with such sureties as the court shall approve. [L. '17, p. 683, § 140.]

§ 1511. Conditions of Bond.

Such bond shall be conditioned that the purchaser will make all payments for such land as shall become due after the date of such sale, and will fully indemnify the executor or administrator and the person so entitled against all demands, costs and charges and expenses, by reason of any covenant or agreement contained in such contract; but if there be no payments thereafter to become due on such contract, no bond shall be required of the purchaser. [L. '17, p. 683, § 141.]

§ 1512. Assignment of Decedent's Contract.

Upon the confirmation of such sale, the executor or administrator shall execute to the purchaser an assignment of the contract, which assignment shall vest in the purchaser, his heirs and assigns, all the right, title and interest of the persons entitled to the interest of the deceased in the land sold at the time of the sale, and such purchaser shall have the same rights and remedies against the vendor of such lands as the deceased would have had if living. [L. '17, p. 683, § 142.]

§ 1513. Redemption of Decedent's Mortgaged Estate.

If any person die having mortgaged any real or personal estate, and shall not have devised the same, or provided for any redemption thereof by will, the court, upon the application of any person interested, may order the executor or administrator to redeem the estate out of the assets, if it should appear to the satisfaction of the court that such redemption would be beneficial to the estate and not injurious to creditors. [L. '17, p. 684, § 143.]

For Payment of Debts—Mortgage Debt: 323, 35 Pac. 1073; Jones v. Seattle Brick
See Remington's Digest, Ex. & Ad., § 108; & Tile Co., 56 Wash. 166, 105 Pac. 238.
Ryan v. Fergusson, 3 Wash. 356, 28 Pac. The restriction in this section has no
910; Clement's Estate, In re, 8 Wash. application to cases where the property has

been devised to a residuary legatee: *Clement's Estate, In re*, 8 Wash. 323, 35 Pac. 1073.

A mortgagee of property in course of administration may, pending administration, not only foreclose, but may pursue his remedy by foreclosure sale, independ-

ently of the probate proceeding, notwithstanding his remedy in probate, under this and following sections; and thereby he waives his right to any deficiency judgment: *Denton v. Maple*, 92 Wash. 290, 158 Pac. 1001.

§ 1514. Sale or Mortgage to Effect Redemption.

If it shall be made to appear to the satisfaction of the court that it will be to the interest of the estate of any deceased person to sell or mortgage other personal estate or to sell or mortgage other real estate of the decedent than that mortgaged by him to redeem the property so mortgaged, the court may order the sale or mortgaging of any personal estate, or the sale or mortgaging of any real estate of the decedent which it may deem expedient to be sold or mortgaged for such purpose, which sale or mortgaging shall be conducted in all respects as other sales or mortgages of like property ordered by the court. [L. '17, p. 684, § 144.]

§ 1515. Sale of Mortgaged Property, if Redemption Inexpedient.

If such redemption be not deemed expedient, the court shall order such property to be sold at public or private sale, which sale shall be with the same notice and conducted in the same manner as required in other cases of real estate or personal property provided for in this act, and shall be sold subject to such mortgage, and the executor or administrator shall thereupon execute a conveyance thereof to the purchaser, which conveyance shall be effectual to convey to the purchaser all the right, title, and interest which the deceased had in the property, and the purchase money, after paying the expenses of the sale, shall be applied to the residue in due course of administration. [L. '17, p. 684, § 145.]

§ 1516. Sales Directed by Will.

When property is directed by will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without the order of the court, and without any notice, and it shall not be necessary under such circumstances to make any application to the court with reference to such sales or have the same confirmed by the court. [L. '17, p. 684, § 146.]

SALES OF REAL ESTATE: See Remington's Digest, Ex. & Ad., §§ 50—55. Sale—Power Under Will: *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147.

§ 51. — Purchase or Lease by Executor or Administrator: *Gardella v. Meeker*, 3 W. T. 178, 13 Pac. 709; *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692.

§ 52. — Conveyance: *Wilson v. Morrell*, 5 Wash. 654, 32 Pac. 733.

§ 53. — Title and Rights of Purchasers: *Wilson v. Morrell*, 5 Wash. 654, 32 Pac. 733; *Bjmerland v. Eley*, 15 Wash. 101, 45 Pac. 730.

§ 54. — Setting Aside: *Davis v. Ford*, 15 Wash. 107, 45 Pac. 737, 46 Pac. 393; *Sharp v. Greene*, 22 Wash. 677, 62 Pac. 147.

§ 55. Mortgage: *Miller v. Borst*, 11 Wash. 260, 39 Pac. 662; *McKenna v. Cosgrove*, 41 Wash. 332, 83 Pac. 240.

May less than all the executors named exercise power of sale. 50 L. R. A. (N. S.) 622.

Duty of executor with power of sale as to land held adversely. 35 L. R. A. (N. S.) 749.

XVIII.

POWERS AND DUTIES OF EXECUTORS AND ADMINISTRATORS.

§ 1517. Powers and Duties.

It shall be the duty of every executor or administrator to settle the estate in his hands as rapidly and as quickly as possible, without sacrifice to the estate. He shall collect all debts due the deceased and pay all debts as hereinafter provided. He shall be authorized in his own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character. [L. '17, p. 685, § 147.]

COLLECTION AND MANAGEMENT OF ESTATE—IN GENERAL: See Remington's Digest, Ex. & Ad., §§ 37—47. **Representation of Decedent:** Smith v. Northern Pac. R. Co., 22 Wash. 500, 61 Pac. 255.

§ 38. **Jurisdiction of Courts:** Wilbur's Estate, In re, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107; Martin's Estate, In re, 82 Wash. 226, 144 Pac. 42.

§ 39. **Discovery and Collection of Assets—Proceedings for Discovery of Assets:** Main v. Hadfield, 41 Wash. 504, 84 Pac. 12.

§ 40. — **Collection and Protection of Assets in General:** McCoy v. Ayres, 2 W. T. 307, 5 Pac. 843; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Lamb-Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 Pac. 593, L. R. A. 1917E, 960.

§ 41. — **Compromise or Release of Claims:** Denney v. Parker, 10 Wash. 218, 38 Pac. 1018.

§ 42. **Custody and Management of Estate:** Ward v. Moorey, 1 W. T. 104; Burch v. McDaniel, 2 W. T. 58, 3 Pac. 586; Ennis' Estate, In re, 96 Wash. 352, 165 Pac. 119.

See, also, Dunn v. Peterson, 4 Wash. 170, 29 Pac. 998; Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

§ 42-1. **Contracts:** Gates v. Herr, 102 Wash. 131, 172 Pac. 912.

See, also, Lamb-Davis Lbr. Co. v. Stowell, 107 Wash. 212, 181 Pac. 520.

§ 43. **Investments—Loss or Depreciation:** Sharp v. Greene, 22 Wash. 677, 62 Pac. 147.

Legatees under a will who objected to the consummation of an investment in bonds and preferred that the executors forfeit a deposit thereon cannot hold an executor personally liable for the deposit on the ground that they failed to obtain permission of the court to make the in-

vestment, where there would have been no loss if the investment had been consummated, as such executor proposed and wished to do: McDonald's Estate, In re, 110 Wash. 366, 188 Pac. 523.

§ 44. **Deposits:** Kohler's Estate, In re, 15 Wash. 613, 47 Pac. 30, 55 Am. St. Rep. 904.

§ 45. **Individual Interest in Transactions:** Bowen v. Hughes, 5 Wash. 442, 32 Pac. 98; Eastham v. Landon, 17 Wash. 48, 48 Pac. 739.

See, also, Lamb-Davis Lbr. Co. v. Stowell, 107 Wash. 212, 181 Pac. 520.

§ 45-1. **Fraud:** Kennedy v. Burr, 101 Wash. 61, 171 Pac. 1022.

§ 47. **Coexecutors and Coadministrators—Joint or Several Authority:** Gilmore v. Baker Co., 12 Wash. 468, 41 Pac. 124.

See, also, Hagerty's Estate, In re, 105 Wash. 547, 178 Pac. 644.

Where two resident executors were actively performing all the duties connected with the office, with the acquiescence of all in interest, complaint cannot be made of their investment of funds without the co-operation of two non-resident executors: McDonald's Estate, In re, 110 Wash. 366, 188 Pac. 523.

Possession and Use: See Remington's Digest, Ex. & Ad., § 48; Ward v. Moorey, 1 W. T. 104; Dunn v. Peterson, 4 Wash. 170, 29 Pac. 998; Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Gibson v. Slater, 42 Wash. 347, 84 Pac. 648.

Right of executor or administrator to avoid contract or conveyance by decedent on ground of mental incapacity. 1 A. L. R. 1517.

Right of personal representative to enjoin execution sale of decedent's property. Ann. Cas. 1918C, 260; 30 L. R. A. 120.

Power of executor to make lease of oil and gas lands. 1 Ann. Cas. 406.

§ 1518. Actions for Recovery of Property and on Contract.

Actions for the recovery of any property or for the possession thereof, and all actions founded upon contracts, may be maintained by and against executors and administrators in all cases in which the same might have been maintained by and against their respective testators or intestates. [L. '17, p. 685, § 148.]

ACTIONS: See Remington's Digest, Ex. & Ad., §§ 140—148. **Capacity to Sue in General:** Denny v. Sayward, 10 Wash. 422, 39 Pac. 119.

§ 141. **Rights of Action by Executors or Administrators—In General:** McCoy v. Ayres, 2 W. T. 307, 5 Pac. 843; Hazleton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Gibson v. Slater, 42 Wash. 347, 84 Pac. 648; Duvall v. Healy Lumber Co., 57 Wash. 446, 107 Pac. 357, 109 Pac. 305; Smith v. Stiles, 68 Wash. 345, 123 Pac. 448; Griffith v. James, 91 Wash. 607, 158 Pac. 251; Wendler v. Woodard, 93 Wash. 684, 161 Pac. 1043; Peterson v. Tull, 85 Wash. 546, 148 Pac. 598.

§ 142. — **Personal or Representative Capacity:** Smith v. Northern Pac. R. Co., 22 Wash. 500, 61 Pac. 255; Harvey v. Pocock, 92 Wash. 625, 159 Pac. 771.

§ 143. **Rights of Action Against Executors or Administrators—In General:** Bowen v. Hughes, 5 Wash. 442, 32 Pac. 98; Eastham v. Landon, 17 Wash. 48, 48 Pac. 739; Bishop v. Locke, 92 Wash. 90, 158 Pac. 997; Denton v. Maple, 92 Wash. 290, 158 Pac. 1001.

An executrix, operating a logging road in continuation of her deceased husband's business, is individually liable for negligence in permitting fires to escape, and hence a claim against the estate is not a condition precedent to action: Fisher v. McNeely, 110 Wash. 283, 188 Pac. 478.

§ 144. — **Personal or Representative Capacity:** Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012; Spokane v. Costello, 57 Wash. 183, 106 Pac. 764; Brownfield v. Holland, 63 Wash. 86, 114 Pac. 890.

See, also, Fisher v. McNeely, 110 Wash. 283, 188 Pac. 478.

§ 145. **Defenses by Administrators:** Wallace v. Grant, 27 Wash. 130, 67 Pac. 578; Ward v. Magaha, 71 Wash. 679, 129 Pac. 395.

§ 146. **Setoff and Counterclaim:** See notes to section 268, supra.

See, also, Green v. Harris, 113 Wash. 259, 193 Pac. 690.

§ 147. **Jurisdiction:** Stewart v. Lohr, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150; Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593; Huston v. Becker, 15 Wash. 586, 47 Pac. 10; Belt's Estate, In re, 29 Wash. 535, 70 Pac. 74, 92 Am. St. Rep. 916.

§ 148. **Venue:** Reese v. Murnan, 5 Wash. 373, 31 Pac. 1027.

Joinder or Intervention in Actions by Others: See Remington's Digest, Ex. & Ad., § 150; Strong v. Eldridge, 8 Wash. 595, 36 Pac. 696; Ritterhoff v. Puget Sound Nat. Bank, 37 Wash. 76, 79 Pac. 601, 107 Am. St. Rep. 791.

Pleading—Allegation of Representative Capacity: See Remington's Digest, Ex. & Ad., § 151; Miller v. Borst, 11 Wash. 260, 39 Pac. 662; Megrath v. Gilmore, 15 Wash. 558, 46 Pac. 1032; Waldo v. Milroy, 19 Wash. 156, 52 Pac. 1012; Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; Stein v. Waddell, 37 Wash. 634, 80 Pac. 184.

Evidence and Trial: See Remington's Digest, Ex. & Ad., §§ 152, 153; McCoy v. Ayres, 2 W. T. 307, 5 Pac. 843; Gilmore v. Baker Co., 12 Wash. 468, 41 Pac. 124; Poncin v. Furth, 15 Wash. 201, 46 Pac. 241; First Nat. Bank of Olympia v. Root, 19 Wash. 111, 52 Pac. 521; McAllister v. Chambers, 71 Wash. 521, 129 Pac. 85; Winston v. Crowe, 28 Wash. 65, 68 Pac. 174; Filley v. Murphy, 30 Wash. 1, 70 Pac. 107.

Right of personal representative to maintain action to quiet title to decedent's real estate. **Ann. Cas.** 1913A, 996.

Right of personal representative to bring ejectment for lands of deceased: 15 **Ann. Cas.** 569; 18 **L. R. A.** 789.

Necessity that executor or administrator, in action brought by him, allege that suit is brought in representative capacity. **Ann. Cas.** 1916E, 114.

§ 1519. Waste, Conversion and Trespass.

Executors and administrators may maintain actions against any person who shall have wasted, destroyed, taken, carried away, or converted to his own use the goods of their testator or intestate in his lifetime; also may maintain actions for trespass committed on the estate of the deceased during his lifetime. [L. '17, p. 685, § 149.]

Railroad fill upon a street changing the grade and interfering with access, to the damage of the abutting owner of improved property, who owns the fee of the

street, is a trespass for which the right of action survives, under this section: *Seward v. Spokane & Seattle R. Co.*, 64 Wash. 516, 117 Pac. 263.

§ 1520. Actions on Torts of Decedent.

Any person, or his personal representatives, shall have an action against the executor or administrator of any estate or intestate who in his lifetime shall have wasted, destroyed, taken, or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person. [L. '17, p. 685, § 150.]

§ 1521. Actions on Bonds of Prior Representatives.

Any administrator may in his own name, for the benefit of all parties interested in the estate, maintain actions on the bond of an executor or of any former administrator of the same estate. [L. '17, p. 685, § 151.]

§ 1522. Compromise of Claims.

The court shall have power to authorize the executor or administrator to compromise and compound any claim owing to the estate. [L. '17, p. 686, § 152.]

§ 1523. Recovery of Decedent's Fraudulent Conveyances.

When there shall be a deficiency of assets in the hands of an executor or administrator, and when the deceased shall in his lifetime have conveyed any real estate, or any rights, or interests therein, with intent to defraud his creditors or to avoid any right, duty or debt of any person, or shall have so conveyed such estate, which deeds or conveyances by law are void as against creditors the executor or administrator may, and it shall be his duty to, commence and prosecute to final judgment any proper action for the recovery of the same, and may recover for the benefit of the creditors all such real estate so fraudulently conveyed, and may also, for the benefit of the creditors, sue and recover all goods, chattels, rights and credits which may have been so fraudulently conveyed by the deceased in his lifetime, whatever may have been the matter of such fraudulent conveyance. [L. '17, p. 686, § 153.]

The rights of an executor to set aside the fraudulent conveyances of the decedent for the benefit of creditors, under this section, are the same as though the creditors were prosecuting the action against the fraudulent transferee during the lifetime of the deceased: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737.

Under this section, the widow of the deceased has no interest in the action as an heir, although the property conveyed

by the deceased was community property, of which the husband had sole control under section 6892, *infra*; since it cannot be said that she did not receive the benefit of the conveyance: *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737.

Right of personal representative to set aside fraudulent conveyance by decedent. 18 Ann. Cas. 37; Ann. Cas. 1915B, 212.

XIX.

ACCOUNTS OF EXECUTORS AND ADMINISTRATORS AND PAYMENT OF DEBTS.

§ 1524. Promise to Pay Decedent's Debts.

No executor or administrator shall be chargeable upon any special promise to answer damages, or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing and signed by such executor or administrator, or by some other person by him thereunto specially authorized. [L. '17, p. 686, § 154.]

§ 1525. Chargeable With Whole Estate.

Every executor and administrator shall be chargeable in his accounts with the whole estate of the deceased which may come into his possession. He shall not be responsible for loss or decrease or destruction of any of the property or effects of the estate, without his fault. [L. '17, p. 686, § 155.]

§ 1526. Allowance of Expenses.

He shall be allowed all necessary expenses in the care, management and settlement of the estate. [L. '17, p. 687, § 156.]

<p>DISBURSEMENTS AND EXPENSES: See Remington's Digest, Ex. & Ad., §§ 159, 159-1. Disbursements for Benefit of Real Property: Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593. Disbursements for Benefit of Legatees or Distributees: Lotzgesell's Estate, In re, 62 Wash. 352,</p>	<p>113 Pac. 1105; Stahl v. Schwartz, 81 Wash. 293, 142 Pac. 651. See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209. What constitute "necessary expenses" of decedent's estate. Ann Cas. 1918D, 923.</p>
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§ 1527. Uncollectible Debts of Estate—Purchase by Executor of Claims.

No executor or administrator shall be accountable for any debts due the estate, if it shall appear that they remain uncollected without his fault. No executor or administrator shall purchase any claim against the estate he represents, but however the executor or administrator may make application to the court for permission to purchase certain claims, and if it appears to the court to be for the benefit of the estate that such purchase shall be made, the court may make an order allowing such claims and directing that the same may be purchased by the executor or administrator under such terms as the court shall order, and such claims shall thereafter be paid as are other claims, but the executor or administrator shall not profit thereby. [L. '17, p. 687, § 157.]

§ 1528. Compensation—Attorney's Fees.

Where no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed such compensation as to the court shall seem just and reasonable, based on the services rendered; and the like compensation shall be allowed to administrators. In all cases where it is necessary for such executor or administrator to employ an attorney, such attorney shall be allowed such compensation as to the court shall seem just and reasonable. [L. '17, p. 687, § 158.]

Cited in 97 Wash. 499; 102 Wash. 262, 263; 112 Wash. 559.

Counsel Fees: See Remington's Digest, Ex. & Ad., § 160; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589; Mason's Estate, In re, 26 Wash. 259, 66 Pac. 435; Witt's Estate, In re, 74 Wash. 172, 132 Pac. 1012; Hart v. Bogle, 88 Wash. 125, 152 Pac. 1010; Snook v. Kennedy, 103 Wash. 390, 174 Pac. 643.

See, also, Babcock's Estate, In re, 112 Wash. 556, 192 Pac. 939.

The allowance of \$1,025 for fees of an attorney for an executrix of an estate, appraised at \$144,000, is excessive and should be reduced to \$500, where \$115,000 of the appraised property proved to be of little or no value: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

An administrator is not to be deprived of his statutory compensation by reason of irregularities, where he was not guilty of fraud and administered the estate with great ability and resourcefulness in the face of financial difficulties: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

The appraised value of the estate is only the prima facie value of figuring an administrator's statutory commissions, which should be based upon the total cash received from all sources, plus the value of real estate conveyed in satisfaction of debts, and plus the appraised value of household goods administered; and where that amounts to the sum of \$39,831.24, the statutory commission is \$1,633.24: Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

Attorneys' Fees and Improper Payments: See Remington's Digest, Ex. & Ad., § 94; Sullivan's Estate, In re, 36 Wash. 217, 78 Pac. 945; Shufeldt v. Hughes, 55 Wash. 246, 104 Pac. 253; Lichtenberg's Estate, In re, 58 Wash. 585, 109 Pac. 48.

Compensation by Way of Commissions: See Remington's Digest, Ex. & Ad., §§ 161—166. **Effect of Testamentary Provisions:** Smith's Estate, In re, 18 Wash. 129, 51 Pac. 348.

The statutory compensation applies to nonintervention wills: Shufeldt v. Hughes, 55 Wash. 246, 104 Pac. 253.

§ 162. — Effect of Agreements: Kuhn's Appeal, 4 Wash. 534, 30 Pac. 643; Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Field's Estate, In re, 33 Wash. 63, 73 Pac. 768; Sloan v. West, 63 Wash. 623, 116 Pac. 272; Tachi's Estate, In re, 90 Wash. 621, 156 Pac. 833.

§ 163. — Waiver of Right: Noble v. Whitten, 38 Wash. 262, 80 Pac. 451; Shufeldt v. Hughes, 55 Wash. 246, 104 Pac. 253; Stahl v. Schwartz, 81 Wash. 293, 142 Pac. 651; Lamb Davis Lumber Co. v. Stowell, 96 Wash. 46, 164 Pac. 593, L. R. A. 1917E, 960.

See, also, Hemrich's Estate, In re, 113 Wash. 667, 194 Pac. 569.

§ 164. — On What Property Allowed: Noble v. Whitten, 38 Wash. 262, 80 Pac. 451.

§ 165. — Rate and Computation: Smith's Estate, In re, 18 Wash. 129, 51 Pac. 348; Horton v. Barto, 17 Wash. 675, 50 Pac. 587; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589; Mason's Estate, In re, 26 Wash. 259, 66 Pac. 435; Hagerty's Estate, In re, 97 Wash. 491, 166 Pac. 1139.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209; McDonald's Estate, In re, 110 Wash. 366, 188 Pac. 523.

§ 166. — Successive Administrations: Mason's Estate, In re, 26 Wash. 259, 66 Pac. 435.

Right of executor or administrator to extra allowance of compensation for extraordinary services. **Ann. Cas.** 1913A, 1267; **Ann. Cas.** 1915A, 149.

Right of personal representatives to compensation for legal services. **Ann. Cas.** 1913A, 1273.

Devise or bequest to executor as provision for his compensation for services as such. **Ann. Cas.** 1913D, 993.

§ 1529. Reports—Contents.

Within thirty days after the expiration of the time for filing of claims of creditors, the executor or administrator shall make, verify by his oath, and file with the clerk of the court a report of the affairs of the estate. Such report shall contain a statement of the claims filed and allowed and all those rejected, and if it be necessary to sell or mortgage any property for the purpose of paying debts or settling any obligations against the estate or expenses of administration or allowance to the family, he may in such report set out the facts showing such necessity and ask for such sale or mortgage; such report shall likewise state the amount of property, real and personal, which has come into

his hands, and give a detailed statement of all sums collected by him, and of all sums paid out, and it shall state such other things and matters as may be proper or necessary to give the court full information regarding any transactions by him done or which should be done. Such executor or administrator may, however, make, verify, and file, prior to the expiration of the time for the presentation of claims, any reports which in his judgment would be proper or which the court may order to be made. [L. '17, p. 687, § 159.]

ACCOUNTING AND SETTLEMENT:
See Remington's Digest, Ex. & Ad.,
§§ 156—158-1.

§ 156. **Jurisdiction of Courts:** Seattle v. McDonald, 26 Wash. 98, 66 Pac. 145; Macdonald's Estate, In re, 29 Wash. 422, 69 Pac. 1111; Drasdo v. Jobst, 39 Wash. 425, 81 Pac. 857; Brown's Estate, In re, 93 Wash. 324, 160 Pac. 945.

§ 157. **Appraisement:** Horton v. Barto,

17 Wash. 675, 50 Pac. 587; Smith's Estate, In re, 18 Wash. 129, 51 Pac. 348.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

§ 158. **Use and Occupation of Premises:** Alfstad's Estate, In re, 27 Wash. 175, 67 Pac. 593.

§ 158-1. **Credits in General:** Witt's Estate, In re, 74 Wash. 172, 132 Pac. 1012.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

§ 1530. **Notice of Hearing—Settlement by Court.**

It shall not be necessary for the executor or administrator to give any notice of the hearing of any report prior to the final report, except as in section 1434 provided, but the court may require notice of the hearing of any such report. If the court does not require such notice to be given, then at any time after ten days following the filing of any report, other than the final report, the court may hear and settle such report. [L. '17, p. 688, § 160.]

§ 1531. **Final Report and Petition for Distribution.**

When the estate shall be ready to be closed, such executor or administrator shall make, verify and file with the court his final report and petition for distribution. Such final report and petition shall, among other things, show that the estate is ready to be settled, and shall show any moneys collected since the previous report, and any property which may have come into the hands of the executor or administrator since his previous report, and debts paid, and generally the condition of the estate at that time. It shall likewise set out the names and addresses, as nearly as may be, of all the legatees and devisees in the event there shall have been a will, and the names and addresses, as nearly as may be, of all the heirs who may be entitled to share in such estate, and shall give a particular description of all the property of the estate remaining undisposed of, and shall set out such other matters as may tend to inform the court of the condition of the estate, and it may ask the court for a settlement of the estate and distribution of property and the discharge of the executor or administrator. If the executor or administrator has been discharged without having legally closed the estate, without having legally obtained an adjudication as to the heirs, or without having legally procured a decree of distribution or final settlement the court may in its discretion upon petition of any person interested, cause all such steps to be taken in such estate as were omitted or defective. [L. '17, p. 688, § 161.]

§ 1532. Time and Place of Hearings—Notice.

When such final report and petition for distribution, or either, shall have been filed, the court shall fix a day for the hearing of the same, which day must be at least twenty-five days subsequent to the day of the first publication and posting of notices of such hearing as hereinafter provided. Notice of the time and place fixed for such hearing shall be given by the executor or administrator by publishing the same at least once a week for three successive weeks preceding the time fixed for such hearing, such publication to be in such paper as the court may order, and such notice shall be posted in three public places in the county at least twenty-five days preceding the time fixed for such hearing, and which shall state in substance that a final report and petition for distribution have, or either thereof has, been filed with the clerk of the court, and that the court is asked to settle such report, distribute the property to the heirs or persons entitled to the same, and discharge the executor or administrator, and it shall give the time and place fixed for the hearing of such final report and petition and shall be signed by the executor or administrator or the clerk of the court and be posted and published or caused to be posted and published as aforesaid. [L. '19, p. 59, § 1. Cf. L. '17, p. 689, § 162.]

Notice of distribution in probate proceedings as jurisdictional. 37 L. B. A. (N. S.) 368.

§ 1533. Hearing on Final Report—Decree of Distribution.

Upon the date fixed for the hearing of such final report and petition for distribution, or either thereof, or any day to which such hearing may have been adjourned by the court, if the court be satisfied that the notice of the time and place of hearing has been given as provided herein, it may proceed to the hearing aforesaid. Any person interested may file objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his objections thereto. The court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be settled, and whether the transactions of the executor or administrator should be approved, and to determine who are the legatees or heirs or persons entitled to have the property distributed to them, and the court shall, if it approves such report, and finds the estate ready to be closed, cause to be entered a decree approving such report, find and adjudge the persons entitled to the remainder of the estate, and that all debts have been paid, and by such decree shall distribute the real and personal property to those entitled to the same. The court may, upon such final hearing, partition among the persons entitled thereto, the estate held in common and undivided, and designate and distribute their respective shares; or assign the whole or any part of said estate to one or more of the persons entitled to share therein. That the person or persons to whom said estate is assigned shall pay or secure to the other parties interested in said estate their just proportion of the value thereof as determined by the court from the appraisement, or from any other evidence which the court may require.

If it shall appear to the court at or prior to any final hearing that the estate cannot be fairly divided, then the whole or any part of said estate may be sold or mortgaged in the manner provided by law for the sale or mortgaging of property by executors or administrators and the proceeds thereof distributed to the persons entitled thereto as provided in the final decree. Upon the production of receipts from the beneficiaries or distributees for their portions of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the executor or administrator.

The court shall have authority to make partition, distribution and settlement of all estates in any manner which to the court seems right and proper, to the end that such estates may be administered and distributed to the persons entitled thereto. No estate shall be partitioned, nor sale thereof made where partition is impracticable, except upon a hearing before the court and upon the testimony of at least three disinterested witnesses previously appointed by the court for the purpose of viewing such property to be partitioned or sold. The court shall fix the values of the several pieces or parcels to be partitioned at the time of making such order of partition or sale; and may order the property sold and the proceeds distributed, or may order partition and distribute the several pieces or parcels, subject to such charges or burdens as shall be proper and equitable.

The provisions of this section shall be concurrent with and not in derogation of other existing statutes as to partition of property. [L. '21, p. 243, § 1. Cf. L. '17, p. 689, § 163.]

Cited in 105 Wash. 590; 109 Wash. 128.

DISTRIBUTION OF ESTATE: See Remington's Digest, Ex. & Ad., §§ 95—100. **Authority and Duty to Make in General:** Wilbur's Estate, In re, 8 Wash. 35, 35 Pac. 407, 40 Am. St. Rep. 886.

§ 96. **Liabilities of Legatee or Distributee to Estate:** Prefontaine v. McMicken, 16 Wash. 16, 47 Pac. 231; Boyer v. Robinson, 26 Wash. 117, 66 Pac. 119; Cooper's Estate, In re, 95 Wash. 351, 163 Pac. 935.

§ 97. **Debt Due to Executor or Administrator Individually:** McLaughlin v. Barnes, 12 Wash. 373, 41 Pac. 62.

§ 98. **Time for Delivery or Payment of Legacy:** Rogers v. Strobach, 15 Wash. 472, 46 Pac. 1040.

§ 99. **Advances by Executor or Administrator:** Murphy's Estate, In re, 30 Wash. 9, 70 Pac. 109.

§ 99-1. **Mode and Sufficiency of Payment in General:** Goss' Estate, In re, 73 Wash. 330, 132 Pac. 409.

§ 100. **Effect of Payment or Distribution:** Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765; Sturgiss v. Dart, 23 Wash. 244, 62 Pac. 858; Thatcher v. Capeca, 75 Wash. 249, 134 Pac. 923; Peck v. Peck, 76 Wash. 548, 137 Pac. 137.

Order or Decree for Distribution: See Remington's Digest, Ex. & Ad., § 102; Huston v. Becker, 15 Wash. 586, 47 Pac. 10; Horton v. Barto, 17 Wash. 675, 50 Pac. 587; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589; Griffin v. Warburton, 23 Wash. 231, 62 Pac. 765.

See, also, Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

The court may determine who are entitled to the property: Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502.

Settlement of Account: See Remington's Digest, Ex. & Ad., §§ 167—169.

Order or Decree: Drasdo v. Jobst, 39 Wash. 425, 81 Pac. 857; Sullivan's Estate, In re, 48 Wash. 631, 94 Pac. 483; Doane's Estate, In re, 64 Wash. 303, 116 Pac. 847; Denton v. Maple, 92 Wash. 290, 158 Pac. 1001; Plath v. Mullins, 94 Wash. 154, 161 Pac. 1187; Litzell v. Hart, 96 Wash. 471, 165 Pac. 393.

§ 168. — **Review:** Horton v. Barto, 17 Wash. 675, 50 Pac. 587; Wilbur v. Wilbur, 17 Wash. 683, 50 Pac. 589; Campbell's Estate, In re, 98 Wash. 295, 167 Pac. 905.

§ 169. — **Operation and Effect:** Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Denny v. Sayward, 10 Wash. 422, 39 Pac. 119; State ex rel. Reser v. Su-

perior Court, 13 Wash. 25, 42 Pac. 630; Krohn v. Hirsch, 81 Wash. 222, 142 Pac. 647.

See, also, Smith's Estate, In re, 108 Wash. 652, 185 Pac. 618.

The settlement of the final account of executors fixing their compensation by an order that was a final judicial determination of the amount on hand under their joint control is not per se conclusive as to their joint liability for the future acts of one of them, resulting in loss of a portion of the property: Hagerty's Estate, In re, 105 Wash. 547, 178 Pac. 618.

Under this section, a widow is not entitled to have a decree set aside to enable her to make a claim for a homestead, on the ground that she was ignorant of English and of her rights, in the absence of a showing of fraud or grounds for the vacation of a judgment as required by Rem. Code, §§ 464-473: Nilson's Estate, In re, 109 Wash. 127, 186 Pac. 268.

Proceedings for Payment or Distribution: See Remington's Digest, Ex. & Ad., § 101; Barker's Estate, In re, 5 Wash. 390, 31 Pac. 976; McGowan v. Smith, 22 Wash. 625, 61 Pac. 713; Reformed Presbyterian Church v. McMillan, 31 Wash. 643, 72 Pac. 502; Sullivan's Estate, In re, 36 Wash. 217, 78 Pac. 945; Ostlund's Estate, In re, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990; Horton v. Barto, 57 Wash. 477, 107 Pac. 191, 135 Am. St. Rep. 999; Teynor v. Heible, 74 Wash. 222, 133 Pac. 1, 46 L. R. A. (N. S.) 1033; State ex rel. Meyer v. Clifford, 78 Wash. 555, 139 Pac. 650; Hoscheid's Estate, In re, 78 Wash. 399, 139 Pac. 61.

In directing final distribution of the estate in probate, the court has no power to charge the estate distributed to the

heirs with a lien in favor of the administrator on account of money paid out by him for the benefit of the estate: Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

Partition by Probate Court in Distribution of Estate: McGowan v. Smith, 22 Wash. 625, 61 Pac. 713.

— **Conclusiveness and Setting Aside for Fraud:** See Remington's Digest, Ex. & Ad., § 104; McLaughlin v. Barnes, 12 Wash. 373, 41 Pac. 62; Prefontaine v. McMicken, 16 Wash. 16, 47 Pac. 231; Ostlund's Estate, In re, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. Rep. 990; Alaska Banking & Safe Deposit Co. v. Noyes, 64 Wash. 672, 117 Pac. 492; Goos' Estate, In re, 73 Wash. 330, 132 Pac. 409; Doyle v. Langdon, 80 Wash. 175, 141 Pac. 352; Krohn v. Hirsch, 81 Wash. 222, 142 Pac. 647; Meeker v. Waddle, 83 Wash. 628, 145 Pac. 967; Veysey v. Veysey, 86 Wash. 553, 151 Pac. 39; Davis v. Seavey, 95 Wash. 57, 163 Pac. 35; Doble v. State, 95 Wash. 62, 163 Pac. 37.

See, also, Johnston's Estate, In re, 107 Wash. 25, 181 Pac. 209.

— **Review:** See Remington's Digest, Ex. & Ad., § 105; Noble v. Whitten, 34 Wash. 507, 76 Pac. 95; Drasdo v. Jobst, 39 Wash. 425, 81 Pac. 857; Sullivan's Estate, In re, 48 Wash. 631, 94 Pac. 483.

An heir who assigned to the administrator all her interest in the estate in consideration of an agreement to pay her a sum equal to her proportionate share on final distribution, has no such interest in the estate as to be entitled to appeal from the final settlement allowing claims and distributing the estate, her remedy being solely on her contract: Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

§ 1534. Representation of Minor by Guardian.

If there be any minor interested in the estate who has no legally appointed guardian, the court shall appoint some disinterested person to represent such minor, with reference to such final report and petition for distribution, who, on behalf of the minor, may contest the same as any other person interested might contest it, and who shall be allowed by the court reasonable compensation for his services. [L. '17, p. 690, § 164.]

§ 1535. Agent for Nonresident Distributee.

When any estate shall have been distributed by decree of the court as provided in this chapter, to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate. [L. '17, p. 690, § 165.]

This act is within the inherent legislative power of the state to control the inheritance and descent of property, and does not violate the constitutional inhibition against the taking or sale of property without due process of law: *Bickford v. Stewart*, 55 Wash. 278, 104 Pac. 263, 34 L. R. A. (N. S.) 623.

Property and Conveyances: See *Remington's Digest*, Absentees, § 3; *Bickford v. Stewart*, 55 Wash. 278, 104 Pac. 263, 34 L. R. A. (N. S.) 623.

Under this section, and *Rem. & Bal. Code*, § 1592, providing that notice could be given personally, any reasonable notice was sufficient, and a notice personally served on the nonresident, as a summons is served, thirty-three days prior to the time for the partition, together with notice to the agent appointed to act, is a reasonable notice: *Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249.

§ 1536. Agent's Bond and Compensation.

Such agent shall give a bond to the state of Washington, to be approved by the court, conditioned faithfully to manage and account for such estate, before he shall be authorized to receive the same, and the court appointing such agent may allow a reasonable sum out of the estate for his services and expenses. [L. '17, p. 691, § 166.]

§ 1537. Sale of Unclaimed Share.

When the estate shall have remained in the hands of the agent unclaimed for three years, it shall be sold under order of the court, and the proceeds, after deducting the expenses of the sale and allowance to the agent, to be fixed by the court, shall be paid into the county treasury. When the payment is made the agent shall take triplicate receipts, one of which he shall file with the county auditor, and another with the court. [L. '17, p. 691, § 167.]

§ 1538. Liability of Agent.

The agent shall be liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of sale as required by the preceding section, and may be sued thereon by any person interested. [L. '17, p. 691, § 168.]

§ 1539. Claimant for Proceeds of Sale—Escheat to State.

If any person shall within four years immediately following the payment of said money as aforesaid to the treasurer, appear and claim the money paid into the treasury, the court making the distribution, being first satisfied of his right, shall order the payment of such money, and, upon the presentation of a certified copy of the order to the county auditor, he shall draw his warrant on the county treasurer for the amount. If no such claim be made within the four year period last above mentioned the said money shall escheat to the state. [L. '17, p. 691, § 169.]

§ 1540. Receipts for Expenses and Charges—Filing.

In rendering his accounts or reports the executor or administrator shall produce receipts for the expenses and charges which he shall have paid, which receipts shall be filed and remain in court; however, he may be allowed any item of expenditure, not exceeding twenty (\$20), for which no receipt is produced, if such item be supported by his own oath, but such allowances without receipts shall not exceed the sum of three hundred dollars (\$300) in any one estate. [L. '17, p. 691, § 170.]

§ 1541. Order for Payment of Debts.

The debts of the estate shall be paid in the following order:

- (1) Funeral expenses in such amount as the court shall order.
- (2) Expenses of the last sickness, in such amount as the court shall order.
- (3) Wages due for labor performed within sixty days immediately preceding the death of the decedent.
- (4) Debts having preference by the laws of the United States.
- (5) Taxes, or any debts or dues owing to the state.
- (6) Judgments rendered against the deceased in his lifetime which are liens upon real estate on which executions might have been issued at the time of his death, and debts secured by mortgages in the order of their priority.
- (7) All other demands against the estate. [L. '17, p. 692, § 171.]

Under this section, the wife's liability for her husband's funeral expenses is secondary and not primary, and in the absence of an express promise, cannot be enforced until the creditor has exhausted his remedy against the estate: *Butterworth v. Bredemeyer*, 74 Wash. 524, 133 Pac. 1061.

Ex. & Ad., §§ 91-1—93. **Particular Classes of Claims:** *Cunningham v. Lakin*, 50 Wash. 394, 97 Pac. 447.

§ 92. **Rights of Creditors to Priority:** *Frew v. Clark*, 34 Wash. 561, 76 Pac. 85; *Blattner's Estate*, In re, 92 Wash. 48, 158 Pac. 1015.

§ 93. **Interest:** *Pelton v. Smith*, 50 Wash. 459, 97 Pac. 460.

PRIORITIES: See *Remington's Digest*,

§ 1542. Mortgage and Judgment Preferences.

The preference given in the preceding section to a mortgage or judgment shall only extend to the proceeds of the property subject to the lien of such mortgage or judgment. [L. '17, p. 692, § 172.]

§ 1543. Allowance to Precede Payment.

No claim against the estate shall be paid until the same shall first have been allowed by both the executor or administrator and the court. [L. '17, p. 692, § 173.]

§ 1544. Payments in Case Estate Insufficient.

If the estate shall be insufficient to pay the debts of any class, each creditor shall be paid in proportion to his claim, and no other creditor of any lower class shall receive any payment until all those of the preceding class shall have been fully paid. [L. '17, p. 692, § 174.]

§ 1545. Expense of Monument.

Executors and administrators of the estate of any deceased person are hereby authorized, by and with the consent of the court, to expend a reasonable amount out of the estate of the decedent to erect a monument or tombstone suitable to mark the grave or crypt of the said decedent, and the expense thereof shall be paid as the expenses of administration are paid. [L. '17, p. 692, § 175.]

§ 1546. Payment of Claims—Liability of Personal Representatives.

Whenever a decree shall have been made by the court for the payment of creditors, the executor or administrator shall be personally liable to each creditor for his claim or the dividend thereon, except

when his inability to make the payment thereof from the property of the estate shall result without fault upon his part. The executor or administrator shall likewise be liable on his bond to each creditor. [L. '17, p. 693, § 176.]

§ 1547. Action on Unpaid Claim—Contribution.

If, after the accounts of the executor or administrator have been settled and the property distributed, it shall appear that there is a creditor or creditors whose claim or claims have been duly filed and not paid or disallowed, the said claim or claims shall not be a lien upon any of the property distributed, but the said creditor or creditors shall have a cause of action against the executor or administrator and his bond, for such an amount as such creditor or creditors would have been entitled to receive had the said claim been duly allowed and paid, and shall also have a cause of action against the distributees and creditors for a contribution from them in proportion to the amount which they have received. If the executor or administrator or his sureties be required to make any payment in this section provided for, he or they shall have a right of action against said distributees and creditors to compel them to contribute their just share. [L. '17, p. 693, § 177.]

§ 1548. Order Maturing Claim not Due.

If there be any claim not due the court may in its discretion, after hearing upon such notice as may be determined by it, mature such claim and direct that the same be paid in the due course of the administration. [L. '17, p. 693, § 178.]

§ 1549. Contingent and Disputed Claims.

If there be any contingent or disputed claim against the estate, the amount thereof, or such part thereof as the holder would be entitled to, if the claim were established or absolute, shall be paid into the court, where it shall remain to be paid over to the party when he shall become entitled thereto; or if he fail to establish his claim, to be paid over or distributed as the circumstances of the case may require. [L. '17, p. 693, § 179.]

Cited in 108 Wash. 653.

§ 1550. Letters After Final Settlement.

A final settlement of the estate shall not prevent a subsequent issuance of letters of administration, should other property of the estate be discovered, or if it should become necessary and proper from any cause that letters should be again issued. [L. '17, p. 694, § 180.]

Cited in 108 Wash. 653.

The approval of an administrator's final account is not prevented by the pendency of an appeal upon a disputed claim, the amount of which was deposited with the clerk to abide the result of the suit; since by this section, a final settlement

does not prevent subsequent letters in case other property is discovered: *Smith's Estate, In re*, 108 Wash. 652, 185 Pac. 618.

Appointment of administrator *de bonis non* after final settlement of estate. 5 Ann. Cas. 497.

XX.

DISTRIBUTION PRIOR TO SETTLEMENT AND ADVANCEMENT.

§ 1551. Application for Premature Distribution.

At any time after six months from the date of the first publication of notice to creditors, any heir, legatee, or devisee, may present his petition to the court praying that the legacy or share of the estate to which he is entitled may be given to him, upon his giving bond with security for the payment of his proportion of the debts of the estate, inheritance tax, expenses of administration, support of the family, or other obligations of the estate. [L. '17, p. 694, § 181.]

§ 1552. Notice.

Notice of the application shall be given to the executor of administrator and to all persons interested in the estate in the same manner that notice is required to be given of the settlement of the final account of the executor or administrator and petition for distribution. [L. '17, p. 694, § 182.]

§ 1553. Resistance of Application.

The executor, administrator, or any person interested in the estate may appear and resist the application; or any other heir, legatee, or devisee may make a similar application for himself. [L. '17, p. 694, § 183.]

§ 1554. Order Setting off Share of Estate—Bond to Secure Payment.

If, on the hearing of such petition or petitions, it appear to the court that the estate is but little in debt and that the shares of the parties applying may be allowed and set off to him or them without injury to the creditors of the estate, the court may make a decree establishing such petitioner or petitioners to be heirs or legatees or devisees and set off to him or them by a decree his or her portion of such estate: Provided, each one of them shall first execute and deliver to the executor or administrator a bond in such sum as may be designated by the court, and with sureties to be approved by the court, which bond shall be conditioned for the payment by the devisee or legatee or heir, whenever required, of his portion of the debts, expenses of administration, inheritance tax, allowance to the family and other obligations of the estate. [L. '17, p. 694, § 184.]

§ 1555. Costs.

The cost of the proceedings authorized by the preceding section shall be paid by the applicant, or if there be more than one, shall be equally apportioned among them. [L. '17, p. 695, § 185.]

§ 1556. Enforcing Repayment by Distributee.

Whenever any bond has been executed and delivered under the provisions of the preceding sections and the court shall determine that it is proper and necessary to require payment of any part of the money thereby secured, he may make an order requiring the payment and direct

the executor or administrator to take such proceedings as may be necessary to enforce such payments, and such executor or administrator may, if the court so order, institute suit on the said bond for the collection of such sums. [L. '17, p. 695, § 186.]

§ 1557. Advancements, Determination of.

All questions as to advancements made, or alleged to have been made, by the deceased to any heirs may be heard and determined by the court before any distribution is made as in this act provided and the same shall be specified in the decree of distribution. [L. '17, p. 695, § 187.]

XXI.

SPECIFIC PERFORMANCE OF DECEDENT'S CONTRACT.

§ 1558. Order for Conveyance.

If any person, who is bound by contract, in writing, to convey any real property, shall die before making the conveyance, the superior court of the county in which the estate is being administered, may upon application of the executor or administrator, without notice, make an order authorizing and directing the executor or administrator to convey such real property to the person entitled thereto. [L. '17, p. 695, § 188.]

A similar section was not impliedly repealed by section 1366, supra: *Griggs Land Co. v. Smith*, 46 Wash. 185, 89 Pac. 477.

A similar act did not abridge the equitable jurisdiction of courts to enforce specific performance in such cases against

the heir: *Christ Church v. Beach*, 7 Wash. 65, 33 Pac. 1053.

Contracts of Decedent: See *Remington's Digest*, Ex. & Ad., § 49; *Sander-Boman Real Estate Co. v. Yesler's Estate*, 2 Wash. 429, 27 Pac. 269; *Hyde v. Heller*, 10 Wash. 586, 39 Pac. 249; *Richardson v. Harkness*, 59 Wash. 474, 110 Pac. 9.

§ 1559. Petition—Notice to Executor.

If the executor or administrator fail to make such application, then any person claiming to be entitled to such conveyance under such contract, may present a petition setting forth the facts upon which such claim is predicated, and the court, or the judge thereof, shall make an order appointing a time for hearing such petition, and shall also order notice thereof and of the time of the hearing to be personally served upon the executor or administrator, by delivery to him of a copy of the same, together with a copy of the petition. If personal service cannot be had upon the executor or administrator, such service shall be made as the court may direct. [L. '17, p. 696, § 189.]

§ 1560. Hearing.

At the time appointed for such hearing, or at such other time as the same may be adjourned to, upon proof of service of the notice as herein provided, the court shall proceed to a hearing and determine the matter. [L. '17, p. 696, § 190.]

§ 1561. Conveyance Under Order of Court.

A conveyance executed under the provisions of this act shall so refer to the order authorizing the conveyance that the same may be readily found, but need not recite the record in the case generally, and

the conveyance made in pursuance of such order shall pass to the grantee all the estate, right, title and interest contracted to be conveyed by the deceased, as fully as if the contracting party himself were still living and executed the conveyance in pursuance of such contract. [L. '17, p. 696, § 191.]

§ 1562. Certified Copy of Order—Filing.

A certified copy of the order shall be recorded with the deed in the office of the auditor of the county where the lands are, and shall be conclusive evidence of the correctness of the proceedings and of the authority of the executor or administrator to make such conveyance. [L. '17, p. 696, § 192.]

§ 1563. Actions in Case of Death of Person Entitled.

If the person to whom the conveyance was to be made shall die before the commencement of the proceedings according to the provisions of this act or before the completion of the conveyance, any person who would have been entitled to the conveyance under him, as heir, devisee, or otherwise, in case the conveyance had been made according to the terms of the contract, or the executor or administrator of such deceased person, for the benefit of persons entitled, may commence such proceedings, or prosecute the same if already commenced; and the conveyance shall be so made as to vest the estate in the persons who would have been entitled to it, or in the executor or administrator for their benefit. [L. '17, p. 696, § 193.]

§ 1564. Depositions of Witnesses.

The testimony of witnesses concerning the claim may be taken by deposition whenever the deposition of such witnesses might be taken to be used in the trial of a civil action. The notice of the time and place of taking such deposition, and the manner of such taking, shall be governed as is provided for in civil actions. [L. '17, p. 697, § 194.]

XXII.

APPOINTMENT OF GUARDIANS FOR MINORS, INSANE AND MENTALLY INCOMPETENT PERSONS.

§ 1565. Authority to Appoint Guardians.

The superior court of each county shall have power to appoint guardians for the persons and estates, or either thereof, of minors, insane and mentally incompetent persons resident of the county, and guardians for the estates of all such persons who are nonresidents of the state but who have property in such county needing care and attention. [L. '17, p. 697, § 195.]

Cited in 113 Wash. 147.

Jurisdiction of Courts: See Remington's Digest, Guard. & W., § 1; Wells, In re, 60 Wash. 518, 111 Pac. 778.

For text treatment of "Guardian and Ward," see 12 B. C. L. 1101.

Right of infant to select his own guardian. Ann. Cas. 1912C, 477.

§ 1566. Qualifications.

Guardians shall have the same qualifications as executors and administrators except that a nonresident, otherwise qualified, may be guardian of the estate in this state of a nonresident ward. [L. '17, p. 697, § 196.]

Religious belief as affecting qualification of person as guardian. *Ann. Cas.* 1915C, 361.

§ 1567. Petition—Notice—Consent of Minor—Foreign Guardian.

When a petition duly verified is presented to the superior court, showing that a person resident of the county where the petition is filed is a minor or is insane or mentally incompetent and needs the care and attention of a guardian, or that such person has property in the county needing care and attention of a guardian, or showing that such minor, insane or mentally incompetent person is a nonresident of the state and has property in the county needing care and attention of a guardian, and praying for appointment of a guardian for the person and property, or either, of such minor, insane or mentally incompetent person, the court shall thereupon make an order setting a time for the hearing of such petition and directing the clerk of the court to issue a notice stating that such petition has been filed and the time and place of hearing thereof and that all persons interested shall appear at such time and place and show cause why a guardian should not be appointed for the person and estate, or either thereof, of such minor, insane or mentally incompetent person: Provided, however, if such petition be made by a parent asking the appointment of himself as guardian of his minor child under the age of fourteen years, or, if a petition be accompanied by the written consent of a minor over the age of fourteen years, consenting to the appointment of the guardian asked for, or should a minor, insane or mentally incompetent person be a nonresident of the state and the petition be by any foreign guardian of such minor, insane or mentally incompetent person, then the court may at once upon presentation of such petition, and without notice of hearing thereof, appoint such guardian. [L. '17, p. 697, § 197.]

Cited in 113 Wash. 147.

Proceedings—Conflicting Applications:

See Remington's Digest, Guard. & W., § 3; Reed v. Brown, 36 Wash. 130, 78 Pac. 783; Russner v. McMillan, 37 Wash. 416, 79 Pac. 988.

See, also, Hogen, In re, 104 Wash. 265, 176 Pac. 339.

—Persons Who may be Appointed:

See Remington's Digest, Ins. Per., § 9; Sall, In re, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885; Martenson, In re, 77 Wash. 36, 137 Pac. 340.

Upon the mental incompetency of the husband, the wife should be appointed guardian of the community property owned by them; and it is an abuse of discretion to refuse her petition and appoint a stranger, where the property consisted of a ranch yielding a rental income, she had for several years largely borne the burden of its management and

was of fair business ability: Wood, In re, 110 Wash. 630, 188 Pac. 787.

The appointment of a mother as guardian of minor children upon the death of the father is proper where she was a suitable and proper person and there was no showing to the contrary: Hogen, In re, 104 Wash. 265, 176 Pac. 339.

Where a father left his property to trustees for the benefit of minor children until they became of age, no guardian of their estate can be appointed, since the record discloses no estate belonging to the minors: Hogen, In re, 104 Wash. 265, 176 Pac. 339.

GUARDIANSHIP OF INSANE: See Remington's Digest, Ins. Per., §§ 6, 7. **Nature and Grounds:** Wetmore's Guardianship, In re, 6 Wash. 271, 33 Pac. 615. **Jurisdiction of Courts:** Wetmore's Guardianship, In re, 6 Wash. 271, 33 Pac. 615; Donaldson v. Winningham, 48 Wash. 374,

93 Pac. 534, 125 Am. St. Rep. 937; Sall, In re, 59 Wash. 539, 110 Pac. 32, 626, 140 Am. St. Rep. 885; Stewart, In re, 85 Wash. 190, 147 Pac. 1153.

Persons Who may be Appointed: See Remington's Digest, Guard. & W., § 2; Lovell v. House of the Good Shepherd, 9 Wash. 419, 37 Pac. 660, 43 Am. St. Rep. 839; Willet v. Warren, 34 Wash. 647, 76 Pac. 273; Russner v. McMillan, 37 Wash. 416, 79 Pac. 988; Masterson's Estate, In re, 45 Wash. 48, 87 Pac. 1047, 122 Am. St. Rep. 886.

See, also, Hogen, In re, 104 Wash. 265, 176 Pac. 339.

DISABILITIES, IN GENERAL: See Remington's Digest, Ins. Per., §§ 1—5.

§ 1. Who are Incompetent: Wetmore's Guardianship, In re, 6 Wash. 271, 33 Pac. 615; Knapp v. Order of Pendo, 36 Wash. 601, 79 Pac. 209.

§ 2. Evidence of Incompetency—Presumption as to Continuance of Condition: Brown, In re, 39 Wash. 160, 81 Pac. 552,

109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540.

§ 3. — Admissibility in General: Blanton v. State, 1 Wash. 265, 24 Pac. 439; State v. Brooks, 4 Wash. 328, 30 Pac. 147; Clum v. Barkley, 20 Wash. 103, 54 Pac. 962; Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489.

§ 4. — Sufficiency of Evidence: Huntington v. Love, 56 Wash. 674, 106 Pac. 185; Ervay, In re, 64 Wash. 138, 116 Pac. 591; Frank v. Switchmen's Union of North America, 87 Wash. 634, 152 Pac. 512; Bayer's Estate, In re, 101 Wash. 694, 172 Pac. 842.

See, also, Jorgenson v. Winter, 69 Wash. 573, 125 Pac. 957.

See, also, Bayer's Estate, In re, 111 Wash. 276, 190 Pac. 323.

§ 5. Restoration to Sanity: Jorgenson v. Winter, 69 Wash. 573, 125 Pac. 957; State ex rel. Martin v. Superior Court, 101 Wash. 81, 172 Pac. 257.

See, also, State ex rel. Thomson v. Clifford, 106 Wash. 16, 179 Pac. 90.

§ 1568. Service of Notice.

If the petition be with reference to the appointment of any guardian mentioned in the preceding section, except guardians for the property of nonresidents of the state, then the notice of hearing provided for in the preceding section shall be personally served upon the person having the custody, care and control of such minor, insane or mentally incompetent person, or the person with whom such minor, insane or mentally incompetent person resides, and if such minor, insane, or mentally incompetent person be over the age of fourteen years, then such notice shall be personally served upon such minor, insane or mentally incompetent person also. If such minor, insane or mentally incompetent person be in the care, custody or control of any officer or institution, then such notice shall be served upon such officer or head of such institution. The notice herein provided for shall be served at least ten days prior to the time set for such hearing, and proof, as in civil actions provided, of such service shall be made and filed in the proceedings. [L. '17, p. 698, § 198.]

Cited in 113 Wash. 147.

— Notice and Record: See Remington's Digest, Guard. & W., § 4; State ex rel. Lowary v. Superior Court, 41 Wash. 450, 83 Pac. 726.

See, also, Lyons v. McElroy, 104 Wash.

481, 177 Pac. 312; Mayer v. Rice, 113 Wash. 144, 193 Pac. 723.

Validity of appointment of guardian for infant without service of process on, or notice to, latter. 1 A. L. R. 919.

§ 1569. Service by Publication—Appointment by Court.

If such petition be for the appointment of a guardian to the property of any minor, insane or mentally incompetent person, who resides without the state of Washington, then the petitioner shall make an affidavit stating the fact of such nonresidence, and unless the petitioner be a nonresident guardian, the notice hereinbefore provided for shall be served by publication in some newspaper printed and of general circulation in the

county where the petition is filed, and such publication shall be for once a week for not less than three successive weeks prior to the time set for such hearing, and proof of such publication shall be made and filed as in other cases. At the time fixed for such hearing, if the court be satisfied that the publication has been made, it may proceed to the hearing and to the appointment of the guardian. [L. '17, p. 699, § 199.]

§ 1570. Substitute Notice.

In all cases for the appointment of guardian where the notice cannot be given as in this act provided, the court may require such notice as to it may seem right and proper and take such proceedings as it shall determine upon with reference to the appointment of such guardian. [L. '17, p. 699, § 200.]

Cited in 113 Wash. 148.

§ 1571. Representation by Prosecuting Attorney.

Before the hearing, the petition or a copy thereof shall be submitted to the prosecuting attorney, whose duty it shall be to appear for such minor, insane or incompetent person at such hearing: Provided, however, it shall not be necessary for the prosecuting attorney to appear if such person for whom a guardian is to be appointed, be represented in the proceeding by any other attorney. [L. '17, p. 699, § 201.]

Cited in 113 Wash. 147.

XXIII.

POWERS AND DUTIES OF GUARDIANS OF MINORS, INSANE OR MENTALLY INCOMPETENT PERSONS OR THEIR ESTATES.

§ 1572. Guardians Under Court Control—Legal Age.

Guardians herein provided for shall at all times be under the general direction and control of the court making the appointment. For the purposes of this act, males shall be of full and legal age when they shall be twenty-one years old, and females shall be deemed of full and legal age when they are eighteen years old or at any age under eighteen, when, with the consent of the parent or guardian, or the person under whose care or government they may be, they shall have been legally married. [L. '17, p. 699, § 202.]

§ 1573. Oath and Bond of Guardian—Successive Recoveries on Bond.

Before letters of guardianship are issued, each guardian shall take and subscribe an oath and file a bond, with sureties to be approved by the court, payable to the state of Washington, in such sum as the court may fix, and such bond shall be conditioned substantially as follows:

The condition of this obligation is such, that if the above bound A. B., who has been appointed guardian for C. D., shall faithfully discharge the office and trust of such guardian according to law and shall render a fair and just account of his guardianship to the superior court for the county of —, from time to time as he shall thereto be required by such court, and comply with all orders of the court, lawfully made, relative to the goods, chattels, moneys, care, management and education of such

minor, insane or mentally incompetent person, or his or her property, and render and pay to such minor, insane or mentally incompetent person all moneys, goods, chattels, title papers and effects which may come into the hands or possession of such guardian, at such time and in such manner as the court may order or adjudge, then this obligation shall be void, otherwise to be and remain in full force and effect.

The said bond shall be for the use of such minor, insane or mentally incompetent person, and shall not become void upon the first recovery, but may be put in suit from time to time against all or any one of the obligors, in the name and for the use and benefit of any person entitled by the breach thereof, until the whole penalty shall be recovered thereon. The court may require an additional bond whenever for any reason it may appear to the court that such additional bond should be given. [L. '17, p. 700, § 203.]

BONDS.—The giving of a bond is a condition precedent to the appointment of a guardian: *Vanhorn v. Nestors*, 99 Wash. 328, 169 Pac. 807.

Actions on Guardian's Bonds: See Remington's Digest, Guard. & W., § 33; *Mackall, In re*, 60 Wash. 655, 111 Pac. 884.

Liabilities on Guardianship Bonds: See Remington's Digest, Ins. Per., § 12; *Dickman v. Strobach*, 26 Wash. 558, 67 Pac. 224.

Liabilities on Bonds for Sale: See Remington's Digest, Guard. & W., § 15; *Dickman v. Strobach*, 26 Wash. 558, 67 Pac. 224.

Necessity of bond to make guardian's acts valid. 33 L. R. A. 759.

Running of statute of limitations against action on guardian's bond. *Ann. Cas.* 1916A, 170; 47 L. R. A. (N. S.) 460.

Liability of sureties on guardian's bond for defalcation prior to execution thereof. 4 *Ann. Cas.* 345; 39 L. R. A. (N. S.) 961.

Judgment against guardian as evidence against surety on official bond. 9 *Ann. Cas.* 156; *Ann. Cas.* 1915D, 404; 52 L. R. A. 187; 40 L. R. A. (N. S.) 417; L. R. A. 1918E, 818.

Penalty as limit of liability on guardian's bond. 55 L. R. A. 392.

§ 1574. What Law Governs.

All the provisions of this act relative to bonds given by executors and administrators shall apply to bonds given by guardians. [L. '17, p. 701, § 204.]

§ 1575. Inventory—Accounts—Payment of Debts—Education of Ward.

It shall be the duty of the guardian of any estate:

(1) To make out and file, within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same, and failing so to do, it shall be the duty of the court to remove him and appoint a successor.

(2) To manage the estate for the best interest of his ward.

(3) To render on oath to the proper court an account of his receipts and of his expenditures, with vouchers therefor, at least once in every two years, and whenever cited to do so, and failing so to do, he shall receive no allowances for services, and be liable to said ward on his bond in damages for ten per cent. of the whole amount of the estate, both real and personal in his hands belonging to such ward.

(4) At the expiration of his trust fully to account for and pay over to the proper person all the estate of said ward remaining in his hands.

(5) To pay all just debts due from such ward out of the estate in his hands, and to collect all debts and demands due such ward, and in case of doubtful debts, to compound the same, and to appear for and defend, or cause to be defended, all suits against such ward.

(6) When any ward has no father or mother, or such father or mother is unable or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify. [L. 17, p. 701, § 205.]

CUSTODY AND CARE OF WARD'S PERSON AND ESTATE: See Remington's Digest, Guard. & W., §§ 5—9-1.

§ 5. Management of Estate—Real Property and Interests Therein: Terry v. Sicade, 37 Wash. 249, 79 Pac. 789.

§ 7. Contracts—Services: Schulteis v. Nash, 27 Wash. 250, 67 Pac. 707.

§ 8. Expenditures—Taxes: Burgert v. Caroline, 31 Wash. 62, 71 Pac. 724, 96 Am. St. Rep. 889.

§ 9. Ratification of Unauthorized Acts: Brazee v. Schofield, 2 W. T. 209, 3 Pac. 265.

§ 9-1. Negligence: Prince v. Mottman, 84 Wash. 287, 146 Pac. 841.

See, also, Jiskra's Estate, In re, 108 Wash. 187, 182 Pac. 961.

ACCOUNTING AND SETTLEMENT: See Remington's Digest, Guard. & W., §§ 20—30.

§ 20. Duty to Account in General: Sroufe's Estates, In re, 74 Wash. 639, 134 Pac. 471.

§ 21. Property to be Included: Williamson, In re, 75 Wash. 353, 134 Pac. 1066; Anderson, In re, 97 Wash. 688, 167 Pac. 71.

§ 22. Property Subject to Charge: Guardianship of Hill's Heirs, In re, 8 Wash. 330, 35 Pac. 1071.

§ 23. Proceedings for Final Settlement: Meeker v. Mettler, 50 Wash. 473, 97 Pac. 507.

§ 24. Actions for Accounting: Ong v. Whipple, 3 W. T. 233, 3 Pac. 898; Wickham v. Sprague, 18 Wash. 466, 51 Pac. 1055; Smith v. Kent Lumber Co., 78 Wash. 278, 138 Pac. 879.

§ 25. Credits: Guardianship of Hill's Heirs, In re, 8 Wash. 330, 35 Pac. 1071.

§ 26. Order or Decree: Meeker v. Mettler, 50 Wash. 473, 97 Pac. 507.

§ 27. Opening or Vacating: Sroufe's Estates, In re, 74 Wash. 639, 134 Pac. 471.

§ 28. Review: Bayer, In re, 80 Wash. 340, 141 Pac. 682.

§ 29. Costs and Expenses: Williamson, In re, 75 Wash. 353, 134 Pac. 1066.

§ 30. Compensation and Liabilities: Anderson, In re, 97 Wash. 688, 167 Pac. 71.

See, also, Jiskra's Estate, In re, 108 Wash. 190, 182 Pac. 959.

A guardian may employ an attorney and contract to pay him a contingent fee under Rem. Code, §§ 1636, 1637: Schulteis v. Nash, 27 Wash. 260, 67 Pac. 707.

Duties and Accounting by Guardian: See Remington's Digest, Ins. Per., § 10; Bayer, In re, 80 Wash. 340, 141 Pac. 682; Eisenhower v. Vaughn, 95 Wash. 256, 163 Pac. 758.

A guardian for an insane person is liable for money lost through the failure of a bank where, by a specific order, he was directed to invest the money upon real estate security to be approved by the court, and without such approval he invested it in certificates of deposit of such bank, where it remained until the bank failed; and it was immaterial that the trial judge was orally informed of such investment: Jiskra's Estate, In re, 108 Wash. 187, 182 Pac. 961.

Where a guardian for an insane person was ordered to invest moneys collected for the current year in certificates of deposit of a certain bank, which was a bank of good repute, and the next year was ordered to invest collections in certificates of deposit without specifying the bank, he was justified in considering the order as a continuing one and in investing the funds in the same bank, and is not liable for the loss of the funds through failure of the bank: Jiskra's Estate, In re, 108 Wash. 190, 182 Pac. 959.

ACTIONS: See Remington's Digest, Guard. & W., §§ 16—19.

§ 16. In General: Mattson v. Mattson, 29 Wash. 417, 69 Pac. 1087.

§ 18. Pleading: Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

§ 19. Appeal and Error: Hill's Heirs, In re, 7 Wash. 421, 35 Pac. 131; South Bend Land Co. v. Denio, 7 Wash. 303, 35 Pac. 64.

ACTIONS: See Remington's Digest, Ins. Per., §§ 23—29. **Capacity to Sue and be Sued, in General:** Townsend v. Price, 19 Wash. 415, 53 Pac. 668.

§ 24. Parties and Defenses: Stewart v. Stewart, 85 Wash. 202, 147 Pac. 1157; United States Fid. & Guar. Co. v. Howell, 74 Wash. 596, 134 Pac. 490; Clough v. Monro, 86 Wash. 507, 150 Pac.

1190; *Whitaker v. Ellis*, 102 Wash. 43, 172 Pac. 881.

§ 26. **Process:** *Townsend v. Price*, 19 Wash. 415, 53 Pac. 686; *United States Fidelity & Guaranty Co. v. Howell*, 74 Wash. 596, 134 Pac. 490; *Clough v. Monro*, 86 Wash. 507, 150 Pac. 1190.

§ 27. **Judgment:** *Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

§ 28. — **Collateral Attack:** *Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

§ 29. **Execution and Enforcement of Judgment:** *Pollock v. Horn*, 13 Wash. 626, 43 Pac. 885, 52 Am. St. Rep. 66.

Duty of guardian to account with respect to transactions after ward's majority.. 19 *Ann. Cas.* 509.

Limitation of actions on suits to, compel guardian to account. *Ann. Cas.* 1917A, 648; 47 *L. R. A. (N. S.)* 451.

Settlement between guardian and ward out of court. *L. R. A.* 1916E, 863.

Right of guardian to expend principal of ward's estate for maintenance and support. 5 *A. L. R.* 632.

§ 1576. Representation of Ward—Compromises.

Guardians of minors, insane or mentally incompetent persons, or their property, shall have power and authority to represent their wards in all matters, and may sue and be sued as such guardian, and such wards shall be bound by any compromise or settlement made by such guardian: Provided, the court shall have ordered or approved such action of the guardian. Before making any such compromise or settlement, the guardian shall file with the court which appointed him a petition setting out the nature of the suit, claim or dispute, together with the reasons for settling or compromising the same, and the court, either with or without notice of hearing, may make such order on such petition as shall appear proper. [L. '17, p. 701, § 206.]

An order entered without notice, authorizing a guardian to compromise a suit instituted by the ward after he became of age, is void, under Rem. Code, §§ 1631 and 1636, providing that the trust expires when the ward becomes twenty-one, and making it the guardian's duty to then

account for all the estate remaining in his hands: *Lyons v. McElroy*, 104 Wash. 481, 177 Pac. 312.

Right of guardian to compromise ward's cause of action. 17 *Ann. Cas.* 609; 21 *L. R. A. (N. S.)* 338; *L. R. A.* 1918A, 697.

§ 1577. Action Against Estate—Rejection of Claim.

No holder of a claim, demand or judgment against an estate of a person under guardianship shall maintain an action thereon or enforce same, unless the claim, demand or judgment shall have been first presented to such guardian and by him rejected in whole or in part. A failure or neglect to allow a claim for thirty days after the same is presented shall be deemed a rejection thereof. [L. '17, p. 702, § 207.]

§ 1578. Judgments—Rank as Claims.

No judgment entered against such guardian or the estate or person of any such minor, insane or mentally incompetent person, except for the foreclosure of a mortgage or other lien, shall be a lien against or upon the estate of such minor, insane or mentally incompetent person, but such judgment shall be presented and paid as other claims of the same class or grade. [L. '17, p. 702, § 208.]

§ 1579. Removal or Death of Guardians—Delivery of Estate to Successors.

The court in all cases shall have power to remove guardians for good and sufficient reasons, which shall be entered of record, and to appoint others in

their place or in the place of those who may die, who shall give bond and security for the faithful discharge of their duties as heretofore prescribed; and when any guardian shall be removed or die, and a successor be appointed, the court shall have power to compel such guardian removed to deliver up to such successor all goods, chattels, moneys, title papers, or other effects belonging to such minor, insane or mentally incompetent person, which may be in the possession of such guardian so removed, or of the executors or administrators of a deceased guardian, or in the possession of any other person or persons, and upon failure, to commit the party offending to prison, until he, she, or they comply with the order of the court. [L. '17, p. 702. § 209.]

A guardianship of an insane ward is terminated by the death of his ward and the appointment of an administrator, under this section, and the estate passes to the control of the administrator: *Eisenhower v. Vaughn*, 95 Wash. 256, 163 Pac. 758.

Action to Vacate: See *Remington's Digest*, Ins. Per., § 11; *Stewart, In re*, 85 Wash. 190, 147 Pac. 1153.

Removal of guardian as matter resting in discretion of court. *Ann. Cas.* 1912B, 977.

§ 1580. Testamentary Guardians.

When either parent is deceased, the surviving parent of any minor child may, by his last will in writing appoint a guardian or guardians for his minor child, whether born at the time of making such will or afterwards, to continue during the minority of such child, or for any less time, and every such testamentary guardian shall give bond in like manner and with like conditions as hereinbefore required, and he shall have the same powers and perform the same duties with regard to the person and estate of the ward as a guardian appointed as aforesaid. [L. '17, p. 703, § 210.]

Cited in 104 Wash. 267.

The act of 1860, Rem. Code, § 1643, providing that the father may by will appoint a guardian for his minor children, was repealed by the act of 1879, Rem. Code, § 6907, providing that, upon

the father's death, the mother shall come into as complete control of the children as the father does in case of the mother's death; and makes such a provision in a father's will void: *Hogen, In re*, 109 Wash. 265, 176 Pac. 339.

§ 1581. Guardian ad Litem.

Nothing contained in this chapter shall affect or impair the power of any court to appoint a guardian to defend the interests of any minor, insane or mentally incompetent person interested in any suit or matter pending therein, or to commence and prosecute any suit in his behalf. [L. '17, p. 703, § 211.]

Guardian ad Litem: See *Remington's Digest*, Infants, §§ 20, 21. **Appointment and Qualification:** *Shannon v. Consolidated Tiger etc. Mining Co.*, 24 Wash. 119, 64 Pac. 169; *Kongsbach v. Casey*, 66 Wash. 643, 120 Pac. 108; *State ex rel. Barnard v. Superior Court*, 74 Wash. 559, 134 Pac. 172. **Rights and Powers:** *State ex rel. Lane v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N. S.) 72; *Plummer v. Northern Pac. R. Co.*, 98 Wash. 67, 167 Pac. 73.

ACTIONS BY GUARDIAN AD LITEM: See *Remington's Digest*, Infants, §§ 17—

19, 24—26. **Capacity to Sue and be Sued in General:** *Hammer v. Caine*, 47 Wash. 672, 92 Pac. 441.

§ 18. **Joinder or Intervention in Actions by Others:** *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822.

§ 19. **Guardian ad Litem or Next Friend—In General:** *Mason v. McLean*, 6 Wash. 31, 32 Pac. 1006; *Donald v. Ballard*, 34 Wash. 576, 76 Pac. 80.

§ 24. **Appearance and Representation by Attorney:** *State ex rel. Lane v. Ballinger*, 41 Wash. 23, 82 Pac. 1018, 3 L.

R. A. (N. S.) 72; *Ponti v. Hoffman*, 87 Wash. 137, 151 Pac. 249.

§ 25. **Pleading:** *Blumauer v. Clock*, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966.

§ 26. **Evidence—In General:** *Miller v. Pacific Coast Condensed Milk Co.*, 65 Wash. 518, 118 Pac. 627.

§ 1582. Sale, Lease or Mortgage of Property.

Whenever it shall appear to the satisfaction of a court by the petition of any guardian, that it is necessary or proper to sell, lease or mortgage any of the real or personal property of the estate of such ward for the purpose of paying debts or for the care, support and education of such ward, or to redeem any property of such ward's estate covered by mortgage or other lien, or for the purpose of making any investments, or for any other purpose which to the court may seem right and proper, the court may make an order directing such sale, lease or mortgage of such part or parts of the real or personal property as shall to the court seem proper. [L. '17, p. 703, § 212.]

Cited in 110 Wash. 634.

SALES AND CONVEYANCES UNDER ORDER OF COURT: See *Remington's Digest*, Guard. & W., §§ 10, 11. **Sale—Notice:** *Brazee v. Schofield*, 2 W. T. 209, 3 Pac. 265.

§ 11. — **Requisites and Validity in General:** *Dormitzer v. German Sav. & Loan Soc.*, 23 Wash. 132, 62 Pac. 862; *Vanhorn v. Nestoss*, 99 Wash. 328, 169 Pac. 807.

A guardian's deed of real estate without any order of court is a nullity: *Palmer v. Abrahams*, 55 Wash. 352, 104 Pac. 648.

Sale or Mortgage Under Order of Court: See *Remington's Digest*, Infants, §§ 10—12; *Ball v. Clothier*, 34 Wash. 299, 75 Pac. 1099; *Wilson v. Hubbard*, 39 Wash. 671, 82 Pac. 154; *Gravelle v.*

Canadian & American Mortgage etc. Co., 42 Wash. 457, 85 Pac. 36.

Sale Under Order of Court: See *Remington's Digest*, Ins. Per., § 17; *Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005; *Curry v. Wilson*, 45 Wash. 19, 87 Pac. 1065; *Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 534, 125 Am. St. Rep. 937.

Power of guardian to sell personalty of ward. *Ann. Cas.* 1916C, 334.

Power of guardian to make lease of ward's real estate. *Ann. Cas.* 1917A, 1256; *L. R. A.* 1916F, 499.

Failure of guardian to give sale bond as affecting sale of ward's land. *Ann. Cas.* 1913D, 190; *Ann. Cas.* 1917A, 888; 33 *L. R. A.* 761.

Power of guardian to ratify conveyances of ward. *Ann. Cas.* 1912D, 704.

§ 1583. Petition—Contents.

Such application shall be by petition, verified by the oath of the guardian, and shall substantially set forth:

(1) The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian.

(2) The disposition of such personal estate.

(3) The amount and condition of the ward's personal estate, if any, dependent upon the settlement of any estate, or the execution of any trust.

(4) The annual income of the real estate of the ward.

(5) The amount of rent received and the application thereof.

(6) The proposed manner of reinvesting the proceeds of the sale, if asked for that purpose.

(7) Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the liquidation thereof.

(8) The age of the ward, where and with whom residing.

(9) All other facts connected with the estate and condition of the ward necessary to enable the court to fully understand the same. If there is no personal estate belonging to such ward, in possession or expectancy, and none has come into the hands of such guardian, and no rents have been received, the fact shall be stated in the application. [L. '17, p. 703, § 213.]

It is not error to refuse to entertain an application for the sale of an incompetent's ranch at the time of hearing applicant's petition for the appointment of a guardian, in view of the stat-

utory requirement of this section of a petition filed by the guardian asking for authority to make such sale: Wood, In re, 110 Wash. 630, 188 Pac. 787.

§ 1584. Law Governing Sales and Mortgages—Leases.

All the provisions of this act with reference to applications by administrators or executors for sales and mortgages by them, and notices concerning same, and all provisions of this act with reference to the report of such administrator or executor of sales and mortgages, and the confirmation thereof, shall be applicable to sales and mortgages made by any guardian mentioned in this act, but the court may order leases to be made upon such terms, conditions and notices as it may see fit. The provisions of section 1434 hereof shall not be applicable to guardianships. [L. '17, p. 704, § 214.]

§ 1585. Irregularities—Conclusiveness of Confirmation.

No sale by any guardian of real or personal property shall be void or be set aside or be attacked because of any irregularities whatsoever, and none of the steps leading up to such sale or the confirmation thereof shall be jurisdictional, and the confirmation by the court of any such sale shall be conclusive as to the regularity and legality of such sale or sales, and the passing of title after confirmation by the court shall vest an absolute title in the purchaser, and such instruments of transfer may not be attacked for any purpose or any reason, except for fraud. [L. '17, p. 704, § 215.]

Cited in 99 Wash. 337.

This section is not to be given a retroactive effect so as to cure jurisdictional defects in a sale made prior to the passage of the act; and sections 1592, 1593, infra, relating to past and future sales, clearly indicating that it is not to be given such retroactive effect: Vanhorn v. Nestoss, 99 Wash. 328, 169 Pac. 807.

The invalidity of a guardian's sale by reason of the failure of the guardian to give a bond is not a defect that is cured by Rem. Code, section 1693, providing that the sale shall not be avoided by reason of any "irregularity," as it is a jurisdictional defect, the statute providing that the giving of an additional bond when required is jurisdictional: Vanhorn v. Nestoss, 99 Wash. 328, 169 Pac. 807.

Rem. Code, § 1693, intended to cure defects and irregularities in administrator's sales, does not cure defects relating to the jurisdiction of the court over the per-

sons of the parties in interest, owing to the failure to give notice to the minor heirs or to appoint a guardian for them, the statutory requirements therefor being mandatory: Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

Defects Cured: See Remington's Digest, Ex. & Ad., § 132; Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605; Hazelton v. Bogardus, 8 Wash. 102, 35 Pac. 602; Ball v. Clothier, 34 Wash. 299, 75 Pac. 1099.

See, also, Remington's Digest, Guard. & W., §§ 12—14. **ratification and Curing Defects:** Brazee v. Schofield, 2 W. T. 209, 3 Pac. 265; Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862.

§ 13. — **Opening, Vacating or Setting Aside:** Dormitzer v. German Sav. & Loan Soc., 23 Wash. 132, 62 Pac. 862; Vanhorn v. Nestoss, 99 Wash. 328, 169 Pac. 807.

§ 14. **Rights and Liabilities of Purchasers:** Dormitzer v. German Sav. &

Loan Soc., 23 Wash. 132, 62 Pac. 862;
 Vanhorn v. Nestoss, 99 Wash. 328, 169
 Pac. 807.

Doctrine of caveat emptor as ap-
 plicable to sale by guardian. *Ann.*
Cas. 1917E, 225.

§ 1586. Compensation and Expenses.

Every guardian shall be allowed by the court, on settling his accounts, the amount of all reasonable expenses incurred in the execution of his trust, and also such compensation for his services and the services of his attorney, as the court shall deem reasonable. [L. '17, p. 705, § 216.]

Upon allowing the final account of a guardian, an allowance of \$25 attorney's fees, and \$25 as a fee for the guardian was proper, under Rem. Code, § 1652:

Jiskra's Estate, In re, 108 Wash. 190, 182 Pac. 959.

What is "necessary expense" in administering estate under guardianship. *Ann. Cas.* 1918D, 921.

§ 1587. Removal of Property of Nonresident Ward—Procedure.

When the guardian and ward are both nonresidents, and the ward is entitled to property in this state, which may be moved to another state or territory, such property may be removed to the state or territory in which such ward may reside, upon the application of the guardian to the judge of the superior court of the county in which the estate of the ward or the principal part thereof, may be, in the manner following: The guardian so applying must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and the said ward reside; that he has qualified as such according to the laws thereof; and must also give thirty days' notice to the resident executor, administrator, guardian, agent or trustee, if there be such, of the applications. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward. [L. '17, p. 705, § 217.]

FOREIGN GUARDIANSHIP: See Remington's Digest, Guard. & W., §§ 31, 32; **Custody and Disposition of Property:** Crosby, *In re*, 42 Wash. 366, 85 Pac. 1; **Actions by Foreign Guardians:** Crosby, *In re*, 42 Wash. 366, 85 Pac. 1.

Remington's Digest, Ins. Per., § 8; *Coleman v. Cravens*, 41 Wash. 1, 82 Pac. 1005; *Donaldson v. Winningham*, 62 Wash. 212, 113 Pac. 285; *Ervay, In re*, 64 Wash. 138, 116 Pac. 591; *Stewart, In re*, 85 Wash. 190, 147 Pac. 1153.

— **Proceedings for Appointment:** See

§ 1588. Notice to Creditors of Ward—Limitation on Claims.

Every guardian for any insane or mentally incompetent person shall, after appointment and qualification, cause notice of his appointment to be published in some newspaper printed in the county of his appointment, once a week for three consecutive weeks, and if there be no such paper published in such county, then by posting such notice for a like period at the courthouse of such county. The court by order may require such notice to be published or posted for an additional period. Such notice shall further call upon all creditors to serve their claims, duly verified, on such guardian or his attorney of record, and file with the clerk of the

court, with proof of service, within six months from the date of the first publication of such notice, otherwise such claims shall be barred. [L. '17, p. 705, § 218.]

XXIV.

GENERAL PROVISIONS.

§ 1589. Jurisdiction of Courts—Powers When Law Inapplicable.

It is the intention of this act that the courts mentioned shall have full and ample power and authority to administer and settle all estates of decedents, minors, insane and mentally incompetent persons in this act mentioned. If the provisions of this [act] with reference to the administration and settlement of such estates should in any cases and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled. [L. '17, p. 706, § 219.]

Cited in 113 Wash. 148, 150.

§ 1590. Exercise of Powers.

In exercising any of the jurisdiction or powers by this act given or intended to be given, the court is authorized to make, issue and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes not inconsistent with the provisions of this act, which may be considered proper or necessary in the exercise of such jurisdiction. [L. '17, p. 706, § 220.]

§ 1591. Appeals to Supreme Court.

Any interested party may appeal to the supreme court from any final order, judgment or decree of the court, and such appeals shall be in the manner and way provided by law for appeals in civil actions. [L. '17, p. 706, § 221.]

Cited in 112 Wash. 558.

§ 1592. Validation of Prior Probate Proceedings.

All probate proceedings heretofore conducted in this state, including sales and mortgages by executors, administrators and guardians, and all final settlements, made or had in conformity with the provisions of this act, or in conformity with the provisions of any prior law applicable thereto, are hereby declared valid. [L. '17, p. 707, § 222.]

The repealing clause (section 223) saved rights under notice to creditors in pending cases given under prior laws.

Sections 1593 to 1692, of Remington and Ballinger's Code, being part of the old Probate Code, are repealed by Laws 1917, p. 707, § 223.

Cited in 99 Wash. 338.

CHAPTER IV.

VALIDITY OF SALES OF ESTATES.

§ 1693. Sales not Void on Account of Irregularity.

In case of an action relating to any estate sold by an executor, administrator, or guardian, in which an heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be voided on account of any irregularity in the proceedings: Provided, it appears,—

1. That the executor, administrator, or guardian was ordered to make the sale by the probate or superior court having jurisdiction of the estate;

2. That he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order;

3. That he gave notice of the time and place of sale, as in the order and by law prescribed; and

4. That the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith. [L. '90, p. 82, § 2; 1 H. C., § 3066.]

Cited in 7 Wash. 380, 381; 8 Wash. 105; 23 Wash. 192; 27 Wash. 134; 34 Wash. 311, 312; 99 Wash. 334, 337.

§ 1695. Chapter Applies to Past as Well as Future Sales.

This chapter shall apply to sales heretofore as well as hereafter made, and all sales heretofore made in conformity with the provisions of this chapter are declared valid. [L. '90, p. 82, § 4; 1 H. C., § 3068.]

CHAPTER V.

ADOPTION OF CHILDREN.

§ 1696. Petition for Leave to Adopt.

Any inhabitant of this state, not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt and change the name if desired, of any child under the age of twenty-one years, but a written consent must be given to such adoption by the child, if of the age of fourteen years, and by each of his or her living parents who is not hopelessly insane or a confirmed drunkard. If there be no such parents, or if the parents be unknown, or shall have abandoned such child, or if such parents, or either of them, are hopelessly insane, or a confirmed drunkard, then by the legal guardian; if there be no such guardian, then by a discreet and suitable person appointed by said court to act in the proceedings as the next friend of such child: Provided, however, that if the parents are living separate and apart, the consent of both is not required, but such consent may be given by the parent having the care, custody and control of such child; and provided further, that either spouse may adopt a child of the other. [L. '05, p. 296, § 1, Cf. L. '75, pp. 110–112; L. '79, p. 136, § 1; Cd. '81, § 1667; 1 H. C., § 1418; L. '97, p. 46, § 1.]

Cited in 14 Wash. 246; 42 Wash. 414; 43 Wash. 189; 78 Wash. 579; 85 Wash. 619; 99 Wash. 415; 104 Wash. 584; 110 Wash. 43, 517; 113 Wash. 153.

Adoption is unknown to the common law; hence the statutory provisions must be strictly complied with, and an adoption cannot be sustained by mere presumptions:

Renton's Estate, In re, 10 Wash. 533, 39 Pac. 145.

Proceedings for Adoption: See Remington's Digest, Adoption, §§ 2—7.

§ 2. Persons Who may Adopt Others: Knight v. Gallaway, 42 Wash. 413, 85 Pac. 21.

§ 4. — Consent of Parties: James v. James, 35 Wash. 655, 77 Pac. 1082; State ex rel. Brook v. Wheeler, 43 Wash. 183, 86 Pac. 394; Beers' Adoption, In re, 78 Wash. 576, 139 Pac. 629; Potter, In re, 85 Wash. 617, 149 Pac. 23; Lind's Estate, In re, 90 Wash. 10, 155 Pac. 159; Lease, In re, 99 Wash. 413, 169 Pac. 816.

The written consent of a father to the filing of a petition for the adoption of his infant child as in effect consent to the adoption, where it further recites that he surrenders and gives the child to the adopting parents and relinquishes all right to it and to its services: Dingman, In re, 110 Wash. 513, 188 Pac. 755.

See, also, Force, In re, 113 Wash. 151, 193 Pac. 698.

A writing whereby the mother voluntarily gives up all claim to her infant child, then delivered to a foundling home, is sufficient consent to a subsequent adoption of the child, and obviates the necessity of notice to the mother under this

section: Rising, In re, 104 Wash. 581, 177 Pac. 351.

§ 5. — Notice: Beatty v. Davenport, 45 Wash. 555, 88 Pac. 1109, 122 Am. St. Rep. 937, 13 Ann. Cas. 585; Beers' Adoption, In re, 78 Wash. 576, 139 Pac. 629.

See, also, Rising, In re, 104 Wash. 581, 177 Pac. 351.

A divorcee, who came into the possession of a child in its infancy, and had no interest except to pay alimony awarded for its support, not being the father of the child, is not entitled to notice of proceedings for its adoption: Rising, In re, 104 Wash. 581, 177 Pac. 351.

Where a child has been declared a dependent child and made a ward of the juvenile department of the superior court, subsequent adoption proceedings in the same court are sufficient notice to the juvenile department, the knowledge of the judge hearing the matter being at least notice of the hearing to the other department: Rising, In re, 104 Wash. 581, 177 Pac. 351.

§ 6. Examination and Approval by Court: Wells, In re, 60 Wash. 518, 111 Pac. 778.

§ 7. Evidence of Adoption: Fields, In re, 56 Wash. 259, 105 Pac. 466.

§ 1697. Separate Examination of Wife.

If the petition be filed by husband and wife, the court shall examine the wife separate and apart from her husband, and shall refuse leave for such adoption, unless the court shall be satisfied, from such examination, that the wife, of her own free will and accord, desire such adoption. [L. '79 p. 136, § 2; Cd. '81, § 1668; 1 H. C., § 1419.]

§ 1698. Order Confirming Adoption.

Upon the compliance with the foregoing provisions, if the court shall be satisfied of the ability of the petitioner or petitioners to bring up and educate the child properly, having reference to the degree and condition of the child's parents, and shall be satisfied of the fitness and propriety of such adoption, the court shall make an order setting forth the facts and declaring that from that date such child, to all legal intents and purposes, is the child of the petitioner or petitioners, and that the name of the child is hereby changed. [L. '79, p. 136, § 3; Cd. '81, § 1669; 1 H. C., § 1420.]

Cited in 60 Wash. 520; 99 Wash. 417; 110 Wash. 46, 517, 520, 521.

Under sections 1696 and 1698, providing for the adoption of a minor by "any inhabitant of this state," and for an order of adoption "setting forth the facts," the failure of the order to set forth the jurisdictional facts does not render the order void, the requirement being merely directory and the superior court being a court of general jurisdiction: Dingman, In re, 110 Wash. 513, 188 Pac. 755.

Effect and Review: See Remington's Digest, Adoption, §§ 8—10. **Review:** Knight v. Gallaway, 42 Wash. 413, 85 Pac. 21; Wells, In re, 60 Wash. 518, 111 Pac. 778.

§ 9: Setting Aside or Revoking Adoption: Beers' Adoption, In re, 78 Wash. 576, 139 Pac. 629.

An order of adoption may be vacated for fraud, and is not subject to the rule in adversary proceedings that the fraud must be such as does not inhere in the

judgment: *Platt v. Magagnini*, 110 Wash. 39, 187 Pac. 716.

An heir of the adopted child may, subsequent to its death, make a direct attack for fraud upon the order of adoption where the court proceeded without jurisdiction: *Platt v. Magagnini*, 110 Wash. 39, 187 Pac. 716.

Under this section and the statute providing that "any inhabitant" of the state may petition for leave to adopt, the jurisdictional fact as to the petitioner's residence cannot be presumed where the petition did not recite, and the order did not find, that the adopting parents were inhabitants: *Platt v. Magagnini*, 110 Wash. 39, 187 Pac. 716.

Where, in dependency proceedings, a woman had been found to be a suitable

person to have custody of the dependent child, and later on obtaining a divorce she was again awarded its custody as a suitable person, an objection to adoption proceedings by her that a next friend should have been appointed to represent the infant on the determination of the fitness of the petitioner, is insufficient to warrant vacation of a decree of adoption: *Rising, In re*, 104 Wash. 581, 177 Pac. 351.

§ 10. Effect of Foreign Adoption on Property Rights of Surviving Husband or Wife: *James v. James*, 35 Wash. 650, 77 Pac. 1080; *James v. James*, 35 Wash. 655, 77 Pac. 1082.

Grounds for vacation of decree of adoption: 17 *Ann. Cas.* 548.

§ 1699. Effect of Adoption—Descent of Property.

By such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child and legal heir of his or her adopter or adopters, entitled to all rights and privileges and subject to all the obligations of a child of the adopter or adopters begotten in lawful wedlock: Provided, that on the decease of parents who have adopted a child or children under this chapter and the subsequent decease of such child or children without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child or children. [L. '79, p. 137, § 4; Cd. '81, § 1670; 1 H. C., § 1421.]

Cited in 38 Wash. 389; 45 Wash. 50, 51; 108 Wash. 309.

Inheritance by Adopted Children: See *Remington's Digest*, Adoption, § 11; *Van Brocklin v. Wood*, 38 Wash. 384, 80 Pac. 530.

Under this section, an adopted child has the right to inherit from a brother or sister by adoption, in view of a liberal construction of the statute: *Masterson's Estate, In re*, 108 Wash. 307, 183 Pac. 93.

There being no right of adoption at common law, an agreement for an adoption prior to the passage of the first territorial act authorizing adoptions in this state, is not valid to give the status of an heir under the laws of inheritance: *Wall v. McEnnery's Estate*, 105 Wash. 445, 178 Pac. 631.

Right of inheritance from adopted child as between natural parents and adoptive parents or their descendants. *Ann. Cas.* 1916C, 757.

Succession to estate inherited from foster-parent by adopted child who dies without issue. *Ann. Cas.* 1914D, 572; *Ann. Cas.* 1916C, 762; *Ann. Cas.* 1917C, 474.

Right of inheritance of child adopted under laws of another state. 16 *Ann. Cas.* 779; *Ann. Cas.* 1916B, 94; *Ann. Cas.* 1918B, 1028; 21 *L. R. A. (N. S.)* 679; 25 *L. R. A. (N. S.)* 1285; *L. R. A.* 1916A, 666.

Right of adopted child to inherit from other than adopting parent. 4 *Ann. Cas.* 881; 9 *Ann. Cas.* 780.

CHAPTER VI.

PROTECTION OF ORPHAN, HOMELESS, OR NEGLECTED CHILDREN.

§ 1700. Adoption by Incorporated Societies.

Any benevolent or charitable society incorporated under the laws of this state for the purpose of receiving, caring for or placing out for adoption, or improving the condition of orphan, homeless, neglected or abused

minor children of this state shall have authority to receive, control, and dispose of children under eighteen (18) years of age under the following provisions:

(a) When the father and mother or the person or persons legally entitled to act as guardian of the person of any minor child shall, in writing, surrender such child to the charge and custody of said society, such child shall thereafter be in the legal custody of such society for the purposes herein provided.

(b) In case of death or legal incapacity of a father or his abandonment or neglect to provide for his family, the mother shall have authority to make such surrender, and in case of the death or legal incapacity of a mother, or her abandonment of such child, then the father shall have authority to make such surrender.

(c) In all cases where the person or persons legally authorized to make such surrender are not known, any judge of superior court may cause a notice of hearing to be published in any newspaper of general circulation printed and published in the county, and if he deems it best for such orphan, homeless, neglected or abused child, he may surrender it to any benevolent or charitable society incorporated under the laws of Washington and having for its object the care of such children.

(d) When any child shall have been surrendered in accordance with any of the preceding clauses and such child shall have been accepted by such society, then, (but not otherwise), the rights of its natural parents or of the guardian of its person (if any) shall cease and such corporation shall become entitled to the custody of such child, and shall have authority to care for and educate such child or place it either temporarily or permanently in a suitable private home in such manner as shall best secure its welfare. Such corporation shall have authority when any such child has been surrendered to it in accordance with any of the preceding provisions, and it is still in its control, to consent to its adoption under the laws of Washington. The custody or control of any such child by any such corporation or by any other corporation, institution, society or person may be inquired into, and, in the discretion of the court, terminated at any time by the superior court of the county where the child may be, upon the complaint of any person, and a showing that such custody is not in the interest of the child. [L. '03, p. 58, § 1.]

See L. '99, pp. 9-12, repealed by this act, § 9.

Cited in 112 Wash. 263.

Proceedings for the adoption of a child held by, and upon the consent of, a charitable institution, as authorized by this section, are void as against the parents, where the institution had no right to the custody of the child: State ex rel. Le Brook v. Wheeler, 43 Wash. 183, 86 Pac. 394.

A preliminary order for the temporary custody of an abandoned child until notice could be given the mother and a hearing had, under this section, is no

defense to habeas corpus by the mother to recover possession of her child, where no process was served on her as required by the statute and no further proceedings were had or final order made: State ex rel. Stitt v. Reynolds, 60 Wash. 12, 110 Pac. 633.

Commitment of Child to Charitable Association: See Remington's Digest, Parent & C., §§ 5, 6; State ex rel. Le Brook v. Wheeler, 43 Wash. 183, 86 Pac. 394.

§ 1701. Issue of Warrant for Taking Child Into Custody—Proceedings.

Upon complaint of any person in writing other than an officer or agent of such society or corporation to any judge of the superior court giving the names and residences of the parents, guardian (if any) or the next of kin of such child, so far as known, and alleging that the father of such minor child is dead, or has abandoned his family or is an habitual drunkard or is a man of notoriously bad character, or is imprisoned for crime, or has grossly abused or neglected such child, and that the mother of such child is an habitual drunkard or imprisoned for crime, or an inmate of a house of ill-fame, or a woman of notoriously bad character or is dead, or has abandoned her family, or has grossly abused or neglected such child, and alleging that the welfare of such child requires that legal steps be taken to provide for its care and custody, a warrant shall issue directing the proper officer, to take such child into custody and care for or dispose of it as such judge shall direct, until a hearing can be had, such proceedings shall have precedence of other causes, of which hearing not less than five days' notice shall be given to such parents, guardian or next of kin and such judge shall hear the allegations of the complaint and all testimony offered for or against the same and determine whether in his judgment there is cause for a change in the care and custody of such child. If the judge shall decide to change the care and custody of such child, he may commit the child to the care and custody of any such benevolent society contemplated in this act which is willing to receive it, and such commitment shall carry with it the same powers and authority as above provided in case of voluntary surrender, or he may enter in such findings and transmit the papers and a transcript of his proceedings to the county commissioners of the county in which the case arises and surrender such child to the care and custody of such commissioners and it may be disposed of without further notice to the parents, guardian or next of kin. [L. '03, p. 60, § 2.]

Cited in 60 Wash. 15, 16.

§ 1702. County Charges—Surrender to Society.

When any minor is a county charge, the board of county commissioners, if they think the welfare of the child demands it, may surrender such child to the care and custody of any benevolent society or corporation without the consent of its parents unless within twenty days after the notice of the intention of such commissioners so to do, given in writing to parents, guardian or next of kin of such child so far as known, to said commissioners, such parents, guardian or next of kin shall provide for such child and relieve the county thereof and when any child has been so surrendered by the county commissioners, it may be disposed of as herein provided for the disposition of other children. [L. '03, p. 60, § 3.]

§ 1703. Investigation of Neglect—Duty of Police.

When any officer or agent of any such society shall request a police officer or other peace officer, to investigate or assist in the investigation of any alleged case of any such neglected or abused child, such officer

shall immediately make or assist in such investigation and if he deem it proper shall forthwith take such child into custody without warrant, taking such child and reporting such case at once to the judge of the superior court for such proceedings as may be proper under the provisions of this chapter. [L. '03, p. 61, § 4.]

§ 1704. Minor Convicted of Offense—Rights of Parent.

When any minor under eighteen years of age shall be convicted on any charge, the punishment for which may be imprisonment or confinement in the reform school, the judge of the superior court, if he finds that the good of such minor demands it, and such minor is an orphan, or a homeless, neglected or abused minor within the terms of this act, or is a county charge, or the parents or guardian of such minor consent thereto, may suspend sentence and surrender the custody of such minor to any society, as is contemplated in this act, when such society is willing to receive such minor, until such minor shall attain the age of majority, or for a term of years to be fixed in the order of surrender, and such society may find a home for such minor and surrender his custody to the person providing such home for the term fixed in said order of surrender, which surrender by the society shall be approved by an order of said court: Provided, that nothing in this section shall be held to affect the natural rights of said minor or of his parents or guardian, except in the matter of his custody: and provided further, that if said minor shall fail to conform to the order of court fixing his custody, he may be apprehended and brought before the court, and the court may sentence said minor as provided by law, or resurrender him as the court may deem best for the interests of said minor. [L. '03, p. 61, § 5.]

§ 1705. Society not to Act as Guardian.

Nothing in this chapter shall entitle any such society to act as guardian or to have control of the estate of any minor child. [L. '03, p. 62, § 6.]

§ 1706. Hearing on Habeas Corpus—Evidence.

Upon the hearing of any writ of habeas corpus for the custody of any such child, if it appears that such child has been surrendered to any such corporation under the provisions of this chapter, such surrender shall be taken as prima facie evidence that such child was legally and properly surrendered to such corporation and that such corporation is entitled to the custody and control of such child under the provisions of this chapter. [L. '03, p. 62, § 7.]

Cited in 60 Wash. 17.

On habeas corpus by a mother to recover custody of a child, held under temporary order in pending proceedings, this

section has no application; and the court should hear the habeas corpus proceedings on the merits: *State ex rel. Stitt v. Reynolds*, 60 Wash. 12, 110 Pac. 633.

§ 1707. County Charges—County to Pay Expenses.

The board of county commissioners shall pay the expenses of bringing the child before the court and caring for it pending a hearing under this act; when a child is surrendered to a benevolent society under

the provisions of this act by the superior court, the county shall pay such society a reasonable compensation for the temporary care of such child until it is placed in a family but not to exceed fifty (\$50) dollars in each case. No clerk, sheriff, police officer, member of the board of county commissioners or agent of any such society shall charge or be allowed to charge any costs whatever in these proceedings, except where a complaint shall be adjudged to be without sufficient cause and malicious, in which event all costs shall be taxed against the complainant: Provided, that the provisions of this section shall not apply to cases under section 1704.]L. '03, p. 62, § 8.]

CHAPTER VII.

HABITUAL DRUNKARDS.

§ 1708. Who may be Adjudged an Habitual Drunkard.

Any person addicted to the use of intoxicating liquors may, upon complaint thereof, or upon certificate of a justice of the peace, as hereinafter provided, be adjudged an habitual drunkard. [Cf. L. '79, p. 113, § 1; Cd. '81, § 1673; L. '83, p. 32, § 1; 1 H. C., § 2523.]

See *infra*, § 7348, action for injuries caused by intoxication.

§ 1709. Complaint, Who may Make.

Either the father, husband, mother, wife, son or daughter of any person addicted to the excessive use of intoxicating liquors or any person in the interest of the relative aggrieved, or of the general public, may make complaint to the superior court of the county, wherein such person so addicted resides, that the person complained of is an habitual drunkard, and that in consequence thereof, such person is squandering his earnings or property, or that he neglects his business, or that he abuses or maltreats his family, which complaint must be verified by the oath of the complainant to the effect that the same is true. And every justice of the peace in whose court any person shall have been convicted twice on a charge of being drunk, or drunk and disorderly, shall certify to the superior court of the county in which he resides, that said person has thus twice been convicted. [Cf. L. '79, p. 113, § 2; L. '81, p. 13, § 1; Cd. '81, § 1674; L. '83, p. 32, § 1; 1 H. C., § 2524.]

§ 1710. Summons—Hearing.

Upon filing of the complaint, duly verified, the superior judge shall cause a copy thereof to be served upon the accused forthwith, and shall summon him to appear and answer, giving at least ten days' notice; and if upon the hearing of the evidence the allegations of the complaint are sustained, or upon filing a certificate of a justice of the peace, as above provided, such judge shall, in open court, declare the accused to be an habitual drunkard, and shall cause the proceeding to be entered in full upon the records of the court. [Cf. L. '79, p. 114, § 3; L. '81, p. 13, § 2; Cd. '81, § 1672; L. '83, p. 32, § 1; 1 H. C., § 2525.]

§ 1711. Fees of Officers—Costs.

The same fees shall be allowed to the superior court, justice of the peace and the sheriff or constable, in all proceedings under the fore-

going section [§ 1710] of this chapter, as are allowed by law for like processes and services, and like fees for witnesses, as in civil cases before justice of the peace; and if the complaint is not sustained, the person making the complaint shall pay the costs; and in case the complaint is sustained, the person accused shall pay the costs. [Cf. L. '79, p. 114, § 4; L. '81, p. 13, § 3; Cd. '81, § 1673; L. '83, p. 32, § 1; 1 H. C., § 2526.]

§ 1712. Penalty for Selling Liquor to Habitual Drunkard.

Any person who shall sell or give any intoxicating liquors to any habitual drunkard, as defined in the foregoing section [§ 1708] of this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof, by any court having criminal jurisdiction, shall be fined in any sum not less than fifty dollars or more than three hundred dollars, or be imprisoned in the county jail not less than one or more than six months, at the discretion of the court. [L. '79, p. 114, § 5; Cd. '81, § 1674; 1 H. C., § 2527.]

§ 1713. Liability for Furnishing Liquor to Habitual Drunkard.

Any person who shall be injured in person or property or means of support by any habitual drunkard, as defined by this chapter, while in a state of intoxication, or in consequence of such intoxication, shall have a right of action in his or her own name, severally or jointly against any person or persons who shall, by selling or giving intoxicating liquors to such habitual drunkard, have caused his intoxication, in whole or in part, and such person selling or giving such intoxicating liquors as aforesaid shall be liable severally or jointly for all damages sustained, and the same may be recovered in a civil action. A married woman may bring such action in her own name, and all damages recovered by her shall inure to her separate use, and all damages recovered by a minor under this chapter shall be paid either to such minor or to such person in trust for him or her as the court may direct. [L. '79, p. 114, § 6; Cd. '81, § 1675; 1 H. C., § 2528.]

Compare §§ 7348-7350, civil remedies against liquor dealers.

§ 1714. List of Habitual Drunkards to be Posted.

It shall be the duty of the superior judge of each county to furnish a list of the names of all persons adjudged habitual drunkards, to all parties licensed to sell, by retail, intoxicating liquors in such county, and such retail dealer shall keep posted up in some conspicuous place in his place of business a list of such habitual drunkards. A person failing to keep such list so posted shall forfeit his license, and if he thereafter sells intoxicating liquors, he shall be punished as if selling without a license. [Cf. L. '81, p. 14, § 4; Cd. '81, § 1676; L. '83, p. 32, § 1; L. '86, p. 160, § 1; 1 H. C., § 2529.]

§ 1715. Order, How Vacated.

Any person so declared to be an habitual drunkard may, at any time after the expiration of two years from the time he was so declared to be such, by a petition addressed to the judge of the court in which he was so adjudged, have a hearing in such court, upon a day which shall be by such court set, which day shall not be more than ten

days after the filing of such petition in such court, which petition may contain a statement of facts tending to show the improved condition and habits of such petitioner and to establish his character for sobriety, and a prayer that the order on record so declaring him to be such habitual drunkard be vacated and he be released from the effects thereof; which petition shall be duly verified by the petitioner. And if upon the hearing of such petition, and the evidence in support thereof, it appear to the judge that such petitioner is entitled to have such record vacated and be so released, then he shall make an order so declaring that such record be vacated and annulled, and that the petitioner be thereafter released from the effects thereof. [L. '81, p. 14, § 4; Cd. '81, § 1677; 1 H. C., § 2530.]

CHAPTER VIII.

ESTATES OF ABSENTEES.

§ 1715-1. Petition—Notice—Hearing—Appointment of Trustee.

Whenever it shall be made to appear by petition to any judge of the superior court of any county that there is property in such county, either real or personal, that requires care and attention, or is in such a condition that it is a menace to the public health, safety or welfare, or that the custodian of such property by the owner thereof is either unable or unwilling to continue longer in the care and custody thereof, and that the owner of such property has absented himself from the county and that his whereabouts is unknown and cannot with reasonable diligence be ascertained, which petition shall state the name of the absent owner, his approximate age, his last known place of residence, the circumstances under which he left and the place to which he was going, if known, his business or occupation and his physical appearance and habits so far as known, the judge to whom such petition is presented shall set a time for hearing such petition not less than six weeks from the date of filing, and shall by order direct that a notice of such hearing be published for three successive weeks in a newspaper published in the county where such petition is filed and in such other counties and states as will in the judgment of the court be most likely to come to the attention of the absentee or of persons who may know his whereabouts, which notice shall state the object of the petition and the date of hearing, and set forth such facts and circumstances as in the judgment of the court will aid in identifying the absentee, and shall contain a request that all persons having knowledge concerning the absentee shall advise the court of the facts. If it shall appear at such hearing that the whereabouts of the absentee is unknown, but there is reason to believe that upon further investigation and inquiry he may be found, the judge may continue the hearing and order such inquiry and advertisement as will in his discretion be liable to disclose the whereabouts of the absentee, but when it shall appear to the judge at such hearing or any adjournment thereof that the whereabouts of the absentee cannot be ascertained, he shall appoint a suitable person resident of the county as trustee of such property, taking into consideration the character of the property and the fitness of such trustee to care for the same, preferring in such appointment the husband or wife of the ab-

sentee to his presumptive heirs, the presumptive heirs to kin more remote, the kin to strangers, and creditors to those who are not otherwise interested, provided they are fit persons to have the care and custody of the particular property in question and will accept the appointment and qualify as hereinafter provided. [L. '15, p. 132, § 1.]

Constitutionality of statutes providing for administration of estate of absentee.
4 L. R. A. (N. S.) 944.

§ 1715-2. Inventory and Appraisal—Bond.

The trustee so appointed shall make, subscribe and file in the office of the clerk of the court an oath for the faithful performance of his duties, and shall, within such time as may be fixed by the judge, prepare and file an inventory of such property, and the judge shall thereupon appoint three disinterested and qualified persons to appraise such property, and report their appraisal to the court within such time as the court may fix. Upon the coming in of the inventory and appraisal, the judge shall fix the amount of the bond to be given by the trustee, which bond shall in no case be less than the appraised value of the personal property and the annual rents and profits of the real property, and the trustee shall thereupon file with the clerk of the court a good and sufficient bond in the amount fixed and with surety to be approved by the court, conditioned for the faithful performance of his duties as trustee, and for accounting for such property, its rents, issues, profits and increase. [L. '15, p. 134, § 2.]

§ 1715-3. Reports of Trustee.

The trustee shall, at the expiration of one year from the date of his appointment and annually thereafter and at such times as the court may direct, make and file a report and account of his trusteeship, setting forth specifically the amounts received and expended and the conditions of the property. [L. '15, p. 134, § 3.]

§ 1715-4. Sale of Property—Application of Income.

If the property or any part thereof be personal property of a perishable nature or property likely to deteriorate in value, or if necessary to pay debts against the absentee which have been duly approved and allowed in the same form and manner as provided for the approving and allowing of claims against the estate of a deceased person the trustee may sell the same under order of the court so to do, at public or private sale, and upon such terms and notice as the court may direct, and shall hold the proceeds of such sale, after deducting the necessary expenses thereof, subject to the order of the court. The trustee is authorized and empowered to, by order of the court, expend the proceeds received from the sale of such property, and also the rents, issues and profits accruing therefrom in the care, maintenance and upkeep of the property, so long as the trusteeship shall continue, and the trustee shall receive out of such property such compensation for his services as may be fixed by the court. [L. '15, p. 134, § 4.]

§ 1715-5. Removal or Resignation of Trustee—Final Account.

The court shall have the power to remove or to accept the resignation of such trustee and appoint another in his stead. At the termination

of his trust, as hereinafter provided or in case of his resignation or removal, the trustee shall file a final account, which account shall be settled in the manner provided by law for settling the final accounts of administrators and guardians. [L. '15, p. 135, § 5.]

§ 1715-6. Period of Trusteeship.

Such trusteeship shall continue until such time as the owner of such property shall return or shall appoint a duly authorized agent or attorney in fact to care for such property, or until such time as the property shall be provisionally distributed to the presumptive heirs, or to the devisees and legatees of the absentee as hereinafter provided, or until such time as the property shall escheat to the state as hereinafter provided. [L. '15, p. 135, § 6.]

§ 1715-7. Distribution to Heirs—Notice of Hearing—Will.

Whenever the owner of such property shall have been absent from the county for the space of five years and his whereabouts are unknown and cannot with reasonable diligence be ascertained, his presumptive heirs at law may apply to the court for an order of provisional distribution of such property, and to be let into provisional possession thereof: Provided, that such provisional distribution may be made at any time prior to the expiration of five years, when it shall be made to appear to the satisfaction of the court that there are strong presumptions that the absentee is dead; and in determining the question of presumptive death, the court shall take into consideration the habits of the absentee, the motives of and the circumstances surrounding the absence, and the reasons which may have prevented the absentee from being heard of. Notice of hearing upon application for provisional distribution shall be published in like manner as notices for the appointment of trustees are published. If the absentee left a will in the possession of any person such person shall present such will at the time of hearing of the application for provisional distribution and if it shall be made to appear to the court that the absentee has left a will and the person in possession thereof shall fail to present it, a citation shall issue requiring him so to do, and such will shall be opened, read, proven, filed and recorded in the case, as are the wills of decedents. [L. '15, p. 135, § 7.]

§ 1715-8. Provisional Distribution—Bond of Distributees.

If it shall appear to the satisfaction of the court upon the hearing of the application for provisional distribution that the absentee has been absent and his whereabouts unknown for the space of five years, or there are strong presumptions that he is dead, the court shall enter an order directing that the property in the hands of the trustee shall be provisionally distributed to the presumptive heirs, or to the devisees and legatees under the will, as the case may be, upon condition that such heirs, devisees and legatees respectively give and file in the court bonds with good and sufficient surety to be approved by the court, conditioned for the return of or accounting for the property provisionally distributed in case the absentee shall return and demand the same, which bonds shall be respectively in twice the amount of the value of the

personal property distributed, and in ten times the amount of estimated annual rents, issues and profits of any real property so provisionally distributed. [L. '15, p. 136, § 8.]

§ 1715-9. Final Distribution—Notice of Application.

Whenever the owner of such property shall have been absent from the county for a space of fifteen years and his whereabouts are unknown and cannot with reasonable diligence be ascertained, his presumptive heirs at law or the legatees and devisees under the will, as the case may be, to whom the property has been provisionally distributed, may apply to the court for a decree of final distribution of such property and satisfaction, discharge and exoneration of the bonds given upon provisional distribution. Notice of hearing of such application shall be given in the same manner as notice of hearing of application for the appointment of trustee and for provisional distribution and if at the final hearing it shall appear to the satisfaction of the court that the owner of the property has been absent and unheard of for the space of fifteen years and his whereabouts are unknown, the court shall exonerate the bonds given on provisional distribution and enter a decree of final distribution, distributing the property to the presumptive heirs at law of the absentee or to his devisees and legatees, as the case may be. [L. '15, p. 136, § 9.]

§ 1715-10. Final Settlement—Escheat.

Whenever the owner of such property for which a trustee has been appointed under the provisions of this act shall have been absent and unheard of for a period of fifteen years and no presumptive heirs have appeared and applied for the provisional distribution of such property and no will of the absentee has been presented and proven, the trustee appointed under the provisions of this act shall apply to the court for a final settlement of his account and upon the settlement of such final account the property of the absentee shall be escheated in the manner provided by law for escheating property of persons who die intestate leaving no heirs. [L. '15, p. 137, § 10.]

TITLE XI.

APPEALS TO THE SUPREME COURT.

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| 1716. When allowed. | 1731. Jurisdiction, effect of appeal upon. |
| 1717. Designation of parties. | 1732. Calendar, how prepared. |
| 1718. Time of taking. | 1733. Motion to dismiss. |
| 1719. Notice of. | 1734. Hearing and disposition of motion. |
| 1720. Who may join in notice. | 1735. Second appeal. |
| 1721. Bond for costs. | 1736. What may be reviewed. |
| 1722. Bond—Execution, conditions and effect of. | 1737. Powers of supreme court. |
| 1723. Temporary injunction to remain in force, when. | 1738. Damages may be awarded, when. |
| 1724. Injunction where appeal to United States supreme court. | 1739. Judgment against appellant and sureties. |
| 1725. Justification of sureties. | 1740. Rehearing, limitation on—Remittitur. |
| 1726. Exception to surety—Certificate—New bond. | 1741. Effect of judgment—Execution under. |
| 1727. Execution countermanded, when. | 1742. Effect of reversal—Writ of restitution. |
| 1728. Application for new bond. | 1743. Death of party not to affect appeal. |
| 1729. Record—What constitutes—Duties of clerk. | 1744. Costs of appeal. |
| 1730. Time for filing and serving briefs. | 1745. Effect of appeal in criminal actions. |
| 1730-1. Abstracts of record—Cost. | 1746. Same—Date of commencement of sentence. |
| 1730-2. Effect of act. | 1747. In what cases bail authorized. |
| 1730-4. Extension of time for opening brief. | 1748. Personal appearance not necessary. |
| 1730-5. Extension of time for respondent's brief. | 1749. Proceedings in case of reversal in criminal cases. |
| 1730-6. Insufficient abstract—Amendment—Dismissal. | 1750. Imprisonment pending appeal to be deducted. |
| 1730-7. Order of filing and serving immaterial. | 1751. Transcript of judgment, effect of. |
| 1730-8. Extension of time—Filing abstract or statement of facts. | 1752. Appeals to be heard on merits. |
| 1730-9. Defects in appeal bond—New bond. | 1753. Rules and regulations. |
| | 1754. Method herein provided exclusive. |

§ 1716. When Allowed.

Any party aggrieved may appeal to the supreme court in the mode prescribed in this title from any and every of the following determinations, and no others, made by the superior court, or the judge thereof, in any action or proceeding.

(1) From the final judgment entered in any action or proceeding, and an appeal from any such final judgment shall also bring up for review any order made in the same action or proceeding either before or after the judgment, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such order sufficiently for the purposes of a review thereof.

(2) From any order refusing to vacate an order of arrest in a civil action.

(3) From an order granting or denying a motion for a temporary injunction, heard upon notice to the adverse party, and from any order vacating or refusing to vacate a temporary injunction: Provided, that no appeal shall be allowed from any order denying a motion for a tem-

porary injunction, or vacating a temporary injunction unless the judge of the superior court shall have found upon the hearing, that the party against whom the injunction was sought was insolvent.

(4) From any order discharging or refusing to discharge an attachment.

(5) From any order appointing or removing, or refusing to appoint or remove, a receiver.

(6) From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action; or (3) grants a new trial; or (4) sets aside or refuses to affirm an award of arbitrators, or refers the cause back to them.

(7) From any final order made after judgment, which affects a substantial right; and an appeal from any such order shall also bring up for review any previous order in the same action or proceeding which involves the merits and necessarily affects the order appealed from, in case the record sent up on the appeal, or any supplementary record sent up before the hearing thereof, shall show such previous order sufficiently for the purposes of a review thereof. But an appeal shall not be allowed to the state in any criminal action, except when the error complained of is in setting aside the indictment or information, or in arresting the judgment on the ground that the facts stated in the indictment or information do not constitute a crime, or is some other material error in law not affecting the acquittal of a prisoner on the merits. [L. '93, p. 119, § 1; L. '01, p. 28, § 1.]

Cited in 6 Wash. 261; 7 Wash. 751; 8 Wash. 231; 10 Wash. 13, 42, 66, 153, 163; 12 Wash. 2, 555, 560, 631, 661, 662; 14 Wash. 112; 16 Wash. 442, 445; 17 Wash. 676; 18 Wash. 362, 451, 462, 483, 652; 19 Wash. 119, 196, 355, 629; 20 Wash. 109, 541; 21 Wash. 20, 105, 254, 261, 407; 23 Wash. 249, 722; 24 Wash. 77, 78, 243; 25 Wash. 183, 424; 26 Wash. 42, 281, 299, 331, 434, 435; 28 Wash. 406, 620; 29 Wash. 320; 30 Wash. 45, 384; 31 Wash. 314, 342; 32 Wash. 153, 404, 695; 34 Wash. 58, 647; 35 Wash. 137; 37 Wash. 485; 39 Wash. 374; 40 Wash. 577; 42 Wash. 689; 43 Wash. 22, 36, 113, 560; 45 Wash. 261; 46 Wash. 91, 92; 47 Wash. 184, 186; 49 Wash. 407; 50 Wash. 455; 52 Wash. 552; 54 Wash. 226, 294; 55 Wash. 94, 394; 56 Wash. 68; 57 Wash. 88; 58 Wash. 117, 306; 60 Wash. 222, 278, 613; 61 Wash. 691; 68 Wash. 351; 69 Wash. 441; 71 Wash. 402; 72 Wash. 119, 519; 74 Wash. 690, 692; 76 Wash. 305; 77 Wash. 630; 78 Wash. 661, 673, 674; 80 Wash. 189; 82 Wash. 231, 333, 478; 86 Wash. 177; 88 Wash. 166, 237; 89 Wash. 6, 399; 91 Wash. 305; 94 Wash. 314; 99 Wash. 164; 102 Wash. 76, 504, 607; 104 Wash. 379; 105 Wash. 165, 166; 107 Wash. 203, 466, 558; 108 Wash. 566; 112 Wash. 506.

NATURE AND FORM OF REMEDY.—See Remington's Digest, App. & E., §§ 1—9, and cases cited.

NATURE AND GROUNDS OF APPELLATE JURISDICTION: See Remington's Digest, App. & E., §§ 10—14, and cases cited. See, also:

§ 11. **Moot Question—Cessation of Controversy:** State ex rel. Seattle and Tacoma v. Public Service Comm., 110 Wash. 130, 188 Pac. 7.

— **Review—Moot Questions:** Holly-Mason Hdw. Co. v. Schnatterly, 111 Wash. 29, 189 Pac. 545.

DECISIONS REVIEWABLE—Courts and Other Tribunals Subject to Review: See Remington's Digest, App. & E., §§ 15—22, and cases cited. See, also:

§ 18. **Highways—Establishment:** Duncan Township v. Stayr, 106 Wash. 514, 180 Pac. 476.

Nature of Subject Matter and Character of Parties: See Remington's Digest, App. & E., §§ 23—32, and cases cited.

Amount or Value in Controversy. See Remington's Digest, App. & E., §§ 33—42, and cases cited. See, also:

§ 40. **Aggregated Claims:** Cascade Construction Co. v. Snohomish County, 105 Wash. 484, 178 Pac. 470; State ex rel. Home Tel. & Tel. Co. v. Hurn, 106 Wash. 362, 180 Pac. 400.

FINALITY OF DETERMINATION: See Remington's Digest, App. & E., §§ 43—62, and cases cited. See, also:

§ 47. **Rulings on Demurrers:** Whitehead v. Stringer, 106 Wash. 501, 180 Pac. 486, 5 A. L. R. 358.

§ 48. **On Motion Relating to Pleadings—Election Between Causes:** Oliver v. Polson, 105 Wash. 164, 177 Pac. 678.

— **Striking Answer:** Nishimoto v. Vernon, 107 Wash. 555, 182 Pac. 617.

§ 49. **Nonsuits and Dismissals:** Whitehead v. Stringer, 106 Wash. 501, 180 Pac. 486, 5 A. L. R. 358.

§ 50. **Granting New Trial:** Picco v. Roney, 107 Wash. 202, 181 Pac. 522.

§ 51. **Order Vacating Default:** Van Buren v. Peterson, 108 Wash. 697, 185 Pac. 572.

§ 58. **Order Fixing Fees:** Hemrich's Estate, In re, 113 Wash. 667, 194 Pac. 569.

§ 62. **Final Orders and Special Proceedings—Prohibition:** State ex rel. Spokane & Eastern Trust Co. v. Superior Court, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

AFFECTING SUBSTANTIAL RIGHTS AND INTERLOCUTORY ORDERS: See Remington's Digest, App. & E., §§ 63—76, and cases cited. See, also:

§ 67. **Receivers:** Liebig v. Liebig, 107 Wash. 464, 182 Pac. 605.

§ 71. **Orders After Judgment—Reducing Alimony:** Liebig v. Liebig, 107 Wash. 464, 182 Pac. 605.

RIGHT TO APPEAL—PERSONS ENTITLED: See Remington's Digest, App. & E., §§ 80—89, and cases cited. See, also:

§ 80. **Appeal from Part of Judgment—Trial De Novo:** Kriegler v. Spokane Merchants' Assoc., 111 Wash. 179, 189 Pac. 1004.

§ 87. **Heir Assigning Interest:** Thompson's Estate, In re, 110 Wash. 635, 188 Pac. 784.

§ 88. **Persons Aggrieved—Guardians:** Bayer's Estate, In re, 108 Wash. 565, 185 Pac. 606.

ESTOPPEL, WAIVER OR AGREEMENTS AFFECTING RIGHT: See Remington's Digest, App. & E., §§ 90—107, and cases cited. See, also:

§ 91. **Right to Appeal—Review—Waiver by Accepting Reduction of Verdict:** Martin v. Jansen, 113 Wash. 290, 193 Pac. 674, 198 Pac. 393.

§ 93. **Compliance With Judgment:** Proctor v. Appleby, 110 Wash. 403, 188 Pac. 481.

§ 102. **Cessation of Controversy by Lapse of Time:** State ex rel. Seattle and

Tacoma v. Public Service Comm., 110 Wash. 130, 188 Pac. 7.

— **Divorce—Provisions of Decree—Custody of Children:** Delle v. Delle, 112 Wash. 512, 192 Pac. 966.

For text treatment of "Appeal and Error," see 2 **R. C. L.** 18.

Bill of particulars, right to appeal from order relating to. **Ann. Cas.** 1913C, 826.

Contempt judgments as appealable. 3 **Ann. Cas.** 759; 17 **Ann. Cas.** 321.

Decedents' estates, right to appeal from order made on distribution. **Ann. Cas.** 1913C, 862.

Dismissal of action as frivolous and vexatious as final or interlocutory order for purposes of appeal. 18 **Ann. Cas.** 394.

Dissolution of temporary injunction, order on motion for, as final or interlocutory. **Ann. Cas.** 1912C, 898.

Drainage district, review of order establishing. **Ann. Cas.** 1915C, 23.

Eminent domain proceedings, appealable judgments and orders. 16 **Ann. Cas.** 1004; **Ann. Cas.** 1915D, 548.

Ex parte order as appealable. 10 **Ann. Cas.** 38.

Nonsuit, right of plaintiff to appeal from voluntary judgment. 9 **Ann. Cas.** 631.

Probate or administration proceedings, appealable judgments or orders. **Ann. Cas.** 1913C, 850.

Receivers, right to appeal from judgments affecting receivership. **Ann. Cas.** 1915D, 802.

Removal of causes, order transferring cause to federal court as appealable. **Ann. Cas.** 1916D, 1049.

Right of state to appeal in action under criminal bail bond. 10 **Ann. Cas.** 294.

Void judgment, decree or order, right of appeal from. 20 **Ann. Cas.** 277; 33 **L. R. A. (N. S.)** 733.

Writ of assistance, appealability of order refusing or granting. 10 **Ann. Cas.** 1042; **Ann. Cas.** 1913D, 1129.

Right to appeal from order releasing one in extradition proceedings. 5 **A. L. R.** 1156.

Discharge on habeas corpus as "final judgment." 10 **A. L. R.** 390.

§ 1717. Designation of Parties.

The party appealing shall be known as the appellant, and the adverse party as the respondent, and they shall be so designated in all papers in the cause after the notice of appeal shall have been given

or served; but the title of the cause shall in other respects remain unchanged. [L. '93, p. 120, § 2.]

Cited in 27 Wash. 177; 49 Wash. 407.

PARTIES: See Remington's Digest, App. & E., §§ 164—171, and cases cited. See, also:

§ 164. **Service—Upon Whom to be**

Made: Cole v. Washington Motion Picture Corp., 112 Wash. 548, 192 Pac. 972.

§ 165. **Parties Entitled to Notice—Service on Receiver—Sufficiency:** Cole v. Washington Motion Picture Corp., 112 Wash. 548, 192 Pac. 972.

§ 1718. Time of Taking.

In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the date of the entry of such final judgment; and an appeal from any order, other than a final order, from which an appeal is allowed by this act, within fifteen days after the entry of the order, if made at the time of the hearing, and in all other cases within fifteen days after the service of a copy of such order, with written notice of the entry thereof, upon the party appealing, or his attorney. In criminal causes, an appeal must be taken within ninety days after the entry of final judgment. [L. '15, p. 301, § 3; L. '13, p. 350, § 3; L. '93, p. 120, § 3; L. '95, p. 81, § 1.]

Cited in 10 Wash. 380; 12 Wash. 232, 555; 13 Wash. 225; 15 Wash. 29; 17 Wash. 597; 20 Wash. 541; 21 Wash. 18; 26 Wash. 43, 230, 308; 27 Wash. 28, 317; 32 Wash. 168; 35 Wash. 67; 42 Wash. 688, 689; 49 Wash. 407; 50 Wash. 263, 455; 55 Wash. 395, 597; 56 Wash. 207; 74 Wash. 693; 76 Wash. 305; 84 Wash. 93, 94; 86 Wash. 180; 87 Wash. 449; 90 Wash. 239; 95 Wash. 423; 107 Wash. 203, 619.

TIME OF TAKING PROCEEDINGS: See Remington's Digest, App. & E., §§ 178—187, and cases cited. See, also:

§ 172. **Premature Appeal:** Adin's Estate, In re, 112 Wash. 93, 191 Pac. 839.

§ 173. **Commencement of Period:** Mathison v. Anderson, 107 Wash. 617, 182 Pac. 622.

§ 174. **Effect of Motion for New Trial:** Reeves v. Wilson, 105 Wash. 318, 177 Pac. 825; Adin's Estate, In re, 112 Wash. 93, 191 Pac. 839.

§ 175. **Effect of Motions:** Reynolds v. Pacific Marine Ins. Co., 105 Wash. 666, 178 Pac. 811.

§ 179. **Granting New Trial:** Picco v. Roney, 107 Wash. 202, 181 Pac. 522.

§ 180. **Particular Proceedings—Order Approving Administrator's Final Account:** Babcock's Estate, In re, 112 Wash. 556, 192 Pac. 939.

§ 181. **Interlocutory Orders—New Trial:** Picco v. Roney, 107 Wash. 202, 181 Pac. 522.

Motion for new trial or rehearing as affecting computation of time for appeal. 3 Ann. Cas. 630.

Waiver of right to notice of judgment required to set statute of limitations running against right of appeal. Ann. Cas. 1913B, 439.

First and last days in computing time for taking appeal. 49 L. R. A. 226; 15 L. R. A. (N. S.) 689.

Exclusion or inclusion of Sunday or holiday in computation of time for appeal or writ of error. Ann. Cas. 1917E, 940; 19 L. R. A. 319.

Death of judgment plaintiff as affecting time for taking appeal. 7 Ann. Cas. 393.

Loss of papers as excuse for delay in filing transcript on appeal. 25 L. R. A. (N. S.) 865.

§ 1719. Notice of.

A party desiring to appeal to the supreme court under the provisions of this title may, by himself or his attorney, give notice in open court or before the judge, if the judgment or order appealed from is rendered or made at chambers, at the time when such judgment or order is rendered or made, that he appeals from such judgment or order to the supreme court, and thereupon the court or judge shall direct the clerk to make an entry of such notice in the journal

of the court. If the appeal be not taken at the time when the judgment or order appealed from is rendered or made, then the party desiring to appeal may, by himself or his attorney, within the time prescribed in section 1718, serve written notice on the prevailing party or his attorney that he appeals from such judgment or order to the supreme court, and within five days after the service of such notice he shall file with the clerk of the superior court the original or a copy of such notice, with proof or the written admission of the service thereof, and thereupon the clerk shall enter such notice, with the proof or admission of service thereof, in the journal of the court. The giving or service of a notice of appeal as prescribed in this section shall effect the appeal, but the same shall become ineffectual if an appeal bond for costs and damages be not given as required by section 1721 of this title. Two or more appealable orders with or without the judgment may be embraced in one appeal: Provided, that the time allowed in this title for appealing from each of such orders has not expired. The appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken, and if from part of any judgment or order, from what particular part. [L. '93, p. 120, § 4.]

Cited in 9 Wash. 665; 10 Wash. 380; 17 Wash. 366, 609; 18 Wash. 361; 20 Wash. 540, 690, 716; 22 Wash. 22, 695; 23 Wash. 251, 722; 24 Wash. 668; 25 Wash. 183; 26 Wash. 224; 27 Wash. 113; 30 Wash. 312; 32 Wash. 531; 34 Wash. 177, 514, 657; 37 Wash. 457; 42 Wash. 78; 43 Wash. 385; 45 Wash. 134; 48 Wash. 420; 49 Wash. 303, 407; 50 Wash. 587, 588, 592, 593; 57 Wash. 438, 638; 63 Wash. 445; 74 Wash. 688; 82 Wash. 309; 83 Wash. 60; 84 Wash. 458; 90 Wash. 239; 94 Wash. 669; 96 Wash. 356; 102 Wash. 77; 110 Wash. 469; 111 Wash. 186; 112 Wash. 551.

Petition or Allowance: See Remington's Digest, App. & E., § 188, and cases cited.

Notice: See Remington's Digest, App. & E., §§ 209—214, and cases cited.

SERVICE OF NOTICE: See Remington's Digest, App. & E., §§ 215—223, and cases cited. See, also:

§ 218. **Upon Whom to be Made:** Cole v. Washington Motion Picture Corp., 112 Wash. 548, 192 Pac. 972.

§ 219. **Service upon Attorneys—Effect:** Geissler's Estate, In re, 110 Wash. 14, 187 Pac. 711.

§ 222. **Filing Proof of Service:** Sergeant v. Russell, 110 Wash. 216, 189 Pac. 406.

Parties entitled to notice of appeal: 13 Ann. Cas. 181; 21 Ann. Cas. 1277.

Substitution of phrase "et al." in appellate process and papers. 14 Ann. Cas. 572.

§ 1720. Who may Join in Notice.

All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like appeal, or join in the appeal already taken by filing with the clerk of the superior court a statement that he joins therein or in some part thereof, specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after service upon him of written notice of the former appeal, unless such former appeal be afterward dismissed. All parties who so joined in an appeal after the notice is given or served shall be

liable for the expenses thereof, and for costs and damages to the same extent and upon the same conditions as if they had originally joined in the notice. When the notice of appeal is not given at the time when the judgment or order appealed from is rendered or made, it shall be served in the manner required by law for the service of papers in civil actions and proceedings, upon all parties who have appeared in the action or proceeding: Provided, that where the record and files in the cause do not disclose the address of a party on whom notice should be made, or of his attorney, and neither such party nor his attorney can be found within the county in which the judgment or order appealed from was rendered or made (of which fact a return by the sheriff that they cannot be so found shall be proof), the notice of appeal need not be served on such party, but the appeal may be taken by filing the notice and such sheriff's return with the clerk. Service on an attorney who was the attorney of record for a party in the cause at the time when the judgment or order appealed from was rendered or made, shall be deemed service on such party in all cases where service is required by this title. [L. '93, p. 121, § 5.]

Parties to appeals, see Remington's Digest, App. & E., §§ 164—171, and cases cited. See note to § 1717, supra.

Cited in 4 Wash. 643; 9 Wash. 115; 10 Wash. 153; 11 Wash. 211; 13 Wash. 39; 14 Wash. 277; 15 Wash. 437; 16 Wash. 331; 17 Wash. 366, 575; 18 Wash. 94, 680; 19 Wash. 347; 21 Wash. 516; 24 Wash. 612, 668; 30 Wash. 312; 34 Wash. 156, 514; 37 Wash. 456; 39 Wash. 259; 43 Wash. 132, 384; 49 Wash. 407; 50 Wash. 586—588, 592, 593, 595; 57 Wash. 437, 438; 60 Wash. 516; 76 Wash. 562; 77 Wash. 347; 78 Wash. 559, 600; 81 Wash. 308; 84 Wash. 93, 94; 85 Wash. 556; 87 Wash. 394; 91 Wash. 611; 92 Wash. 672; 93 Wash. 237, 238; 94 Wash. 574, 576, 668; 95 Wash. 108; 96 Wash. 356; 98 Wash. 338; 112 Wash. 551.

§ 1721. Bond for Costs.

An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section 1722, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. But no bond or deposit shall be required when the appeal is taken by the state, or by a county, city, town or school district thereof, or by a defendant in a criminal action. [L. '93, p. 122, § 6.]

Cited in 11 Wash. 78, 479; 12 Wash. 563; 14 Wash. 323, 403; 15 Wash. 266; 16 Wash. 201; 17 Wash. 367, 702; 20 Wash. 130, 182, 540, 716; 21 Wash. 503; 24 Wash. 126, 613; 26 Wash. 199, 308; 28 Wash. 262, 627; 29 Wash. 582; 30 Wash. 268; 32 Wash. 148, 168; 34 Wash. 642; 36 Wash. 407, 408; 39 Wash. 134; 43 Wash. 384, 481; 45 Wash. 134; 49 Wash. 262; 60 Wash. 645; 65 Wash. 580; 66 Wash. 145; 82 Wash. 309, 363; 84 Wash. 262; 86 Wash. 157, 158; 90 Wash. 239; 94 Wash. 664, 665; 101 Wash. 68, 268.

BONDS OR OTHER SECURITY: See Remington's Digest, App. & E., §§ 189—208, and cases cited. See, also:

§ 198. Sureties — Competency: Den Bleyker v. King County, 108 Wash. 687, 185 Pac. 613.

§ 202. Conditions: Seargeant v. Russell, 110 Wash. 216, 189 Pac. 406.

§ 207. Amendment: Den Bleyker v. King County, 108 Wash. 687, 185 Pac. 613.

§ 1722. Bond—Execution, Condition and Effect of.

The appeal bond must be executed in behalf of the appellant by one or more sufficient sureties, and shall be in a penalty of not less than two hundred dollars in any case; and in order to effect a stay of proceedings as in this section provided, the bond, where the appeal is from a final judgment for the recovery of money, shall be in a penalty double the amount of the damages and costs recovered in such judgment and in other cases shall be in such penalty, not less than two hundred dollars, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall prescribe. It shall be conditioned that the appellant will pay all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, not exceeding two hundred dollars. An appeal shall not stay proceedings on the judgment or order appealed from or on any part thereof, unless the original or a subsequent appeal bond be further conditioned that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court, and (where such condition is applicable) shall pay all rents of or damages to property accruing during the pendency of the appeal, out of the possession of which any respondent shall be kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order it shall be varied so as to secure the part stayed alone. When such bond, further conditioned as hereinabove prescribed, has been filed the appeal shall operate so long as it shall remain effectual under the provisions of this title to stay proceedings upon the judgment or order appealed from; but in case of an appeal from an order other than an order granting a new trial, no appeal or appeal bond shall operate to stay proceedings in the cause except proceedings upon the order appealed from; and no appeal or stay shall vacate or affect any part of a judgment or order not appealed from and where an appeal is taken from an order vacating a temporary injunction, the appellant cannot proceed further in the cause in the superior court during the pendency of the appeal, except so far as may be rendered necessary by proceedings of an adverse party. [L. '93, p. 122, § 7.]

Cited in 11 Wash. 78, 367; 14 Wash. 52, 366; 15 Wash. 266, 344; 17 Wash. 99; 18 Wash. 237; 20 Wash. 130; 21 Wash. 362, 504; 22 Wash. 104; 25 Wash. 629; 28 Wash. 362; 29 Wash. 622; 30 Wash. 233, 330; 26 Wash. 199, 308; 32 Wash. 637, 697; 34 Wash. 125; 35 Wash. 413; 37 Wash. 446; 38 Wash. 190; 42 Wash. 168; 43 Wash. 385; 46 Wash. 319; 48 Wash. 23, 421; 49 Wash. 407; 56 Wash. 92; 59 Wash. 162; 60 Wash. 645, 664; 62 Wash. 169; 66 Wash. 349; 70 Wash. 332, 336, 338, 522; 82 Wash. 363; 86 Wash. 52, 157, 158; 88 Wash. 392; 93 Wash. 698; 97 Wash. 625; 102 Wash. 18, 20; 106 Wash. 629; 108 Wash. 185; 110 Wash. 469; 111 Wash. 556.

SUPERSEDEAS OR STAY OF PROCEEDINGS: See Remington's Digest, App. & E., §§ 232—244, and cases cited, See, also:

§ 232. **Right to Dismissal—Garnishment:** State ex rel. Pioneer Mining & Ditch Co. v. Superior Court, 108 Wash. 183, 183 Pac. 74.

— **Restitution:** Fisher v. Seattle Trust Co., 109 Wash. 257, 186 Pac. 649.

— **Right to and Necessity of Supersedeas:** Fisher v. Seattle Trust Co., 109 Wash. 257, 186 Pac. 649.

§ 236. **Amount of Penalty—Money Judgment—Parties Affected:** Zittel v. Meyer, 106 Wash. 625, 180 Pac. 921.

— **Stay of Execution:** Osner & Mehlhorn v. Loewe, 111 Wash. 550, 191 Pac. 746.

§ 244. **By Supreme Court:** Hillman v. Gordon, 107 Wash. 249, 181 Pac. 677; West Side Irrigating Co. v. Chase, 112 Wash. 579, 192 Pac. 892.

— **Discretion — Merits of Appeal:** State ex rel. Spokane & Eastern Trust Co. v. Superior Court, 109 Wash. 634, 187 Pac. 358, 9 A. L. R. 157.

— **Restitution:** Fisher v. Seattle Trust Co., 109 Wash. 257, 186 Pac. 649.

Construction of condition in appeal bond requiring surety to pay judg-

ment of appellate court. 5 Ann. Cas. 90.

Liability of surety in appeal bond, where there was no supersedeas, for costs in court below. 12 A. L. R. 721.

Liability of sureties on appeal bond where judgment is in favor of one principal and against another. 51 L. R. A. (N. S.) 656.

Effect of insertion of unauthorized provision in appeal bond. L. R. A. 1917B, 990.

Liability of sureties on dismissal of appeal for insufficiency of bond. Ann. Cas. 1915C, 1210.

§ 1723. Temporary Injunction to Remain in Force, When.

In all cases where a final judgment shall be rendered by any superior court of this state in a cause wherein a temporary injunction has been granted, and the party at whose instance such injunction was granted shall appeal from such judgment, such injunction shall remain in force during the pendency of such appeal, if, within five days after service on him of notice of the entry of the final judgment, such appellant shall file with the clerk of the superior court a bond, with one or more sufficient sureties, in a penalty to be fixed by said court, conditioned that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on the appeal, and all costs and damages that may accrue to the respondent by reason of the injunction remaining in force. [L. '93, p. 123, § 8.]

Cited in 15 Wash. 269; 30 Wash. 202; 43 Wash. 229; 56 Wash. 22; 70 Wash. 522; 71 Wash. 5; 95 Wash. 508.

Power of trial court to grant or con-

tinue temporary injunction on appeal from judgment denying permanent injunction. 21 Ann. Cas. 1362.

§ 1724. Injunction Where Appeal to United States Supreme Court.

In all cases where a final judgment shall be rendered by the supreme court of this state in a cause wherein a temporary or final injunction has been granted and the party at whose instance such injunction was granted shall appeal from such judgment to the supreme court of the United States, such injunction shall remain in force during the pendency of such appeal, if, within sixty days after the rendition of such judgment of the supreme court of this state, such appellant shall file with the clerk of the supreme court a bond, with one or more sufficient sureties, in a penalty to be fixed by said court, conditioned that the appellant shall pay to the respondent all costs and damages that may be adjudged against the appellant on appeal, and all costs and damages that may accrue to the respondent by reason of the injunction remaining in force. [L. '93, p. 124, § 9.]

§ 1725. Justification of Sureties.

An appeal bond whether conditioned so as to effect a stay of proceedings or not, shall be of no force unless accompanied by the affidavit of the surety or sureties therein attached thereto, in which each surety shall state that he is a resident of this state and is

worth a certain sum mentioned in such affidavit, over and above all debts and liabilities, in property within this state, exclusive of property exempt from execution, and which sums so sworn to by the surety or sureties, shall be at least equal to the penalty named in the bond if there be but one surety, or shall amount in all to at least twice such penalty if there be more than one surety. [L. '93, p. 124, § 10.]

Cited in 12 Wash. 563; 18 Wash. 658;
33 Wash. 88; 65 Wash. 568.

Effect of failure of sureties on appeal bond to make affidavit of

property qualification. 12 Ann. Cas. 586.

False justification by surety on appeal bond as contempt. 11 A. L. E. 347.

§ 1726. Exception to Surety—Certificate—New Bond.

Any respondent may except to the sufficiency of the surety or sureties in an appeal bond, within ten days after the service on him of the notice of appeal or within five days after the service on him of the bond or written notice of the filing thereof, by serving on the appellant a notice stating that he so excepts, and specifying a place at the county seat, and a time, not less than three nor more than ten days distant, at which the surety or sureties are required to attend before the superior court in which the judgment or order appealed from was rendered or made, or before a judge thereof, and to justify their sufficiency as sureties. At the time and place named in such notice, or to which the proceedings may be then adjourned by the court or judge, the surety or sureties must attend before the court or judge, and may be then and there examined in detail, under oath, as to their property and other qualifications as sureties, by any respondent or by the judge, or by both. If the judge upon such examination is satisfied that the surety or sureties are qualified as such, to the extent to which they are required by section 1723 of this title to make affidavit, then he shall make a certificate to that effect indorsed upon or attached to the bond, which shall thereupon stand as a sufficient appeal bond to the effect expressed in the condition thereof; but if he is not so satisfied, or if the sureties fail to attend and justify, then the judge shall in like manner certify to that effect, and thereupon the bond shall become void: Provided, that in such case the appellant may, within five days after the making of such certificate, file a new appeal bond, in conformity with the requirements of this title, and subject to the requirement of justification of the sureties therein, as hereinabove provided; but in case such new appeal bond be found insufficient, no new bond can thereafter be filed in lieu thereof. In case the original or new appeal bond be not conditioned so as to effect a stay of proceedings, however, an additional appeal bond may be filed at any time thereafter when the appellant desires to effect a stay as provided in this title, during the pendency of the appeal. The examination of the sureties taken upon their justification shall be reduced to writing and subscribed by the sureties, if either party so requires, and attached to the certificate made thereon. [L. '93, p. 125, § 11.]

Cited in 11 Wash. 70; 12 Wash. 23, 683; Wash. 146; 2 Wash. 381; 28 Wash. 262;
17 Wash. 110; 18 Wash. 668; 20 Wash. 33 Wash. 198; 34 Wash. 511; 60 Wash.
304; 21 Wash. 433; 24 Wash. 613; 25 Wash. 646; 97 Wash. 625.

§ 1727. Execution Countermanded, When.

When an appeal bond is conditioned so as to effect a stay of proceedings if execution has issued the clerk shall on demand of the appellant, issue to the sheriff a certificate that proceedings have been stayed, which shall countermand the execution; and thereupon the sheriff shall release any property levied on and not already sold, and return the execution into court. [L. '93, p. 126, § 12.]

Cited in 97 Wash. 625; 101 Wash. 164.

§ 1728. Application for New Bond.

If any respondent shall have cause to believe, after any appeal bond shall have been filed and the sureties therein have justified or the time for requiring their justification has expired, that the sureties have since become disqualified as such, so that the bond is no longer an adequate security, he may apply by motion to the supreme court to require a new or additional bond; and upon the hearing of such motion the court may receive evidence in support of and in opposition to the motion in such manner, and may make such order thereon, as it shall deem proper. [L. '93, p. 126, § 13.]

Cited in 48 Wash. 428.

Power of appellate court to require
new supersedeas or appeal bond.

10 Ann. Cas. 804; 17 Ann. Cas.
378; 9 L. R. A. (N. S.) 1054.

§ 1729. Record—What Constitutes—Duties of Clerk.

Within ninety days after an appeal shall have been taken by notice as provided in this title, the clerk of the superior court shall prepare, certify and file in his office, at the expense of the appellant (except in criminal appeals prosecuted in forma pauperis, and in such cases at the expense of the county), a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified and filed, in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief, as hereinafter provided. Within four months after said appeal shall have been taken by notice as aforesaid, the clerk of the superior court shall at the expense of appellant, send up to the supreme court said transcript together with the original briefs on appeal filed in his office. The papers and copies so sent up together with any thereafter sent up as hereinbelow provided, shall constitute the record on appeal. Any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up as a part thereof, unless the superior court or a judge thereof has not yet passed on an application for the settlement and certifying of such bill or statement. In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal embracing so much thereof as the appellant deems material, or a copy thereof may be prepared, certified and sent up at any time prior to the hearing of the appeal. And in case the respondent deems any part of the files or record not already sent up to be material to the review of

the matters embraced within the appeal, he may cause the clerk, in like manner, at his expense, to prepare, certify and send up a supplementary record on appeal embracing such omitted files or records, or copies thereof, at any time prior to the hearing of the appeal. Any such supplementary record or records, if filed in the supreme court prior to the hearing of the appeal, shall be considered by the court as part of the record on appeal, so far as the same may be material to a review of the matters embraced within the appeal. When the review of an original paper in the cause may be important to a correct decision of the appeal, the court or judge may order the clerk to transmit the same to the clerk of the supreme court and the same shall be transmitted accordingly, and shall be under the control of the supreme court. [L. '93, p. 126, § 14; L. '01, p. 29, § 2.]

Cited in 8 Wash. 393; 11 Wash. 142; 16 Wash. 274; 20 Wash. 407; 23 Wash. 261; 26 Wash. 494; 30 Wash. 159; 31 Wash. 537; 32 Wash. 695; 34 Wash. 529, 531; 38 Wash. 575; 48 Wash. 7; 63 Wash. 410; 82 Wash. 30; 103 Wash. 241; 107 Wash. 204.

EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR—POWERS AND PROCEEDINGS OF LOWER COURT: See Remington's Digest, App. & E., §§ 224—228-1, and cases cited. See, also:

§ 228. **Provisional Remedies—Receiver's Sale:** State ex rel. Silver Basin Mining Co. v. Superior Court, 110 Wash. 559, 188 Pac. 384.

JURISDICTION ACQUIRED BY APPELLATE COURT: See Remington's Digest, App. & E., §§ 229—231, and cases cited. See, also:

§ 229. **Effect of Taking Appeal—Custody of Minor Children:** State ex rel. Wilkerson v. Superior Court, 108 Wash. 15, 183 Pac. 63.

RECORD AND PROCEEDINGS NOT IN RECORD—Matters to be Shown by

Record: See Remington's Digest, App. & E., §§ 245—249, and cases cited.

Scope and Contents of Record: See Remington's Digest, App. & E., §§ 250—261, and cases cited. See, also:

§ 253. **Motions and Order:** Tomanovich v. Casey, 106 Wash. 642, 180 Pac. 919.

Transcript, Form, Requisites and Certification: See Remington's Digest, App. & E., §§ 323, 324, and cases cited.

TRANSMISSION, FILING AND SERVICE OF COPIES: See Remington's Digest, App. & E., §§ 325—330, and cases cited. See, also:

§ 326. **Failure to Fill in Time:** Picco v. Roney, 107 Wash. 202, 181 Pac. 522.

§ 329. **Excuse for Delay:** State v. Terrien, 111 Wash. 345, 190 Pac. 1017.

Defects and Objections: See Remington's Digest, App. & E., §§ 331—335, and cases cited.

Conclusiveness: See Remington's Digest, App. & E., § 336, and cases cited.

§ 1730. Time for Filing and Serving Briefs.

Within ninety days after an appeal shall have been taken by notice as provided in this title, the appellant shall serve on the respondent three copies and shall file with the clerk of the superior court fifteen copies, together with proof or written admission of service, as aforesaid, of a printed brief on the appeal upon his part, which brief shall clearly point out each error that the appellant relies on for a reversal, and shall conform to such regulations of its contents in other respects, and its form and size, as the supreme court by its rules may have prescribed. Within thirty days after the service of the appellant's brief, the respondent shall likewise serve and file with the clerk of the superior court, with like proof of service, the like numbers of copies of a printed brief on the appeal upon his part which shall likewise conform to the rules of the supreme court. Not less than ten days prior to the hearing the appellant may also serve and file either with the clerk of the superior court or in the supreme court

like printed brief or briefs, strictly in reply to respondent's brief. The time for service and filing of briefs, as in this section prescribed, may be extended by order of the superior court for good cause shown, or by stipulation of the parties concerned; and if the time for filing any statement of facts shall be extended by order or stipulation, the time herein prescribed for serving and filing the appellant's opening brief shall thereby be correspondingly extended. Either party may after the filing of his briefs and not less than one day prior to the hearing of the appeal submit to the supreme court and to the adverse party a written or printed statement of any additional authorities, with suitable comment thereon strictly in support of the position taken in his brief hereinabove required to be filed. But the appellant shall not be permitted to urge in any such reply brief or statement of additional authorities, or on the hearing, any grounds for reversal not clearly pointed out in his original brief. [L. '93, p. 127, § 15; L. '01, p. 30, § 3.]

Cited in 12 Wash. 387, 390; 16 Wash. 321; 30 Wash. 58; 34 Wash. 532; 38 Wash. 575; 39 Wash. 33; 42 Wash. 604; 80 Wash. 6; 88 Wash. 205; 93 Wash. 159; 103 Wash. 241.

BRIEFS: See Remington's Digest, App. & E., §§ 337—347, and cases cited. See, also:

§ 337. **Time for Filing:** Peterson v. Peterson, 113 Wash. 317, 194 Pac. 380.

§ 338. **Excuse for Delay:** State v. Terrien, 111 Wash. 345, 190 Pac. 1017; Love-

joy v. Americus, 111 Wash. 571, 191 Pac. 790.

§ 341. **Designation of Appellant:** Berry v. National Council Knights & Ladies of Security, 107 Wash. 531, 182 Pac. 562.

ASSIGNMENT OF ERRORS: See Remington's Digest, App. & E., §§ 348—352, and cases cited: See, also:

§ 349. **Form and Requisites in General:** Connecticut Investment Co. v. Yokom, 106 Wash. 693, 180 Pac. 926.

§ 352. **Failure to Assign in Brief:** Mohney v. Davis, 104 Wash. 209, 176 Pac. 31.

§ 1730-1. Abstracts of Record—Cost.

The appellant shall, at or before the time when he is required by rule or statute to serve his opening brief, cause to be typewritten and served upon the opposite party an abstract of so much of the record and statement of facts as he may deem necessary to the proper hearing of his assignments of error: Provided, that in all cases in which no testimony is sent up with the record, or in which the statement of facts does not exceed one hundred (100) pages of double space, typewritten evidence, no abstract of record shall be required. Said abstract, in so far as it sets out testimony, shall be condensed into narrative form, without the questions and answers except when necessary for the discussion of evidence. It shall be prepared without notice or hearing thereon, and if the opposite party be not satisfied with it, he may cause to be typewritten and served, without notice, either before or at the time of serving his answering brief, so much of the record and statement of facts, condensed as above, as he for his part may deem proper for the correction or supplementing of his opponent's abstract. Each party shall pay the cost of typewriting his abstract, and the prevailing party shall be entitled to recover his disbursements therefor as other costs. For any abuse in typewriting excessive or unnecessary matter in the abstract, the supreme court, without regard to which party may prevail, may impose the costs thereof upon the party committing such abuse. The supreme court shall also provide by rule the form

of abstracts, the number thereof to be typewritten, and for other particulars thereof, including the time and place of filing the same. [L. '15, p. 300, § 1; L. '13, p. 349, § 1.]

Cited in 78 Wash. 529; 80 Wash. 2, 471, 700; 81 Wash. 133; 82 Wash. 147; 87 Wash. 449; 91 Wash. 447; 103 Wash. 241.

ABSTRACTS OF RECORD: See Remington's Digest, App. & E., § 322-1, and cases cited. See, also:

Necessity, Sufficiency and Duty to Make: Connecticut Inv. Co. v. Yokom, 105 Wash. 428, 178 Pac. 628.

— **Dismissal:** Hausken v. Hodson-Feenaughty Co., 109 Wash. 606, 187 Pac. 319.

§ 1730-2. Effect of Act.

Nothing in this act contained shall alter in any respect the present manner of settling and certifying statements of fact and bills of exceptions, and such statements and bills shall be transmitted to the supreme court to be referred to in any controversy concerning the accuracy of the abstracts, as well as for reference to exhibits, and for such other uses as the supreme court may find proper in consideration of all matters on appeal. [L. '15, p. 301, § 2; L. '13, p. 350, § 2.]

"Act" refers to §§ 1718, 1730-1 to 1730-9.

Cited in 77 Wash. 112.

§ 1730-4. Extension of Time for Opening Brief.

In all cases in which the abstract of record which, by the terms of this act, is to be served upon the opposite party by the appellant is served within the time limited by existing law, or by any law hereafter passed, for the service of appellant's opening brief, the time for serving appellant's opening brief shall be, by such service of such abstract of record, extended for and until ten days after the service of such abstract of record, providing that the time for serving such opening brief would otherwise have expired within said ten days, and this section shall not be construed to shorten the time for serving of appellant's opening brief. [L. '15, p. 301, § 4.]

§ 1730-5. Extension of Time for Respondent's Brief.

In all cases in which the opposite party is not satisfied with the abstract of record as furnished by the appellant, and in which such opposite party shall serve so much of a record and statement of facts as he shall deem proper for correcting or supplementing of his opponent's abstract, the service thereof shall extend the time as limited by existing law, or by any law hereafter passed for the service of the opposite party's brief for a period of ten days from and after the service of said correcting and supplementing abstract by the opponent, but this section shall not be construed to shorten the time for the serving of the opponent's brief. [L. '15, p. 302, § 5.]

§ 1730-6. Insufficient Abstract—Amendment—Dismissal.

In case the appellant serves an abstract of record and statement of facts within the time limited by this act, and it is found that the same is insufficient and defective under the terms of this act or the rules of the supreme court, the appeal shall not be dismissed by reason thereof, but the appellant may be allowed to file an amended or supplementary

abstract as may be required by the facts of the case within such time and upon such terms as may be fixed by the order of the supreme court, and if the appellant fails to comply with the order of the court in regard thereto, then the appeal may be dismissed by reason and because of such failure to comply with the order of the supreme court in regard thereto. [L. '15, p. 302, § 6.]

Cited in 93 Wash. 630; 100 Wash. 475; 101 Wash. 69; 103 Wash. 242; 105 Wash. 428.

§ 1730-7. Order of Filing and Serving Immaterial.

Whenever any statute heretofore or hereafter enacted requires a motion for a new trial, statement of facts, bill of exceptions, notice of appeal or other documents concerning appeals or constituting a part of the record of appeals to the supreme court, or to any other tribunal having appellate jurisdiction, to be filed and served or served and filed, the serving and filing shall be equally valid and effective whether the document shall be filed or served first and no appeal shall be dismissed because of the order of the filing and serving. [L. '15, p. 302, § 7.]

§ 1730-8. Extension of Time—Filing Abstract or Statement of Facts.

In case of a failure of the appellant to serve an abstract of record and statement of facts, or the one served is insufficient, the supreme court shall, if such failure is found to be excusable, allow the appellant a reasonable time, upon such terms as the court may impose, in which to supply such abstract of record and statement of facts. [L. '15, p. 303, § 8.]

Cited in 92 Wash. 534; 98 Wash. 29, 32; 102 Wash. 511; 103 Wash. 241; 104 Wash. 345; 107 Wash. 370, 371; 108 Wash. 172.

The supreme court will not allow a statement of facts to be supplied, under this section, where appellants' first attempt to file or propose a statement was some time after the extreme limit of ninety days fixed by § 393: *Universal Motor Co. v. McGeorge*, 104 Wash. 344, 176 Pac. 331.

Under this section an appellant failing to serve a statement of facts within the time limited, must apply to the supreme

court for leave to supply the same, upon a showing that such failure was excusable: *Swanson v. Stubb*, 108 Wash. 170, 183 Pac. 91.

Under this section, appellant erroneously refused an extension of time for filing a proposed statement of facts, may proceed by motion in the supreme court to obtain an extension of time and direction to the lower court to certify a statement; or such motion will be considered as an application for a writ of review: *Howell v. Dunning*, 107 Wash. 369, 181 Pac. 522.

§ 1730-9. Defects in Appeal Bond—New Bond.

When a notice of appeal to the supreme court shall have been served and filed in due time and an appeal bond shall have been given within the time required by law, no appeal shall be dismissed because of any defect in the appeal bond, nor because an appeal bond which is given both as a cost bond and as a bond on supersedeas shall be insufficient by reason of the amount, but the appellant shall in all cases be allowed to give a new bond within such time and upon such terms as the court may order. [L. '15, p. 303, § 9.]

Cited in 94 Wash. 665, 679; 106 Wash. 627, 628.

§ 1731. Jurisdiction, Effect of Appeal Upon.

Upon the taking of an appeal by notice as provided in this title, and the filing of a bond to render the appeal effectual, the supreme court shall acquire jurisdiction of the appeal for all necessary purposes, and shall have control of the superior court and of all inferior officers in all matters pertaining thereto, and may enforce such control by a mandate or otherwise, and, if necessary, by fine and imprisonment, which imprisonment may be continued until obedience shall be rendered to the mandate of the supreme court. But the superior court shall, nevertheless, retain jurisdiction for the purpose of all proceedings by this act provided to be had in such court, and for the purpose of settlement and certifying the bills of exceptions and statements of facts, and for all purposes in so far as the cause is not affected by the appeal. [L. '93, p. 128, § 16.]

Cited in 12 Wash. 565; 26 Wash. 124; 142; 71 Wash. 76, 398; 80 Wash. 110; 83 Wash. 621; 56 Wash. 23; 64 Wash. Wash. 673; 109 Wash. 258.

§ 1732. Calendar, How Prepared.

All appeals in which the record shall have [been] filed in the supreme court at least ten days before the beginning of any stated session of the court, shall be placed on the calendar of the court for hearing at such session; and the subsequent filing of a supplementary record shall not affect the position of the appeal on the calendar. But the hearing of an appeal may at any time be postponed by the court or continued for the session, of its own motion or for good cause shown, and on such terms as may be just. [L. '93, p. 128, § 17.]

DOCKETS, CALENDARS AND PROCEEDINGS PRELIMINARY TO HEARING: See Remington's Digest, App. & E., §§ 361, 362, and cases cited.

HEARING AND REHEARING: See Remington's Digest, App. & E., §§ 363, 364, and cases cited.

§ 1733. Motion to Dismiss.

Any respondent may move the supreme court, at such time and in such manner as the court by its rules may have prescribed, to dismiss an appeal either on the ground that the court has no jurisdiction of an appeal from the judgment or order from which the appeal was taken, or that the notice of appeal was not served or filed within the time limited by law, or is insufficient, or that the appeal bond was not filed within the time limited by law, or is not in form or substance such as to render the appeal effectual, or that the appellant's brief has not been served or filed, or that the record on appeal has not been sent up, or that the appeal has not been diligently prosecuted or on any ground going to the merits of the further prosecution of the appeal, or on any two or more of the grounds hereinabove mentioned; and there may be combined with a motion to dismiss a motion to affirm the judgment or order appealed from, or a motion for damages on the ground that the appeal was taken merely for delay, or was manifestly unauthorized by law, or both such motions. A general appearance in the supreme court shall not be a waiver of the right to make any motion herein authorized. [L. '93, p. 129, § 18.]

Cited in 9 Wash. 657; 11 Wash. 78, 480; 27 Wash. 178; 29 Wash. 621; 60 Wash. 645; 80 Wash. 110; 90 Wash. 672.

DISMISSAL: See Remington's Digest, App. & E., §§ 353—360, and cases cited. See, also:

§ 355. Effect: Maddox v. Industrial Ins. Comm., 113 Wash. 137, 193 Pac. 231. Right of appellant to dismiss appeal. 2 Ann. Cas. 794; 11 Ann. Cas. 966; L. R. A. 1917A, 113.

§ 1734. Hearing and Disposition of Motion.

If the supreme court on the hearing of any such motion or motions shall find the grounds or any thereof alleged, for the same, to be well taken and true in effect, the court may grant the same in whole or in part, but when any such motion does not go to the substance of the appeal, or to the right of appeal, and the court shall be of the opinion that the moving party can be compensated in costs, or by the imposition of other terms for any delay of the appellant which is made the ground of any such motion (except a failure to take the appeal within the time limited by law) the court, in its discretion, may deny the motion on such terms as may be just. The court shall upon like terms allow all amendments in matters of form, curative of defects in proceedings to the end that substantial justice be secured to the parties, and no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal if the appellant shall forthwith, upon order of the supreme court, perfect the appeal. [L. '93, p. 129, § 19; L. '99, p. 79, § 1.]

Cited in 12 Wash. 565; 20 Wash. 691; 127; 78 Wash. 600; 80 Wash. 489; 102 Wash. 224; 27 Wash. 178; 50 Wash. Wash. 77, 509. 586—595, 597; 66 Wash. 146; 67 Wash.

§ 1735. Second Appeal.

No withdrawal of an appeal, and no dismissal which does not go to the substance of or the right to the appeal, shall preclude any party from taking another appeal in the same cause, within the time limited by law. [L. '93, p. 130, § 20.]

Cited in 9 Wash. 658; 28 Wash. 702; 40 Wash. 451, 580; 84 Wash. 93; 89 Wash. 137.

§ 1736. What may be Reviewed.

Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment, appearing upon the record sent up from the superior court. Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party and sent up in the record on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of fact or a refusal to make findings based thereon shall have been

excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement. [L. '93, p. 130, § 21.]

Cited in 9 Wash. 300; 10 Wash. 154; 11 Wash. 395, 403, 553; 12 Wash. 68, 113, 188, 252; 13 Wash. 35; 22 Wash. 293; 24 Wash. 610; 28 Wash. 615; 29 Wash. 42; 33 Wash. 195, 655; 34 Wash. 94; 53 Wash. 390; 70 Wash. 227; 74 Wash. 476; 75 Wash. 84; 76 Wash. 596, 624; 77 Wash. 397; 82 Wash. 559; 83 Wash. 380; 85 Wash. 362; 86 Wash. 514; 90 Wash. 17; 95 Wash. 404; 96 Wash. 540; 105 Wash. 348, 613.

PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—ISSUES AND QUESTIONS IN LOWER COURT: See Remington's Digest, App. & E., §§ 108—111, and cases cited. See, also:

§ 108. **Necessity:** Crowl v. West Coast Steel Co., 109 Wash. 426, 186 Pac. 866.

§ 111. **Objections not Presented Below:** Brengman v. King County, 107 Wash. 306, 181 Pac. 861.

OBJECTIONS AND MOTIONS AND RULINGS THEREON: See Remington's Digest, App. & E., §§ 112—135-1, and cases cited. See, also:

§ 117. **Pleadings—Objections to Complaint:** Vergonis v. Vazeleou, 105 Wash. 441, 178 Pac. 463; Bishop v. Ryan Construction Co., 106 Wash. 254, 180 Pac. 126.

§ 119-1. **Objections to Pleadings—Amendments:** Williams v. Snow, 109 Wash. 329, 186 Pac. 861.

§ 123. **Objections to Evidence:** Kane v. Nakamoto, 113 Wash. 476, 194 Pac. 381.

§ 135. **Judgments:** Peterson v. Pacific American Fisheries, 108 Wash. 63, 183 Pac. 79, 8 A. L. R. 198.

MOTIONS FOR NEW TRIAL: See Remington's Digest, App. & E., §§ 153—161, and cases cited. See, also:

§ 159. **Necessity of Moving Against Default:** Gordon v. Hillman, 105 Wash. 529, 178 Pac. 625.

FINDINGS OF FACT AND MOTIONS: See Remington's Digest, App. & E., §§ 162, 163, and cases cited. See, also:

§ 162. **Necessity of Findings of Fact:** Rowe v. Josevig-Kennecott Copper Co., 106 Wash. 455, 180 Pac. 413.

REVIEW—SCOPE AND EXTENT IN GENERAL: See Remington's Digest, App. & E., §§ 365—373½, and cases cited. See, also:

§ 365. **Questions Considered:** Pioneer Mining & Ditch Co. v. Davidson, 111 Wash. 262, 190 Pac. 242.

WHAT MAY BE REVIEWED IN GENERAL: See Remington's Digest, App. & E., §§ 374—383, and cases cited. See, also:

§ 375. **Matters not Before the Lower Court:** Union Machinery & Supply Co. v. McCush, 104 Wash. 62, 175 Pac. 559; Sowle v. Johnson, 109 Wash. 218, 186 Pac. 255.

§§ 379, 380. **Interlocutory Orders—Appeal from Final Judgment or Specific Order:** Liebig v. Liebig, 107 Wash. 464, 182 Pac. 605; Brace v. Pederson, 106 Wash. 573, 180 Pac. 917.

Review on appeal from final judgment of an interlocutory appealable order not theretofore appealed from. 11 Ann. Cas. 552; Ann. Cas. 1913A, 816.

Right to review void judgment, decree or order by appeal or writ of error. 20 Ann. Cas. 277.

PARTIES ENTITLED TO ALLEGE ERROR: See Remington's Digest, App. & E., §§ 384—388, and cases cited. See, also:

§ 384. **Fault of Coparty:** Bullock v. Yakima Valley Transportation Co., 108 Wash. 413, 184 Pac. 641, 187 Pac. 410.

§§ 386, 387. **Waiver of Objections:** Biel v. Union Fuel & Ice Co., 105 Wash. 41, 177 Pac. 813; Lauridsen v. Bowden, Gazam & Arnold, 107 Wash. 310, 181 Pac. 885.

— **Consent to Reduction of Verdict:** McElrath v. Fall, 111 Wash. 438, 191 Pac. 398.

— **Withdrawal of Objections:** Clark v. Schwaegler, 104 Wash. 12, 175 Pac. 300.

§ 388. **Respondents:** Brace v. Pederson, 106 Wash. 573, 180 Pac. 917; Klundt v. Bachtold, 110 Wash. 594, 188 Pac. 924.

— **Cross-appeals:** Rogers v. Savage, 112 Wash. 246, 192 Pac. 13.

AMENDMENTS. See Remington's Digest, App. & E., § 389, and cases cited. See, also:

§ 389. **Amendments Regarded as Made:** Wilson v. Mears, 105 Wash. 296, 177 Pac. 815; Wright v. Seattle Grocery Co., 105 Wash. 383, 177 Pac. 818; Watson v. Barnard, 105 Wash. 536, 178 Pac. 477; Bishop v. Ryan Construction Co., 106 Wash. 254, 180 Pac. 126; Daniel v. Daniel, 106 Wash. 659, 181 Pac. 215; Foy v. Pacific Power & Light Co., 110 Wash. 248, 188 Pac. 514; Hurley-Mason Co. v. Pacific Commissary Co., 111 Wash. 439, 191 Pac. 642.

— **Variance — Prejudicial Effect:** Umpqua Valley Fruit Union v. North Pac. Fruit Distributors, 108 Wash. 265, 183 Pac. 101.

PRESUMPTIONS: See Remington's Digest, App. & E., §§ 390—399, and cases cited. See, also:

§ 390. **Nature and Extent in General:** Erikson's Estate, In re, 106 Wash. 529, 180 Pac. 263.

§ 397. **Verdicts and Findings:** Hampson v. Welt, 105 Wash. 499, 178 Pac. 469.

§ 398. **Judgments and Orders:** Erikson's Estate, In re, 106 Wash. 529, 180 Pac. 263.

— **Judgments in Absence of Statement:** Burke v. Wilson, 107 Wash. 454, 181 Pac. 904.

— **Pleading—Amendments:** State ex rel. Lincoln v. Superior Court, 111 Wash. 615, 191 Pac. 805.

DISCRETION OF LOWER COURT: See Remington's Digest, App. & E., §§ 400—407, and cases cited. See, also:

§ 401. **Order of Proof:** Seal v. Long, 112 Wash. 370, 192 Pac. 904.

§ 406. **Grant of New Trial:** Hurd v. Wysong, 109 Wash. 202, 186 Pac. 301; Crowl v. West Coast Steel Co., 109 Wash. 426, 186 Pac. 866; Getty v. Hutton, 110 Wash. 429, 188 Pac. 497; Hendrickson v. Smith, 111 Wash. 82, 189 Pac. 550; Ziomko v. Puget Sound Elec. Railway, 112 Wash. 426, 192 Pac. 1009; Southern Alaska Canning Co. v. Smith, 113 Wash. 400, 194 Pac. 383; Truva v. Goodyear Tire & Rubber Co., 113 Wash. 413, 194 Pac. 386.

QUESTIONS OF FACT, VERDICTS AND FINDINGS: See Remington's Digest, App. & E., §§ 408—421, and cases cited. See, also:

§ 411. **Force of Evidence—View of Premises:** Samples v. Kergan, 109 Wash. 503, 187 Pac. 383.

§ 413. **Verdict:** Carlin v. Draper, 104 Wash. 29, 175 Pac. 571; State v. Wernitsch, 105 Wash. 224, 177 Pac. 712; Allen v. Schultz, 107 Wash. 393, 181 Pac. 916, 6 A. L. R. 676; Jones v. Elliott, 111 Wash. 138, 189 Pac. 1007; Olson v. Clark, 112 Wash. 691, 191 Pac. 810.

— **Weight of Evidence:** Newport Mining Co. v. Bead Lake Gold-Copper Mining Co., 110 Wash. 120, 188 Pac. 27.

— **Excessive Damages to Real Property:** Clark Lloyd Lbr. Co. v. Puget Sound & Cascade R. Co., 111 Wash. 232, 190 Pac. 226.

§ 414. **Conclusiveness in General:** Calhoun v. Portland Railway, Light & Power Co., 105 Wash. 592, 178 Pac. 895; Swafford v. Levine, 107 Wash. 363, 181 Pac. 682.

§ 416. **Findings—Effect in Equitable Actions:** Peterson v. Ogle, 110 Wash. 610, 188 Pac. 768; George v. Pierce County, 111 Wash. 495, 191 Pac. 406; Cartwright v. Hamilton, 111 Wash. 685, 191 Pac. 797.

§ 417. **Preponderance of Evidence:** Saari v. Wells Fargo Express Co., 109 Wash. 415, 186 Pac. 898.

§ 418. **Trial Without Jury:** Alexander v. Barnes Amusement Co., 105 Wash. 346, 177 Pac. 786; Aura v. Markle, 105 Wash. 654, 178 Pac. 814; Maze v. Feuchtwanger, 106 Wash. 327, 179 Pac. 850; Oregon-Wash. Lbr. & Manufg. Co. v. Bay City Lbr. Co., 107 Wash. 353, 181 Pac. 687; Yankov v. Lakos, 109 Wash. 335, 186 Pac. 848; Luten v. Earles, 109 Wash. 550, 187 Pac. 349; Hausken v. Hodson-Feenaughty Co., 109 Wash. 606, 187 Pac. 319; Ames v. Duff & Youk, 111 Wash. 259, 190 Pac. 230; Di Luck v. Bradner Co., 111 Wash. 291, 190 Pac. 904; Woolfolk v. Mullins Saw Mill Co., 112 Wash. 296, 191 Pac. 854; Snider v. Wright, 112 Wash. 536, 192 Pac. 923; Esmond v. Richards, 112 Wash. 641, 192 Pac. 917.

Consideration by appellate court of impressions made on minds of jurors by view. 10 Ann. Cas. 666.

Right of appellate court to set aside verdict of jury on ground that it is contrary to scientific facts. 7 L. R. A. (N. S.) 357; 15 L. R. A. (N. S.) 701; 28 L. R. A. (N. S.) 648; L. R. A. 1916B, 301.

Review on appeal of evidence as to genuineness of disputed documents. 12 A. L. R. 212.

Facts as reviewable on appeal under Workmen's Compensation Act. Ann. Cas. 1916B, 475; Ann. Cas. 1918B, 647; L. R. A. 1917D, 188.

Weight in appellate court of finding of judge as to amount of damages as compared with verdict of a jury. Ann. Cas. 1913C, 178.

HARMLESS ERROR: See Remington's Digest, App. & E., §§ 422—470, and cases cited. See, also:

§ 423. **Burden to Show Prejudice:** American Iron & Wire Works v. Fisher, 109 Wash. 279, 186 Pac. 877.

§ 428. **Error on Issues Found in Favor of Appellant:** Mohnney v. Davis, 104 Wash. 209, 176 Pac. 31; Du Pont De Nemours Powder Co. v. Pederson, 104 Wash. 433, 176 Pac. 542; Flessner v. Carstens Packing Co., 105 Wash. 694, 179 Pac. 100.

§ 432. **Party not Entitled to Succeed in Any Event:** Tyrell v. Legee, 105 Wash. 438, 178 Pac. 467; Dillabough v. Okanogan County, 105 Wash. 609, 178 Pac. 802; Peerless Pattern Co. v. Whitmore, 110 Wash. 457, 188 Pac. 386.

§ 433. **Favorable to Appellant:** Heitmiller v. Prall, 108 Wash. 382, 184 Pac. 334.

§ 438. **Rulings on Pleadings—Demurrers:** Manahan v. Aumiller, 110 Wash. 673, 188 Pac. 789.

§ 440. **Striking:** Greene v. Atwood, 106 Wash. 416, 180 Pac. 399.

§ 443. **Favorable to Appellant:** Getty v. Hutton, 110 Wash. 124, 188 Pac. 10.

§ 444. **Comment on Evidence—Cure by Instructions:** State v. Herwitz, 109 Wash. 153, 186 Pac. 290.

§ 445. **Misconduct of Counsel:** Calhoun v. Portland Railway, Light & Power Co., 105 Wash. 592, 178 Pac. 805; Pallis v. Kusumi, 108 Wash. 641, 184 Pac. 789; Sound Timber Co. v. Danaher Lbr. Co., 112 Wash. 314, 192 Pac. 941.

— **Restricting Argument:** Crowl v. West Coast Steel Co., 109 Wash. 426, 186 Pac. 866.

§§ 448, 449. **Rulings on Questions to Witnesses and Admission or Exclusion of Evidence:** Bromley v. Heffernan Engine Works, 108 Wash. 31, 182 Pac. 929; Umpqua Valley Fruit Union v. North Pac. Fruit Distributors, 108 Wash. 265, 183 Pac. 101; Fisher v. Anacortes, 109 Wash. 191, 186 Pac. 271; Clements v. Cook, 112 Wash. 217, 191 Pac. 874.

§ 451. **Admission of Evidence:** Dillabough v. Okanogan County, 105 Wash. 609, 178 Pac. 802; Maze v. Feuchtwanger, 106 Wash. 327, 179 Pac. 850; Manahan v. Aumiller, 110 Wash. 673, 188 Pac. 789; McVeety v. Hayes, 111 Wash. 457, 191 Pac. 401.

§ 452. **Trial de Novo:** Northern Pac. R. Co. v. Johnson & Higgins, 110 Wash. 86, 188 Pac. 30.

§ 456. **Cure by Instructions:** Bundy v. Dickinson, 108 Wash. 52, 182 Pac. 947; Pallis v. Kusumi, 108 Wash. 641, 184 Pac. 789.

§§ 457, 458. **Exclusion of Evidence and Facts Otherwise Established:** Deer Park Lbr. Co. v. Oregon-Washington Lbr. & Manufg. Co., 104 Wash. 531, 177 Pac. 336; Hendrickson v. Sund, 105 Wash. 406, 177 Pac. 808; Armstrong v. Modern Woodmen of America, 105 Wash. 356, 178 Pac. 1; West Marginal Way, Seattle, In re, 109 Wash. 116, 186 Pac. 644; Utterback v. Johnson, 110 Wash. 57, 187 Pac. 369; Sound Timber Co. v. Danaher Lbr. Co., 112 Wash. 314, 192 Pac. 941.

§ 1737. Powers of Supreme Court.

Upon an appeal from a judgment or order, or from two or more orders with or without the judgment, the supreme court may affirm, reverse or modify any such judgment or order appealed from, as to any or all of the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had; and, if the appeal is from a part of a judgment or order, may affirm, reverse or modify as to the part appealed from. The decision of the court shall be given in writing, and no cause shall be deemed decided until the decision in writing is filed with the clerk. In giving its decision, if a new trial is granted, the court shall pass upon and determine all the questions of law involved in the cause presented upon

§ 460. **Instructions to Jury—Prejudicial Effect:** Mohney v. Davis, 104 Wash. 209, 176 Pac. 31; Deer Park Lbr. Co. v. Oregon-Washington Lbr. & Manufg. Co., 104 Wash. 531, 177 Pac. 336; Clark Lloyd Lbr. Co. v. Puget Sound & Cascade R. Co., 111 Wash. 232, 190 Pac. 226.

§ 462. **Instructions in Equitable Actions:** Owens v. Bausman, 105 Wash. 412, 177 Pac. 792; Wells v. Walker, 109 Wash. 332, 186 Pac. 857.

§ 463. — **Applicability to Issues and Evidence:** Bleitz v. Bryant Lbr. Co., 110 Wash. 437, 188 Pac. 509; Bennington v. Northern Pac. R. Co., 113 Wash. 1, 192 Pac. 1073.

§ 464. **Refusal of Requests:** Hanson v. Seattle, 108 Wash. 586, 185 Pac. 581.

§ 465. **Instructions Cured by Verdict:** Blanchard v. Puget Sound Traction Light & P. Co., 105 Wash. 226, 177 Pac. 822; Miller v. Great Northern R. Co., 105 Wash. 349, 177 Pac. 799; Thompson v. City of Bellingham, 112 Wash. 583, 192 Pac. 952.

§ 468. **Findings by Court:** Stevens v. Hines, 110 Wash. 579, 188 Pac. 917.

Error Waived in Appellate Court: See Remington's Digest, App. & E., § 471, and cases cited.

SUBSEQUENT APPEALS: See Remington's Digest, App. & E., §§ 472—476, and cases cited. See also:

§ 473. **Law of Case:** Randall v. Gerick, 104 Wash. 422, 176 Pac. 675; Pacific Power & Light Co. v. White, 104 Wash. 528, 177 Pac. 313; Ramat v. California Ins. Co., 104 Wash. 608, 177 Pac. 638; Ecuyer v. New York Life Ins. Co., 107 Wash. 411, 181 Pac. 871, 186 Pac. 327; Diamond Ice & Storage Co. v. Klock Produce Co., 110 Wash. 683, 189 Pac. 257; Foy v. Pacific Power & Light Co., 110 Wash. 248, 188 Pac. 514.

§ 475. **Questions Concluded:** Foy v. Pacific Power & Light Co., 110 Wash. 248, 188 Pac. 514; State ex rel. Tacoma Eastern R. Co. v. Public Service Comm., 112 Wash. 629, 192 Pac. 1979; Harris v. Saunders, 113 Wash. 482, 194 Pac. 533, 198 Pac. 393.

such appeal and necessary to the final determination of the cause. [L. '93, p. 130, § 22.]

Cited in 23 Wash. 722; 43 Wash. 132; 44 Wash. 368; 49 Wash. 407; 53 Wash. 514; 70 Wash. 215; 71 Wash. 356; 94 Wash. 265; 110 Wash. 643.

DETERMINATION AND DISPOSITION OF CAUSE—DECISION IN GENERAL: See Remington's Digest, App. & E., §§ 496—498, and cases cited. See also:

§ 477. **Scope—Effect on Attorney's**

Fees: Geissler's Estate, In re, 110 Wash. 14, 187 Pac. 711.

§ 483. **Effect upon Strangers—Relief to Taxpayers as Class:** Great Northern R. Co. v. Stevens County, 108 Wash. 238, 183 Pac. 65.

— **Scope—Effect on Attorney's Fees:** Geissler's Estate, In re, 110 Wash. 14, 187 Pac. 711.

§ 1738. Damages may be Awarded, When.

Upon the affirmance of any judgment or order for the payment of money, the collection of which, in whole or in part, has been stayed by an appeal bond, as in this title provided, the court may award to the respondent damages upon the amount superseded; and, if satisfied by the record that the appeal was taken for delay only, the court must so award such damages not exceeding fifteen per cent of the sum by such judgment or order recovered or directed to be paid, as will effectually tend to prevent the taking of appeals for delay only. [L. '93, p. 131, § 23.]

Cited in 13 Wash. 140; 16 Wash. 679; 51 Wash. 447; 56 Wash. 12.

§ 1739. Judgment Against Appellant and Sureties.

Upon the affirmance of a judgment or [on] appeal for the payment of money, the supreme court shall render judgment against both the appellant and his sureties in the appeal bond for the amount of the judgment appealed from (in case the bond was conditioned so as to support such judgment) and for the damages and costs awarded on the appeal; and in any other case of affirmance the supreme court shall likewise render judgment against both the appellant and his sureties in the appeal bond for the amount recoverable according to the condition of the bond, in case such amount can be ascertained by the court without an issue and trial. [L. '93, p. 131, § 24.]

Cited in 9 Wash. 603, 657; 11 Wash. 480; 18 Wash. 70; 28 Wash. 196, 473; 29 Wash. 258, 315; 43 Wash. 385; 48 Wash. 23; 54 Wash. 37; 86 Wash. 52; 89 Wash. 551; 102 Wash. 21.

LIABILITIES ON BONDS AND UNDERTAKINGS: See Remington's Di-

gest, App. & E., §§ 499—505, and cases cited.

Judgment against principal on appeal bond as evidence against surety. 9 Ann. Cas. 157; Ann. Cas. 1915D, 405; 40 L. R. A. (N. S.) 741; L. R. A. 1918E, 819.

§ 1740. Rehearing, Limitation on—Remittitur.

If a petition for rehearing or an appeal be filed within thirty days after the filing of the decision of the supreme court, the remittitur upon the appeal shall not be sent down to the lower court till such petition shall have been acted upon by the supreme court. But at the expiration of thirty days after the filing of the decision of any cause on appeal in case no petition for rehearing shall be filed, or in case such a petition is filed and is denied by the court, then forthwith upon such denial the clerk of the supreme court shall send down to the superior court from which the appeal was taken a remittitur in the cause, which shall con-

sist of the judgment of the supreme court, and a certified copy of the opinion of the court in case any judgment or order appealed from was reversed or modified thereby. [L. '93, p. 131, § 25.]

Rehearings, and hearings en banc: Rule XIII, 71 Wash. li.

See supra, §§ 9-11, rehearings and hearings en banc.

See notes to § 1739, supra.

Cited in 87 Wash. 378; 111 Wash. 30.

§ 1741. Effect of Judgment—Execution Under.

If the supreme court affirm or modify any judgment or order appealed from, it may remand the cause to the court below with directions to carry the same into effect, or it may itself issue the necessary process for that purpose to the sheriff of the proper county, as it may deem advisable. If the cause is remanded to the court below to have such judgment or order carried into effect, the decision of the supreme court, and its order entered thereon, upon being certified to the court below and entered on its records, shall have the same force and effect therein as if made and entered by the court below during its session. Executions issued from the supreme court shall be similar to those from the superior court, and of like force and effect, and returnable in the same time. [L. '93, p. 131, § 26.]

See supra, § 10, finality of decisions.

See supra, § 14, effect of judgment.

Cited in 28 Wash. 196; 76 Wash. 525.

RENDITION, FORM AND ENTRY OF JUDGMENT: See Remington's Digest, App. & E., §§ 484-491, and cases cited. See also:

§ 487. **Decision—Matters Determined With Remand:** American Iron & Wire Works v. Fischer, 109 Wash. 279, 186 Pac. 877.

— **Segregation of Damages:** Florence Fish Co. v. Everett Packing Co., 111 Wash. 1, 188 Pac. 792.

— **Modification Without Remand:** McDonald v. Prosser Falls Land & Power Co., 110 Wash. 175, 188 Pac. 462.

MANDATE AND PROCEEDINGS IN LOWER COURT: See Remington's Digest, App. & E., §§ 492-495-2, and cases cited. See also:

§ 493. **Decision—Remand—Modification—Recall of Remittitur—Leave to Attack:** Hartford v. Stout, 105 Wash. 46, 177 Pac. 666.

JURISDICTION AND PROCEEDINGS OF APPELLATE COURT AFTER REMAND: See Remington's Digest, App. & E., §§ 496-498, and cases cited. See, also:

§ 498. **Modification—Recall of Remittitur—Leave to Attack:** Hartford v. Stout, 105 Wash. 46, 177 Pac. 666.

— **Jurisdiction:** Mathison v. Anderson, 107 Wash. 617, 182 Pac. 622.

Jurisdiction of appellate court to grant rehearing after remand. 11 Ann. Cas. 866; Ann. Cas. 1917A, 285.

§ 1742. Effect of Reversal—Writ of Restitution.

If by a decision of the supreme court the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of the judgment or order appealed from, either the supreme court or the court below may direct an execution or writ of restitution to issue for the purpose of restoring to the appellant his property, or the value thereof. But property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal. [L. '93, p. 132, § 27.]

See notes to § 1741, supra.

Cited in 18 Wash. 437; 31 Wash. 503; 84 Wash. 294, 302; 100 Wash. 426; 101 Wash. 164; 109 Wash. 259.

Where a forcible entry and detainer action is dismissed for want of jurisdiction, restitution of premises cannot be

awarded under this section: *State ex rel. Huston v. Big Bend Land Co.*, 100 Wash. 425, 171 Pac. 259.

The supreme court will not require restitution pending an appeal where the parties are amply protected by this sec-

tion: *Fisher v. Seattle Trust Co.*, 109 Wash. 257, 186 Pac. 649.

Amount of restitution where property is sold under a judgment subsequently reversed. 15 *Ann. Cas.* 672; *L. B. A.* 1917C, 1179.

§ 1743. Death of Party not to Affect Appeal.

The death of a party after the rendition of a final judgment in the superior court shall not affect any appeal taken, or the right to take an appeal; but the proper representatives in personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the cause, or may be made parties at the instance of another party, as may be proper, as in case of death of a party pending an action in the superior court, and thereupon the appeal may proceed or be taken as in other cases; and the time necessary to enable such representatives to be admitted or brought in as parties shall not be computed as part of the time in this act limited for taking an appeal, or for taking any step in the progress thereof. [L. '93, p. 132, § 28.]

Cited in 82 Wash. 671; 102 Wash. 159, 160, 414, 415.

Abatement: See *Remington's Digest*, *Crim. Law*, § 379-1; *State v. Furth*, 82

Wash. 665, 144 Pac. 907; *State v. Banks*, 94 Wash. 237, 161 Pac. 1189; *State v. Scott*, 101 Wash. 199, 172 Pac. 234.

§ 1744. Costs of Appeal.

Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the supreme court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the supreme court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys' fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer's fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts; but when the judgment of the court below shall be affirmed in part and reversed in part, or affirmed as to some of the parties and reversed as to others, or modified, the costs shall be in the discretion of the court, and when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action. When in the opinion of the supreme court a brief of the prevailing party shall be unnecessarily long, or improper in substance, the court may in its discretion order the disallowance as costs of any part or the whole of the disbursements for printing the same. [L. '93, p. 132, § 29.]

Cited in 11 Wash. 480; 34 Wash. 182; 39 Wash. 693, 699, 700; 40 Wash. 10, 454; 63 Wash. 244; 74 Wash. 155; 91 Wash. 645; 94 Wash. 324; 102 Wash. 576.

Subdivision 5 of the Code of 1881 (2 *Hill's Code*, § 829), providing for an at-

torneys' fee of \$15 in all actions where judgment is rendered in the supreme court, was not impliedly repealed by this section, which is applicable only to cases appealed to the superior court: *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453, 82 Pac. 878.

COSTS ON APPEAL: See Remington's Digest, Costs, §§ 59—84-1. **Power of Appellate Court to Award Costs:** Bringgold v. Spokane, 19 Wash. 333, 53 Pac. 386; Thomas v. Knights of the Maccabees of the World, 85 Wash. 665, 149 Pac. 7, Ann. Cas. 1917B, 804, L. R. A. 1916A, 750.

§ 60. **Review of Decisions of Justices of the Peace:** State v. White, 8 Wash. 230, 35 Pac. 1100.

§ 61. **Prevailing or Successful Party:** Thurston County v. Scammell, 7 Wash. 94, 34 Pac. 470; State ex rel. Hallett v. Seattle Lighting Co., 60 Wash. 81, 110 Pac. 799, 30 L. R. A. (N. S.) 492; Jones v. Kehoe, 61 Wash. 422, 112 Pac. 497; Michaelson v. Seattle, 63 Wash. 230, 115 Pac. 167; Williams v. Hitchcock, 86 Wash. 536, 150 Pac. 1143; Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342; Fidelity & Deposit Co. v. Spokane Merchants' Assoc., 91 Wash. 170, 157 Pac. 464; Phoenix Assur. Co. v. Columbia & Puget Sound R. Co., 94 Wash. 323, 162 Pac. 519; Rugger v. Hammond, 95 Wash. 85, 163 Pac. 408; Klock Produce Co. v. Diamond Ice & Storage Co., 98 Wash. 676, 168 Pac. 476; Smith v. Fisher, 99 Wash. 102, 168 Pac. 975; Nowogroski v. Southworth, 100 Wash. 336, 170 Pac. 1011; Jacobs v. Seattle, 100 Wash. 524, 171 Pac. 662, L. R. A. 1918E, 131.

§ 62. **Recovery of More Favorable Judgment:** Baxter v. Scoland, 2 W. T. 86, 3 Pac. 638; Adams County v. Dobschlag, 19 Wash. 356, 63 Pac. 339; Belle City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580; Wilcox v. Smith, 38 Wash. 585, 83 Pac. 803; Garey v. Pasco, 89 Wash. 382, 154 Pac. 433; In re Tachi's Estate, 90 Wash. 621, 156 Pac. 833; Hillyard ex rel. Tanner v. Carabin, 96 Wash. 366, 165 Pac. 381.

§ 63. **Dismissal:** Allen v. Catlin, 9 Wash. 603, 38 Pac. 79; Grunewald v. West Coast Grocery Co., 11 Wash. 478, 39 Pac. 964; Post v. Spokane, 28 Wash. 701, 69 Pac. 371, 1104; Columbia etc. R. Co. v. Brailard, 12 Wash. 22, 44 Pac. 382; Henry v. Great Northern R. Co., 16 Wash. 417, 47 Pac. 895; Bash v. Eisenbeis, 16 Wash. 700, 47 Pac. 886; Lamey v. Coffman, 11 Wash. 301, 39 Pac. 682; Grunewald v. West Coast Grocery Co., 11 Wash. 478, 39 Pac. 964; McKenzie v. Royal Dairy, 35 Wash. 390, 77 Pac. 680; Seattle, In re, 40 Wash. 450, 82 Pac. 747; Bleakley v. Wilcox, 49 Wash. 164, 94 Pac. 903; Jones & Co. v. Cunningham, 79 Wash. 4, 139 Pac. 612.

§ 64. **Affirmance:** Willey v. Morrow, 1 W. T. 474; O'Hare v. Wilson, 3 W. T. 251, 14 Pac. 595; Tinkham v. Kimble, 2 Wash. 682, 28 Pac. 1038; Chehalis Flume etc. Co. v. Reinhart, 3 Wash. 428, 28 Pac. 256; Hesford v. Doud, 3 Wash. 430, 28 Pac. 362; Seattle & Montana R. v. Joergenson, 3 Wash. 622, 29 Pac. 88; Hol-

burte's Estate, In re, 38 Wash. 199, 80 Pac. 294; Bond v. Marr, 98 Wash. 177, 167 Pac. 132; Miles v. Mead, 98 Wash. 215, 167 Pac. 106.

§ 65. **Modification:** Schmidt v. Olympia Light & Power Co., 46 Wash. 360, 90 Pac. 212.

§ 66. **Reversal—In General:** Westlake Avenue, In re, 40 Wash. 144, 82 Pac. 279; Sheard v. United States Fidelity & Guaranty Co., 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; Wilson v. Biggama, 73 Wash. 444, 132 Pac. 43.

§ 67. — **As to Part of Judgment or Order:** Trumbull v. Jefferson County, 37 Wash. 604, 79 Pac. 1105; Wheeler Co. v. Pates, 43 Wash. 247, 86 Pac. 625; National Grocery Co. v. Simmons, 63 Wash. 264, 115 Pac. 306; Mazzini Society v. Corgiat, 63 Wash. 273, 115 Pac. 93; Hallidie Co. v. Washington Brick, Lime & Mfg. Co., 70 Wash. 80, 126 Pac. 96.

§ 68. **Persons Liable in General:** Thurston County v. Scammell, 7 Wash. 94, 34 Pac. 470; Romine v. State, 7 Wash. 215, 34 Pac. 924; State ex rel. Dean v. Lamping, 31 Wash. 652, 72 Pac. 476.

§ 69. — **Acts or Omissions of Parties as Affecting Right:** Somerville v. Johnson, 3 Wash. 140, 28 Pac. 373; Bell v. Waudby, 7 Wash. 203, 34 Pac. 917; Vermont Loan & T. Co. v. Greer, 19 Wash. 611, 53 Pac. 1103; Cushing v. Spokane, 45 Wash. 193, 87 Pac. 1121, 122 Am. St. Rep. 890; Ramsdell v. Ramsdell, 47 Wash. 444, 92 Pac. 278; Olympia Brewing Co. v. Pioneer Mut. Ins. Assn., 53 Wash. 16, 101 Pac. 371; Johnson v. Collier, 54 Wash. 478, 103 Pac. 818; McCormick v. Sorenson, 58 Wash. 107, 107 Pac. 1055, 137 Am. St. Rep. 1047; Baker v. Murray, 78 Wash. 241, 138 Pac. 890.

§ 70. — **Failure to Raise Question in Lower Court:** Gaffrey v. Megrath, 11 Wash. 456, 39 Pac. 973; Brace & Hergert Mill Co. v. Burbank, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739; Redick v. Peterson, 99 Wash. 368, 169 Pac. 804.

§ 71. — **Cessation of Controversy:** Hartson v. Dale, 9 Wash. 379, 37 Pac. 475; State ex rel. Daniels v. Prosser, 16 Wash. 608, 48 Pac. 262; Seattle, In re, 40 Wash. 450, 82 Pac. 747; Miller v. Seattle, 41 Wash. 599, 84 Pac. 583.

§ 72. **Apportionment of Costs on Appeal or Error:** Willey v. Morrow, 1 W. T. 474; Hector v. Hector, 51 Wash. 434, 99 Pac. 13; Akers v. Lord, 71 Wash. 299, 128 Pac. 672; Thomas v. Leo, 74 Wash. 286, 133 Pac. 446, 134 Pac. 510; Wiley v. Hart, 74 Wash. 142, 132 Pac. 1015; Bane v. Dow, 80 Wash. 631, 142 Pac. 23; Modern Irr. & Land Co. v. Neely, 81 Wash. 38, 142 Pac. 458; Berg v. Yakima Valley Canal Co., 83 Wash. 451, 145 Pac. 619, L. R. A. 1915D, 292; Cannon Hill Co. v. Moore, 100 Wash. 247, 170 Pac. 551.

§ 73. Directions to Lower Court as to Costs: *Huntington v. Blakeney*, 1 W. T. 111.

§ 74. Security for Costs: *Ewing v. Van Wagenen*, 6 Wash. 39, 32 Pac. 1009; *State ex rel. Baldwin v. Seavey*, 7 Wash. 563, 35 Pac. 389; *Fox v. Utter*, 6 Wash. 299, 33 Pac. 354; *Ahrens v. Seattle*, 39 Wash. 168, 81 Pac. 558; *State ex rel. Illinois Surety Co. v. Superior Court*, 82 Wash. 361, 144 Pac. 292.

§ 75. Proceedings in Forma Pauperis: *State ex rel. Coella v. Fenimore*, 2 Wash. 370, 26 Pac. 807; *State ex rel. Langhorne v. Superior Court*, 32 Wash. 80, 72 Pac. 1027.

§ 76. Amount and Items in General: *Soules v. McLean*, 7 Wash. 451, 35 Pac. 364, 1082; *Potwin v. Blasher*, 9 Wash. 460, 37 Pac. 710; *Nelson v. McLellan*, 34 Wash. 181, 75 Pac. 635; *Clarke v. Eltinge*, 39 Wash. 696, 83 Pac. 901.

§ 76-1. Disbursements in General: *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 127 Am. St. Rep. 1059.

§ 77. Attorney's Fees on Appeal or Error: *Ebey v. Engle*, 1 W. T. 72; *Owsley v. Oregon R. & N. Co.*, 1 Wash. 491, 20 Pac. 782; *Boyer v. Boyer*, 4 Wash. 80, 29 Pac. 981; *State ex rel. Spokane Terminal Co. v. Superior Court*, 40 Wash. 453, 82 Pac. 878; *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117; *Sweatt v. Hunt*, 42 Wash. 96, 84 Pac. 1; *Smith v. Smith*, 56 Wash. 461, 105 Pac. 1030.

§§ 78, 79. Expenses of Record or Transcript: *Brown v. Winehill*, 4 Wash. 98, 29 Pac. 927; *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 39 Pac. 737, 33 Pac. 1055; *Clarke v. Eltinge*, 39 Wash. 696, 82 Pac. 901; *Eggerth v. Spokane*, 91 Wash. 31, 32 Pac. 1006.

§ 80. Unnecessary Expenditures: *King v. Collins*, 1 W. T. 469; *Scully v. Book*, 3 Wash. 182, 28 Pac. 556; *Soules v. McLean*, 7 Wash. 451, 35 Pac. 364, 1082; *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489; *Colkett v. Hammond*, 101 Wash. 416, 172 Pac. 458.

§ 81. Expenses of Briefs: *Carrol v. Anderson*, 2 W. T. 366, 7 Pac. 890; *State v. Freidrich*, 3 Wash. 418, 28 Pac. 747; *Bellingham Bay Land Co. v. Dibble*, 6 Wash. 165, 32 Pac. 108; *Wetmore's Guardianship, In re*, 6 Wash. 271, 33 Pac. 615; *Commercial Nat. Bk. v. Johnson*, 17 Wash. 264, 49 Pac. 488; *Deering v. Holland*, 26 Wash. 588, 67 Pac. 240; *Stowe v. La Conner Trad. & Transp. Co.*, 39 Wash. 28, 80 Pac. 856, 81 Pac. 97; *Brown v. Kildea*, 58 Wash. 184, 108 Pac. 452, 1135; *Gordon v. McClanahan*, 78 Wash. 531, 139 Pac. 496; *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803, Ann. Cas. 1917E, 739.

§ 82. Damages and Penalties for Frivolous Appeal and Delay: *Seattle & Mont. R. v. Joergenson*, 3 Wash. 622, 29 Pac. 88; *Chehalis Flume etc. Co. v. Reinhart*, 3 Wash. 428, 28 Pac. 256; *Hesford v. Doud*, 3 Wash. 430, 28 Pac. 362; *Walter v. Maresch*, 3 Wash. 624, 29 Pac. 205; *Wheeler v. Commercial Inv. Co.*, 22 Wash. 546, 61 Pac. 715.

§ 83. Taxation of Costs on Appeal or Error: *Bellingham Bay etc. R. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782; *Bellingham Bay etc. R. Co. v. Strand*, 5 Wash. 807, 32 Pac. 782; *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 892; *Ettor v. Tacoma*, 77 Wash. 267, 137 Pac. 820.

§ 84. New Trial: *Casey v. Malidore*, 19 Wash. 279, 53 Pac. 60.

§ 84-1. Setoff Against Debt, Recovery, or Other Costs: *Sullivan v. Sullivan*, 52 Wash. 160, 100 Pac. 321.

Power of appellate court to award costs on dismissal of appeal for want of jurisdiction. 13 Ann. Cas. 1048.

Liability of land owner for costs on appeal in eminent domain proceedings. Ann. Cas. 1912C, 533; Ann. Cas. 1916E, 692; Ann. Cas. 1917E, 262; 36 L. R. A. (N. S.) 624.

§ 1745. Effect of Appeal in Criminal Actions.

An appeal by a defendant in a criminal action shall stay the execution of the judgment of conviction. In case the defendant has been convicted of a felony, and has been unable to furnish the bail bond required by section 1747 pending the appeal, the time during which he remains in the jail of the county from which the appeal is taken shall be deducted from the term for which he was theretofore sentenced to the penitentiary, if judgment against him be affirmed. [L. '93, p. 133, § 30.]

See next section.

Cited in 2 Wash. 552; 7 Wash. 356; 26 Wash. 324; 30 Wash. 330; 56 Wash. 92.

Status of judgment of conviction as affected by appeal. Ann. Cas. 1915B, 289.

§ 1746. Same—Date of Commencement of Sentence.

In the event no appeal be taken from the judgment of conviction of a felony, the term of sentence imposed upon such judgment shall commence to run from the date of the imposition thereof. In the event an appeal be taken from such judgment of conviction, and upon such appeal the judgment be affirmed, the term of sentence shall commence to run from the date upon which the remittitur shall be filed in the lower court. [L. '03, p. 39, § 1.]

§ 1747. In What Cases Bail Authorized.

In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant; and the appellant shall be committed until a bond to the state of Washington in the sum so fixed be executed on his behalf by at least two sureties possessing the qualifications required for sureties on appeal bonds by section 1725 of this title, such bond to be conditioned that the appellant shall appear whenever required, and stand to and abide by the judgment or orders of the appellate court, and any judgment and order of the superior court that may be rendered or made in pursuance thereof. If the appellant be already at large on bail, his sureties shall be liable to the amount of their bond, in the same manner and upon the same conditions as if they had executed the bond prescribed by this section; but the court may by order require a new bond in a larger amount or with new sureties, and may commit the appellant until the order be complied with. [L. '93, p. 133, § 31.]

Cited in 2 Wash. 552; 37 Wash. 259; 64 Wash. 141.

Right to release pending appeal: See Remington's Digest, Bail, §§ 1, 2; Foye, In re, 21 Wash. 250, 57 Pac. 825; State ex rel. Denham v. Superior Court, 28 Wash. 590, 68 Pac. 1051; Pakenham v. Reed, 37 Wash. 258, 79 Pac. 786; State ex rel. Moorehead v. Chapman, 64 Wash.

140, 116 Pac. 592; State ex rel. Sylvester v. Foster, 84 Wash. 58, 146 Pac. 169, L. R. A. 1915E, 588.

Right to release on bail pending appeal under general statute. 37 L. R. A. (N. S.) 693.

Right to release pending appeal from conviction upon taking pauper's oath. L. R. A. 1916F, 106.

§ 1748. Personal Appearance not Necessary.

Personal appearance of any party in the supreme court shall not be necessary on appeal in either civil or criminal actions. In criminal actions the defendant shall be entitled to close the argument. [L. '93, p. 134, § 32.]

§ 1749. Proceedings in Case of Reversal in Criminal Cases.

When in a criminal action the judgment against the defendant is reversed and it appears that no offense whatever has been committed, the supreme court must direct that the defendant be discharged; but if it appear that the defendant is guilty of an offense, although defectively charged in the indictment or information, the supreme court, if the defendant is in prison, must direct the keeper of the place of con-

finement to cause the prisoner to be returned to the sheriff of the proper county, there to abide the order of the superior court thereof; and such keeper shall be entitled to the usual fees therefor. [L. '93, p. 134, § 33.]

Cited in 36 Wash. 445; 84 Wash. 120, 121.

§ 1750. Imprisonment Pending Appeal to be Deducted.

If a defendant who has been in prison during the pendency of an appeal, upon a new trial ordered by the supreme court, shall be again convicted, the period of his former imprisonment shall be deducted by the superior court from the period of imprisonment to be fixed on the last verdict of conviction. [L. '93, p. 134, § 34.]

§ 1751. Transcript of Judgment, Effect of.

A transcript of any order or judgment, or both, of the supreme court, certified under the seal of the court, shall be sufficient authority to any court, or to any officer on whom it may be secured, to proceed according to its mandate. [L. '93, p. 134, § 35.]

§ 1752. Appeals to be Heard on Merits.

The supreme court shall hear and determine all causes removed thereto in the manner hereinbefore provided, upon the merits thereof, disregarding all technicalities, and shall upon the hearing consider all amendments which could have been made as made. [L. '93, p. 134, § 36.]

Review on merits, see notes to § 1736, *supra*.

Cited in 21 Wash. 333; 22 Wash. 25, 71 Wash. 411; 78 Wash. 7, 153; 79 Wash. 293; 24 Wash. 199, 221; 26 Wash. 342; 545; 81 Wash. 376; 82 Wash. 694; 85 Wash. 409, 626; 32 Wash. 372; 35 Wash. 464, 512; 87 Wash. 303; 88 Wash. 267; 38 Wash. 612; 48 Wash. 240; 611; 89 Wash. 121; 92 Wash. 465; 99 Wash. 363; 51 Wash. 445; 53 Wash. 429; 103 Wash. 147; 104 Wash. 634; 56 Wash. 124; 60 Wash. 207; 65 Wash. 373; 105 Wash. 305, 386; 111 Wash. 69; 67 Wash. 588; 70 Wash. 77; 450, 622.

§ 1753. Rules and Regulations.

The supreme court is hereby authorized to make all needful rules and regulations not inconsistent with law concerning practice and procedure in cases appealed to the supreme court. [L. '93, p. 135, § 37.]

Rules of Supreme Court, see 71 Wash., p. xxxvii; 82 Wash., p. xxvii.

§ 1754. Method Herein Provided Exclusive.

The mode provided by this title for appealing cases to the supreme court, and for securing a revision of the same therein, shall be exclusive and shall supersede all other methods heretofore provided. But no rights acquired under statutes which are abrogated by this title shall be lost by reason of the passage of this title, and all appeals pending when this title takes effect may be prosecuted to their determination as if this title had not been passed. [L. '93, p. 135, § 38.]

Cited in 14 Wash. 663.

ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS.

TITLE XII.

ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS AND BEFORE MAGISTRATES.

See *supra*, §§ 43—49, justices' courts.
See *infra*, §§ 6513—6545, justices of the peace.

CHAPTER I.—COMMENCEMENT OF CIVIL ACTIONS IN JUSTICE'S COURT.

- | | |
|---|---|
| 1755. Civil actions, how commenced. | 1765. Proof of service. |
| 1756. Venue of actions—Precinct of defendant's residence. | 1766. Service by publication—Form. |
| 1757. Jurisdiction — Coextensive with limits of county. | 1767. Proof of service by publication. |
| 1758. Action by summons, how commenced—Form, etc. | 1768. Written admission equivalent to proof of service. |
| 1759. Action by complaint and notice—Form. | 1769. Jurisdiction, when acquired. |
| 1760. Service of process by constable or sheriff. | 1770. Justice's docket, entries in. |
| 1761. How served. | 1771. Infant to sue by guardian or next friend. |
| 1762. Style of process. | 1772. Appointment of guardian ad litem. |
| 1763. Return of process. | 1773. Time for appearance. |
| 1764. Service by person appointed by justice—Return. | 1774. Change of venue. |
| | 1775. Change of venue as in superior court. |
| | 1776. Penalty for false return. |
| | 1777. Security of nonresident for costs. |

CHAPTER I-A.—SMALL CLAIMS DEPARTMENT IN JUSTICE'S COURT.

- | | |
|--|---|
| 1777-1. Small claims department—Jurisdiction. | 1777-7. Verification. |
| 1777-2. Actions, how commenced. | 1777-8. Consent to appearance by attorney — Witnesses — Judgment. |
| 1777-3. Setting for hearing—Filing fee — Compensation. | 1777-9. Informal pleadings and trial. |
| 1777-4. Service on defendant—Fees. | 1777-10. Satisfaction of judgments. |
| 1777-5. Statement of claim—Requisites. | 1777-11. Certification of unpaid judgment—Docket entry. |
| 1777-6. Notice of claim—Time for Answer. | 1777-12. Records. |

CHAPTER II.—PLEADINGS IN CIVIL ACTIONS IN JUSTICE'S COURT.

- | | |
|--|---|
| 1778. Pleadings, when to take place. | 1784. Pleadings to be verified. |
| 1779. Pleadings, what constitute. | 1785. Uncontroverted allegations deemed admitted. |
| 1780. Pleadings may be oral or written. | 1786. Objections to pleading—Amendment. |
| 1781. Pleadings docketed or filed—Form immaterial. | 1787. Variance immaterial, when. |
| 1782. Denial of knowledge or information. | 1788. Amendments. |
| 1783. Pleading account or instrument. | 1789. Setoff, how pleaded. |

CHAPTER III.—ARREST AND BAIL IN JUSTICE'S COURT.

- | | |
|---|--|
| 1790. Warrant may issue, when. | 1794. Detention not to exceed twenty-four hours. |
| 1791. Bond for warrant. | 1795. Continuance—Bond. |
| 1792. Warrant, how served. | |
| 1793. Notice of arrest to plaintiff, etc. | |

CHAPTER IV.—REPLEVIN IN JUSTICE'S COURT.

- | | |
|--|---|
| 1796. Plaintiff may claim immediate delivery. | 1799. Execution of order—Bond. |
| 1797. Affidavit where delivery claimed, contents of. | 1800. Exceptions to sureties. |
| 1798. Order for delivery. | 1801. Return of property on giving bond, etc. |
| | 1802. Justification of sureties. |

ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS.

- | | |
|---|--|
| 1803. Officer may break open building or inclosure. | 1805. Proceedings where property claimed by third party. |
| 1804. Officer to keep and deliver property. | 1806. Return of order and affidavit. |

CHAPTER V.—GARNISHEE PROCESS BY OFFICERS.

- | | |
|---|---|
| 1807. Affidavit for garnishment. | 1816. Costs. |
| 1808. Garnishee summons. | 1817. Judgment against garnishee. |
| 1809. Service of summons. | 1818. Costs against garnishee. |
| 1811. Liability of garnishee. | 1819. Final judgment—Negotiable instrument. |
| 1812. Garnishee action — When deemed commenced. | 1820. Default, etc., by garnishee. |
| 1813. Examination of garnishee. | 1821. Appearance after default. |
| 1814. Trial, when. | 1822. Judgment in bar. |
| 1815. Defendant may participate in trial. | |

CHAPTER VI.—WRITS OF GARNISHMENT BY JUSTICES.

- | | |
|--|---|
| 1823. Writ of garnishment — When may issue. | 1836. Execution against garnishee. |
| 1824. Affidavit for garnishment — Requisites. | 1837. Garnishee in possession of property — Surrender—Custody. |
| 1825. Issuance of writ—Contents. | 1838. Attachment for contempt. |
| 1826. Form for writ. | 1839. Corporation garnishee — Shares of stock sold. |
| 1827. How issued. | 1840. Sales, how conducted. |
| 1828. Service of writ. | 1841. Title on sale. |
| 1829. Service upon bank as garnishee. | 1842. Controverting the answer of the garnishee—Trial. |
| 1830. Effect of service—Payment of debt. | 1843. Attorneys' fees—Costs. |
| 1831. Bond to release garnishee. | 1844. Garnishee's defense against defendant. |
| 1832. Answer of garnishee. | 1845. Garnishee's answer — Identity of names, how determined—Trial. |
| 1833. Discharge of garnishee. | 1846. Answer of garnishee — Defense of defendant—Exemptions. |
| 1834. Default of garnishee—Judgment—Dismissal of action. | |
| 1835. Judgment against garnishee—Satisfaction. | |

CHAPTER VII.—TRIAL OF CIVIL ACTIONS IN JUSTICE'S COURT.

- | | |
|--|---|
| 1847. Continuance — Not to exceed sixty days. | 1851. Selection of jury. |
| 1848. Justice to try cause unless jury demanded. | 1852. Summons for jurors. |
| 1849. Jury — Number — Qualifications — Fees. | 1853. Swearing jury. |
| 1850. Time of jury trial. | 1854. Delivery of verdict. |
| | 1855. Justice may discharge jury, when. |
| | 1856. Failure to appear when summoned —Penalty. |

CHAPTER VIII.—JUDGMENTS IN CIVIL ACTIONS IN JUSTICE'S COURT.

- | | |
|-------------------------------------|--|
| 1857. Judgment of dismissal. | 1861. Setoff allowed, to what extent. |
| 1858. Judgment by default—Evidence. | 1862. Judgment for cost—Attorney's fees. |
| 1859. Judgment—Rendition—Entry. | 1863. Proceedings where title to land is in issue. |
| 1860. Tender, judgment in case of. | |

CHAPTER IX.—FEES AND COMPENSATION OF JUSTICES OF THE PEACE.

- | | |
|---|---|
| 1864. Schedule of justice fees. | 1866. Compensation limited to schedule. |
| 1865. Fees where justice receives salary. | |

CHAPTER X.—EXECUTIONS AND PROCEEDINGS THEREON.

- | | |
|---|---|
| 1867. Stay of execution. | 1874. Procedure as to setoff rendered before another justice. |
| 1868. Bond for stay. | 1875. Execution for balance after setoff. |
| 1869. Form of bond. | 1876. No execution after five years. |
| 1870. Levy against property of principal or bail. | 1877. Execution from succeeding justice. |
| 1871. Bail may collect from defendant. | 1878. Execution to another county. |
| 1872. Execution revoked where judgment stayed.* | 1879. Execution—Direction, date, etc. |
| 1873. Setoff of mutual judgments. | 1880. Amount of debt, etc., to be stated. |
| | 1881. Execution may be renewed. |

1755 ACTIONS AND PROCEEDINGS IN JUSTICES' COURTS. [TITLE XII

- | | |
|---|--|
| 1882. Notice of sale upon execution. | 1886. Garnishees may be examined under oath. |
| 1883. Sale upon execution—Return. | 1887. Execution for costs. |
| 1884. Officer not to buy at execution sale. | 1888. Claim by third person to property levied on or attached. |
| 1885. Execution may issue against the person, when. | 1889. Claimant may resort to other remedies. |

CHAPTER XI.—FORMS IN CIVIL ACTIONS IN JUSTICE'S COURT.

1890. Forms—Equivalents may be used.

CHAPTER XII.—PROCEEDINGS FOR CONTEMPT BEFORE JUSTICES OF THE PEACE.

- | | |
|---|------------------------------|
| 1891. When justice may punish for contempt. | 1894. Summary arraignment. |
| 1892. Punishment for contempt. | 1895. Form of warrant. |
| 1893. Hearing—Warrant for offender. | 1896. Form of judgment. |
| | 1897. Warrant of commitment. |

CHAPTER XIII.—WITNESSES AND DEPOSITIONS.

- | | |
|--|--|
| 1898. Witnesses may be subpoenaed within twenty miles. | 1905. Proceedings on party's refusal to testify. |
| 1899. How and by whom served. | 1906. Examination of party in his own behalf. |
| 1900. Attachment for failure to appear. | 1907. When depositions may be taken. |
| 1901. Service and costs in attachment. | 1908. How taken and certified. |
| 1902. Damages for nonattendance. | 1909. How used on trial. |
| 1903. Party to action as witness. | |
| 1904. Testimony of party may be rebutted. | |

CHAPTER XIV.—APPEALS FROM JUSTICE'S COURT.

- | | |
|--|---|
| 1910. Appeal in civil actions. | 1918. Judgment against appellant and sureties, when. |
| 1911. Appeal, how taken—Bond. | 1919. Appeal in criminal cases—Notice. |
| 1912. Stay of proceedings, when. | 1920. Fees not required in advance—Failure to prosecute, effect of. |
| 1913. Release of property on certificate of appeal. | 1921. Justice to recognize witnesses—Transcript. |
| 1914. Transcript—Jurisdiction—Procedure in superior court. | 1922. Appeal from order for security to keep the peace. |
| 1915. Pleadings in superior court on appeal. | 1923. Proceedings on such appeal—New bond—Costs. |
| 1916. Attachment for certified transcript. | 1924. Failure to prosecute such appeal, effect of. |
| 1917. Appeal not to be dismissed for defective bond, when. | |

CHAPTER I.

COMMENCEMENT OF CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1755. Civil Actions, How Commenced.

Civil actions in the several justices' courts of this state may be instituted either by the voluntary appearance and agreement of the parties, by the service of a summons, or by the service upon the defendant of a true copy of the complaint and notice, which notice shall be attached to the copy of the complaint, and cite the defendant to be and appear before the justice at the time and place therein specified, which shall not be less than six nor more than twenty days from the date of filing the complaint. [Cf. L. '60, p. 245; L. '73, p. 35, § 19; Cd. '81, § 1712; 2 H. C. § 1452.]

Process: See Remington's Digest, J. P., 24 Pac. 539; McCoy v. Bell, 1 Wash. 504, § 14; Nelson v. Campbell, 1 Wash. 261, 20 Pac. 595.

§ 1756. Venue of Actions—Precinct of Defendant's Residence.

All civil actions commenced in a justice court against a defendant or defendants residing in a city or town of more than three thousand inhabitants shall be brought in the justice court of the precinct in said city or town in which one or more of such defendants reside. [L. '99, p. 53, § 1; L. '01, p. 105, § 1.]

Cited in 104 Wash. 650.

An "action" is the formal demand, including the proceeding and adjudication of the rights of one party against another, in a court, and relates only to civil actions, for otherwise there might be no courts to which the same could apply: *State ex rel. Calderwood v. Schomber*, 23 Wash. 573, 63 Pac. 221.

This section has no application to a prosecution for the violation of an ordinance of a city of the third class, jurisdiction of which is exclusively vested in the police judge of the city by section 9143, *infra*: *State ex rel. Kiggins v. Hadley*, 104 Wash. 648, 177 Pac. 655.

§ 1757. Jurisdiction—Coextensive With Limits of County.

The jurisdiction of justices of the peace in all civil actions, except as provided in the preceding section, shall be coextensive with the limits of the county in which they are elected or appointed, and no other or greater, but every justice of the peace shall continue to reside and perform all the duties of his office in the precinct for which he was elected or appointed during his continuance in office. [L. '01, p. 105, § 2.]

§ 1758. Action by Summons, How Commenced—Form, etc.

A party desiring to commence an action before a justice of the peace for the recovery of a debt by summons shall file his claim with the justice of the peace, verified by his own oath, or that of his agent or attorney; and thereupon the justice of the peace shall, on payment of his fees, if demanded, issue a summons to the opposite party, which summons shall be in the following form, or as nearly as the case will admit, viz.:—

The State of Washington, } ss.
 — County,

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to summon —, if he (or they) be found in your county, to be and appear before me at — on — day of —, at — o'clock, P. M. (or A. M.), to answer the complaint of —, for a failure to pay him a certain demand, amounting to — dollars and — cents, upon (here state briefly the nature of the claim); and of this writ make due service and return.

Given under my hand this — day of —, 18—.

— —, Justice of the Peace.

And the summons shall specify a certain place, day, and hour for the appearance and answer of the defendant, not less than six nor more than twenty days from the date of filing plaintiff's claim with the justice, which summons shall be served at least five days before the time of trial mentioned therein, and shall be served by the officer delivering to the defendant, or leaving at his place of abode, with some person over twelve years of age, a true copy of such summons, certified by the officer to be

such. [Cf. L. '60, p. 243, § 29; L. '73, p. 335, § 20; Cd. '81, § 1713; 2 H. C., § 1453.]

Effect of error or irregularity in
summons issued by justice of the

peace: **Ann. Cas.** 1914A, 1085; 6
A. L. R. 851.

§ 1759. Action by Complaint and Notice—Form.

Any person desiring to commence an action before a justice of the peace by the service of a complaint and notice can do so by filing his complaint, verified by his own oath or that of his agent or attorney, with the justice, and when such complaint is so filed, upon payment of his fees, if demanded, the justice shall attach thereto a notice, which shall be substantially as follows:—

The State of Washington, } ss.
— County,

To —.

In the name of the state of Washington, you are hereby notified to be and appear at my office in —, on the — day of —, 18—, at the hour of —, — M., to answer the foregoing complaint, or judgment will be taken against you as confessed, and the prayer of the plaintiff granted.

Dated —, 18—.

— —, J. P.

[Cf. L. '60, p. 245, § 29; L. '73, p. 336, § 21; Cd. '81, § 1714; 2 H. C., § 1454.]

Cited in 11 Wash. 12.

§ 1760. Service of Process by Constable or Sheriff.

All process in actions and proceedings in justice courts, having a salaried constable, when served by an officer, shall be served by such constable or by the sheriff of the county or his duly appointed deputy; and all fees for such service shall be paid into the county treasury. [L. '09, p. 433, § 1.]

§ 1761. How Served.

The complaint and notice shall be served at least five days before the time mentioned in the notice for the defendant to appear and answer the complaint, by delivering to the defendant, or leaving at his place of abode, with some person over twelve years of age, a true copy of the complaint and notice, certified by the officer or person making the service to be such. [L. '73, p. 337, § 22; Cd. '81, § 1715; 2 H. C., § 1455.]

Cited in 11 Wash. 12; 31 Wash. 362.

Under this section a justice of the peace acquires no jurisdiction of the defendant by a service of a summons upon

his daughter of the age of eleven years: *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243.

§ 1762. Style of Process.

All process issued by justices of the peace shall run in the name of the state of Washington, be dated the day issued and signed by the justice granting the same, and all executions and writs of attachment or of replevin shall be served by the sheriff or some constable of the county in which the justice resides, but a summons or notice and complaint may be served by any citizen of the state of Washington over the age of twenty-

one years and not a party to the action. [L. '03, p. 18, § 1. Cf. L. '73, p. 337, § 23; Cd. '81, § 1716; 2 H. C., § 1456; L. '93, p. 264, § 1; L. '95, p. 95, § 1.]

Cited in 71 Wash. 597.

§ 1763. Return of Process.

Every constable or sheriff serving process or complaint and notice shall return in writing, the time, manner and place of service and indorse thereon the legal fees therefor and shall sign his name to such return, and any person other than one of said officers serving summons or complaint and notice shall file with the justice his affidavit, stating the time, place and manner of the service of such summons or notice and complaint: Provided, that no fee shall be allowed for the service of a summons or notice and complaint by a person other than an officer. [L. '03, p. 19, § 2. Cf. L. '54, p. 229, § 31; L. '60, p. 246, § 37; L. '73, p. 337, § 24; Cd. '81, § 1717; 2 H. C., § 1457; L. '93, p. 264, § 2; L. '95, p. 195, § 2.]

§ 1764. Service by Person Appointed by Justice—Return.

Any justice may, by appointment in writing, authorize any person other than the parties to the proceeding, or action, to serve any subpoena, summons, or notice and complaint issued by such justice; and any such person making such service shall return on such process or paper, in writing, the time and manner of service, and shall sign his name to such return, and be entitled to like fees for making such service as a sheriff or constable, and shall indorse his fees for service thereon: Provided, it shall not be lawful for any justice to issue process or papers to any person but a regularly qualified sheriff or constable, in any precinct where such officers reside, unless from sickness or some other cause said sheriff or constable is not able to serve the same: Provided further, that it shall be lawful for notice and complaint or summons in a civil action in the justice court to be served by any person over the age of twenty-one years and not a party to the action in which the summons or notice and complaint shall be issued without previous appointment by the justice. [L. '03, p. 19, § 3. Cf. L. '73, p. 337, § 25; Cd. '81, § 1718; 2 H. C., § 1458.]

§ 1765. Proof of Service.

Proof of service in either of the above cases shall be as follows: When made by a constable or sheriff, his return signed by him and indorsed on the paper or process. When made by any person other than such officer, then by the affidavit of the person making the service. [L. '73, p. 337, § 26; Cd. '81, § 1719; 2 H. C., § 1459.]

§ 1766. Service by Publication—Form.

In case personal service cannot be had by reason of the absence of the defendant from the county in which the action is sought to be commenced, it shall be proper to publish the summons or notice, with a brief statement of the object and prayer of the claim or complaint, in some weekly newspaper published in the county wherein the action is commenced; or if there is no paper published in such county then in some newspaper published in the nearest adjoining county, which notice shall be published not less than once a week for three weeks prior to the time

fixed for the hearing of the cause, which shall not be less than four weeks from the first publication of said notice. Said notice may be substantially as follows:—

The State of Washington, }
County of —, } ss.

In Justice's Court, — Justice.

To —.

In the name of the state of Washington, you are hereby notified that — has filed a complaint (or claim, as the case may be) against you in said court, which will come on to be heard at my office in —, in — county, state of Washington, on the — day of —, A. D. 18—, at the hour of — o'clock, — M., and unless you appear and then and there answer, the same will be taken as confessed, and the demand of the plaintiff granted. The object and demand of said claim (or complaint, as the case may be), is (here insert a brief statement).

Complaint filed —, A. D. 18—.

— —, J. P.

[L. '73, p. 337, § 27; Cd. '81, § 1720; 2 H. C., § 1460.]

Cited in 71 Wash. 667, 671, 672.

This section authorizes only a judgment in rem against the property attached, even if the defendant was a resident of the state; and where the attached property is not sufficient to satisfy the

judgment, no other execution can issue against other property of the defendant as in the case of personal judgments: Clifford v. Paterson Transfer Co., 71 Wash. 665, 129 Pac. 369.

§ 1767. Proof of Service by Publication.

Proof of service, in case of publication, shall be the affidavit of the publisher, printer, foreman or principal clerk, showing the same. [L. '73, p. 338, § 28; Cd. '81, § 1721; 2 H. C., § 1461.]

§ 1768. Written Admission Equivalent to Proof of Service.

The written admission of the defendant, his agent or attorney, indorsed upon any summons, complaint and notice, or other paper, shall be complete proof of service in any case. [L. '73, p. 338, § 29; Cd. '81, § 1722; 2 H. C., § 1462.]

§ 1769. Jurisdiction, When Acquired.

The court shall be deemed to have obtained possession of the case from the time the complaint or claim is filed, after completion of service, whether by publication or otherwise, and shall have control of all subsequent proceedings. [L. '73, p. 338, § 30; Cd. '81, § 1723; 2 H. C., § 1463.]

See notes to § 44, *supra*, jurisdiction of justices.

§ 1770. Justice's Docket, Entries in.

Every justice of the peace shall keep a docket in a well-bound book, in which he shall enter,—

1. The title of all actions commenced before him;
2. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand;

3. The date of the notice and the time of its return; and if an order to arrest the defendant be made, the statement of the facts on which the order is issued;

4. The time when the parties, or either of them, appear, or their non-appearance, if default be made;

5. A brief statement of the nature of the plaintiff's demand, and the amount claimed; and if any setoff be pleaded, a similar statement of the setoff and the amount estimated, and every motion, rule, order, and exception, with the decision of the court thereon;

6. Every continuance, stating at whose request, and for what time;

7. The demand for a trial by jury, when the same is made, and by whom made, the order for the jury, and the time appointed for the trial and return of the jury;

8. The names of the jury who appear and are sworn; the names of witnesses sworn, and at whose request;

9. The verdict of the jury, and when received; and if the jury disagree and are discharged, the fact of such disagreement and discharge;

10. The judgment of the court, and the time when rendered;

11. The time of issuing execution, and the name of the officer to whom delivered, and an account of the debt and costs, and the fees due to each person separately;

12. The fact of an appeal having been made and allowed, and the time when;

13. Satisfaction of the judgment, or any money paid thereon, and the time when;

14. And such other entries as may be material. [Cf. L. '54, p. 227, § 25; L. '73, p. 339, § 31; Cd. '81, § 1724; 2 H. C., § 1464.]

Cited in 74 Wash. 479; 88 Wash. 551.

§ 1771. Infant to Sue by Guardian or Next Friend.

No action shall be commenced by an infant plaintiff, except by his guardian or until a next friend for such infant shall have been appointed. Whenever requested, the justice shall appoint some suitable person, who shall consent thereto in writing, to be named by such plaintiff, to act as his next friend in such action, who shall be responsible for the costs therein. [L. '54, p. 230, § 40; Cd. '81, § 1753; 2 H. C., § 1465.]

Cited in 13 Wash. 165.

§ 1772. Appointment of Guardian ad Litem.

After service and return of process against an infant defendant, the action shall not be further prosecuted until a guardian for such infant shall have been appointed. Upon the request of such defendant, the justice shall appoint some person, who shall consent thereto in writing, to be guardian of the defendant in defense of the action; and if the defendant shall not appear on the return day of the process, or if he neglect or refuse to nominate such guardian, the justice may, at the request of the plaintiff, appoint any discreet person as such guardian. The consent of the guardian or next friend shall be filed with the justice; and such guardian for the defendant shall not be liable for any costs in the action. [L. '54, p. 230, § 41; Cd. '81, § 1754; 2 H. C., § 1466.]

§ 1773. Time for Appearance.

The parties shall be entitled to one hour in which to make their appearance after the time mentioned in the summons or notice for appearance. but shall not be required to remain longer than that time, unless both parties appear, and the justice, being present, is actually engaged in the trial of another action or proceeding; in such case he may postpone the time of appearance until the close of such trial. [L. '54, p. 230, § 42; Cd. '81, § 1755; 2 H. C., § 1467.]

Cited in 1 Wash. 509.

Appearance and Representation by Attorney: See Remington's Digest, J. P., §§ 15, 16; Nelson v. Campbell, 1 Wash. 261, 24 Pac. 539; McCoy v. Bell, 1 Wash. 504, 20 Pac. 595; State ex rel.

Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895. **Waiver of Defects of Process:** Baxter v. Scoland, 2 W. T. 86, 3 Pac. 638; Knoff v. Puget Sound Co-op. Colony, 1 Wash. 57, 24 Pac. 27.

§ 1774. Change of Venue.

If, previous to the commencement of any trial before a justice of the peace, the defendant, his attorney or agent, shall make and file with the justice an affidavit that the deponent believes that the defendant cannot have an impartial trial before such justice, it shall be the duty of the justice to forthwith transmit all papers and documents belonging to the case to the next nearest justice of the peace in the same county, who is not of kin to either party, sick, absent from the county, or interested in the result of the action, either as counsel or otherwise. The justice to whom such papers and documents are so transmitted shall proceed as if the suit had been instituted before him. Distance, as contemplated by this section, shall mean to be by the nearest traveled route. The costs of such change of venue shall abide the result of the suit. [Cf. L. '67, p. '88, §§ 2, 3; L. '81, p. 8, §§ 2, 3; Cd. '81, § 1938; 2 H. C., § 1468.]

Cited in 13 Wash. 573; 60 Wash. 240; 86 Wash. 200; 98 Wash. 506, 507.

Change of Venue: See Remington's Digest, J. P., § 12; Puyallup v. Snyder,

13 Wash. 572, 43 Pac. 635; Kerstetter v. Thomas, 36 Wash. 620, 79 Pac. 290; State ex rel. Hall v. Wicker, 60 Wash. 238, 110 Pac. 992.

§ 1775. Change of Venue as in Superior Court.

Change of venue may be allowed for the same causes for which they are allowed in the superior court. [Cf. L. '60, p. 252, § 68; L. '63, p. 369, § 162; Cd. '81, § 1881.]

§ 1776. Penalty for False Return.

If any officer, without showing good cause therefor, fail to execute any process to him delivered, and make due return thereof, or make a false return, such officer, for every such offense, shall pay to the party injured ten dollars, and all damages such party may have sustained by reason thereof, to be recovered in a civil action. [Cf. L. '54, p. 230, § 39; L. '73, p. 343, § 51; Cd. '81, § 1752; 2 H. C., § 1469.]

§ 1777. Security of Nonresident for Costs.

Whenever the plaintiff is a nonresident of the county, the justice may require of him security for the costs in a sum not exceeding fifty dollars at the time of the commencement of the action. Provided, however, that after an action has been commenced by a nonresident plaintiff and no

security given for costs, the defendant may require such security by motion; when allowed all proceedings shall be stayed until such security has been given. [L. '05, p. 27, § 1. Cf. L. '54, p. 228, § 27; Cd. '81, § 1725; 2 H. C., § 1470.]

CHAPTER I-A.

SMALL CLAIMS DEPARTMENT IN JUSTICE'S COURT.

§ 1777-1. Small Claims Department—Jurisdiction.

In every justice's district of this state there shall be created and organized by the justice of the peace thereof a department to be known as the "small claims department of the justice's court," which shall have jurisdiction, but not exclusive, in cases for the recovery of money only where the amount claimed does not exceed twenty dollars (\$20), and where the defendant resides within the district of such justice court. [L. '19, p. 579, § 1.]

§ 1777-2. Actions, How Commenced.

Actions in such small claims departments shall be deemed commenced by the plaintiff appearing before the justice of the peace and subscribing to and verifying a claim as hereinafter provided. [L. '19, p. 580, § 2.]

§ 1777-3. Setting for Hearing—Filing Fee—Compensation.

Upon filing said claim such justice of the peace shall appoint a time for the hearing of said matter and shall cause to be issued a notice of the claim, as hereinafter provided, which shall be served upon the defendant.

Said justice of the peace shall collect in advance upon each claim the sum of one dollar (\$1), and this shall be the only fee for such justice of the peace to be charged or taxed against the plaintiff in such action during the pendency or disposition of said claim: Provided, however, that when any such "small claims department" shall be created and organized in any justice's district as herein provided, in which the justice is not paid a salary, he may be paid as compensation for conducting such department from the county treasury of his county such monthly salary as the county court and commissioners of said county shall deem just and proper. [L. '19, p. 580, § 3.]

§ 1777-4. Service on Defendant—Fees.

Said notice of claim shall be served by the officers provided for in section 1760, and the same shall be served in the manner provided for in section 1761, but no other paper is to be served with said notice. The officer serving such notice shall be entitled to receive from the plaintiff fifty cents (\$.50) for such service; which sum, together with the fee of the justice of the peace named in section 1777-3, shall be added to any judgment given for plaintiff. [L. '19, p. 580, § 4.]

§ 1777-5. Statement of Claim—Requisites.

The claim hereinbefore referred to shall contain the name of the plaintiff and the name of the defendant, followed by a statement, in

brief and concise form, of the nature and amount of said claim and the time of the accruing of such claim; and shall also state the name and residence of the defendant, if same be known to the plaintiff, for the purpose of serving the notice of claim on such defendant. [L. '19, p. 580, § 5.]

§ 1777-6. Notice of Claim—Time for Answer.

Said notice of claim shall be directed to the defendant, naming him, and shall contain a statement in brief and concise form notifying such defendant of the name, address, amount and natures of the alleged claim of plaintiff, and directing and requiring defendant to appear personally in court before the justice of the peace of said justice's court at a time certain, which shall not be less than five nor more than ten days from the date of service of such notice; said notice shall further provide that in case of failure to so appear, judgment will be given against defendant for the amount of such claim. [L. '19, p. 581, § 6.]

§ 1777-7. Verification.

All claims must be verified by the real claimant, and no claim shall be filed or prosecuted in such department by the assignee of such claim. [L. '19, p. 581, § 7.]

§ 1777-8. Consent to Appearance by Attorney—Witnesses—Judgment.

No attorney at law nor any person other than the plaintiff and defendant, shall concern himself or in any manner interfere with the prosecution or defense of such litigation in said department without the consent of the justice of said justice's court; nor shall it be necessary to summon witnesses, but the plaintiff and defendant in any claim shall have the privilege of offering evidence in their behalf by witnesses appearing at such hearing, and the justice may informally consult witnesses or otherwise investigate the controversy between the parties, and give judgment or make such orders as may by him be deemed to be right, just and equitable for the disposition of the controversy. [L. '19, p. 581, § 8.]

§ 1777-9. Informal Pleadings and Trial.

No formal pleading, other than the said claim and notice, shall be necessary to define the issue between the parties; and the hearing and disposition of all such actions shall be informal, with the sole object of dispensing speedy and quick justice between the litigants: Provided, that no attachment, garnishment or execution shall issue from the small claims department on any claim except as hereinafter provided. [L. '19, p. 582, § 9.]

§ 1777-10. Satisfaction of Judgments.

If the judgment or order be against the defendant, it shall be his duty to pay the same forthwith upon such terms and conditions as the justice of such court shall prescribe. [L. '19, p. 582, § 10.]

§ 1777-11. Certification of Unpaid Judgment—Docket Entry.

The judgment of said court shall be conclusive. If the defendant fails to pay the judgment according to the terms and conditions thereof.

the justice before whom such hearing was had, may, on application of the plaintiff, certify such judgment in substantially the following form:

Washington.

In the justice's court of — county, before — justice of the peace
for — precinct.

—, Plaintiff, }
vs. }
—, Defendant. }

In the Small Claims Department.

This is to certify that in a certain action before me, the undersigned, had on this the — day of — 19—, wherein — was plaintiff and — defendant, jurisdiction of said defendant having been had by personal service (or otherwise) as provided by law, I then and there entered judgment against said defendant in the sum of — dollars; which judgment has not been paid.

Witness my hand this — day of —, 19—.

— —,
Justice of the Peace sitting in the Small Claims Department.

The justice of the peace of said justice's court shall forthwith enter such judgment transcript on the judgment docket of such justice's court; and thereafter garnishment, execution and other process on execution provided by law may issue thereon, as obtains in other cases of judgments of justice's courts, and transcripts of such judgments may be filed and entered in judgment lien dockets in superior courts with like effect as in other cases. [L. '19, p. 582, § 11.]

§ 1777-12. Records.

Each justice of the peace shall keep a separate docket for the small claims department of his court, in which he shall make a permanent record of all proceedings, orders and judgments had and made in such small claims department. [L. '19, p. 583, § 12.]

CHAPTER II.

PLEADINGS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1778. Pleadings, When to Take Place.

The pleadings in justice's court shall take place upon the appearance of the parties, unless they shall have been previously filed, or unless the justice shall, for good cause shown, allow a longer time than the time of appearance. [L. '54, p. 231, § 43; Cd. '81, § 1756; 2 H. C., § 1471.]

§ 1779. Pleadings, What Constitute.

The pleadings in the justice's court shall be,—

1. The complaint of the plaintiff, which shall state in a plain and direct manner the facts constituting the cause of action;

2. The answer of the defendant, which may contain a denial of the complaint, or any part thereof, and also a statement, in a plain and direct manner, of any facts constituting a defense;

3. When the answer sets up a setoff by way of defense, the reply of the plaintiff. [L. '54, p. 231, § 44; Cd. '81, § 1757; 2 H. C., § 1472.]

Cited in 1 Wash. 136, 510.

Pleadings: See Remington's Digest, J. P., §§ 17, 18.

§ 17. Mode and Form in General: McCoy v. Bell, 1 Wash. 504, 20 Pac. 595.

§ 18. — Reply: Bellingham Bay & B. C. R. Co. v. Strand, 1 Wash. 133, 23 Pac. 928.

Necessity of pleading the statute of frauds in justice's court. 49 L. R. A. (N. S.) 28.

§ 1780. Pleadings may be Oral or Written.

The pleadings in justices' courts may be oral or in writing. [L. '54, p. 231, § 45; Cd. '81, § 1758; 2 H. C., § 1473.]

§ 1781. Pleadings Docketed or Filed—Form Immaterial

When the pleadings are oral, the substance of them shall be entered by the justice in his docket. When in writing, they shall be filed in his office, and a reference made to them in his docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended. [L. '54, p. 231, § 46; Cd. '81, § 1759; 2 H. C., § 1474.]

Cited in 88 Wash. 551.

§ 1782. Denial of Knowledge or Information.

A statement, in an answer or reply, that the party has not sufficient knowledge or information in respect to a particular allegation in the previous pleadings of the adverse party to form a belief shall be deemed equivalent to a denial. [L. '54, p. 231, § 47; Cd. '81, § 1760; 2 H. C., § 1475.]

§ 1783. Pleading Account or Instrument.

When the cause of action or setoff arises upon an account or instrument for the payment of money only, it shall be sufficient for the party to deliver the account or instrument, or a copy thereof, to the court, and to state that there is due to him thereon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, with liberty to copy the same; or if not so exhibited, may prohibit its being given in evidence. [L. '54, p. 231, § 48; Cd. '81, § 1761; 2 H. C., § 1476.]

§ 1784. Pleadings to be Verified.

Every complaint, answer, or reply shall be verified by the oath of the party pleading; or if he be not present, by the oath of his attorney or agent, to the effect that he believes it to be true. The verification shall be oral or in writing, in conformity with the pleading verified. [L. '54, p. 232, § 49; Cd. '81, § 1762; 2 H. C., § 1477.]

§ 1785. Uncontroverted Allegations Deemed Admitted.

Every material allegation in a complaint, or relating to a setoff in an answer, not denied by the pleading of the adverse party, shall, on the trial, be taken to be true, except that when a defendant who has not been served with a copy of the complaint fails to appear and answer, the plaintiff cannot recover without proving his case. [L. '54, p. 232, § 50; Cd. '81, § 1763; 2 H. C., § 1478.]

§ 1786. Objections to Pleading—Amendment.

Either party may object to a pleading by his adversary, or to any part thereof, that is not sufficiently explicit for him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended; and if the party refuse to amend, the defective pleading shall be disregarded. [L. '54, p. 232, § 51; Cd. '81, § 1764; 2 H. C., § 1479.]

§ 1787. Variance Immaterial, When.

A variance between the proof on the trial and the allegations in a pleading shall be disregarded as immaterial, unless the court be satisfied that the adverse party has been misled to his prejudice thereby. [L. '54, p. 232, § 52; Cd. '81, § 1765; 2 H. C., § 1480.]

§ 1788. Amendments.

The pleadings may be amended at any time before the trial, or during the trial, or upon appeal, to supply any deficiency or omissions in the allegations or denials necessary to support the action or defense, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court that a continuance is necessary to the adverse party in consequence of such amendment, a continuance shall be granted. The court may also, in its discretion, require as a condition of an amendment the payment of costs to the adverse party. [L. '54, p. 232, § 53; Cd. '81, § 1766; 2 H. C., § 1481.]

Cited in 3 Wash. 709.

It is discretionary with the superior court to allow amendments to the pleadings used before the justice, and prohibition will not lie to prevent such ac-

tion where the court has jurisdiction of the subject matter of the suit: State ex rel. Bagley v. Superior Court, 3 Wash. 705, 29 Pac. 213.

§ 1789. Setoff, How Pleaded.

To entitle a defendant to any setoff he may have against the plaintiff, he must allege the same in his answer; and the statutes regulating setoffs in the superior court shall in all respects be applicable to a setoff in a justice's court, if the amount claimed to be set off, after deducting the amount [found] due the plaintiff, be within the jurisdiction of the justice of the peace; judgment may, in like manner, be rendered by the justice, in favor of the defendant, for the balance found due the plaintiff. [L. '54, p. 232, § 54; Cd. '81, § 1767; 2 H. C., § 1482.]

See *infra*, § 1861, action when setoff exceeds jurisdiction.

See *infra*, § 1873, setoff of mutual judgments.

CHAPTER III.

ARREST AND BAIL IN JUSTICE'S COURT.

§ 1790. Warrant may Issue, When.

A justice of the peace shall issue a warrant of arrest in all such cases within his jurisdiction, and for such causes and upon such proof, as is provided for an order for a warrant in the act regulating civil actions. [L. '54, p. 229, § 32; Cd. '81, § 1746; 2 H. C., § 1484.]

This act held unconstitutional. See notes to § 749, *supra*.

Bail in criminal cases, see *infra*, §§ 1952, 1952½.

Cited in 81 Wash. 397.

A justice of the peace is not liable for the unlawful arrest of a party as an absconding debtor under this invalid act, upon process issued by him in good

faith, without malice, the case being colorably, though not really, within his jurisdiction: *Hayes v. Hutchinson & Shields*, 81 Wash. 394, 142 Pac. 865.

§ 1791. Bond for Warrant.

Before issuing the warrant of arrest, the justice shall require a bond on part of the plaintiff, with one or more sureties, to the effect that if the defendant recover judgment the plaintiff will pay all costs that may be awarded to the defendant, and all damages which may be sustained by reason of the arrest, not exceeding the sum specified in the bond, which shall be at least one hundred dollars. [L. '54, p. 229, § 33; Cd. '81, § 1747; 2 H. C., § 1485.]

§ 1792. Warrant, How Served.

The warrant shall be served by arresting the defendant, and taking him before the justice of the peace who issued the same; but if such justice, at the return thereof, be absent or unable to try the action, the officer shall immediately take the defendant to the nearest justice of the same county, who shall take cognizance of the action, and proceed thereon as if the warrant had been issued by himself. [L. '54, p. 229, § 34; Cd. '81, § 1748; 2 H. C., § 1486.]

§ 1793. Notice of Arrest to Plaintiff, etc.

The officer making the arrest shall immediately give notice to the plaintiff, his agent or attorney, and indorse on the warrant the time of the arrest and the time of serving notice on the plaintiff. [L. '54, p. 229, § 35; Cd. '81, § 1749; 2 H. C., § 1487.]

§ 1794. Detention not to Exceed Twenty-four Hours.

When a defendant is brought before a justice on a warrant, he shall be detained in the custody of the officer until he shall be discharged according to law; but in no case shall the defendant be detained longer than twenty-four hours from the time he shall be brought before the justice, unless within that time the trial of the action shall be commenced, or unless it has been delayed at the instance of the defendant. [L. '54, p. 229, § 36; Cd. '81, § 1750; 2 H. C., § 1488.]

§ 1795. Continuance—Bond.

If the defendant, on his appearance, demand a continuance, the same may be granted on condition that he remain in custody or execute and file with the justice a bond, with one or more sufficient sureties, to be approved by the justice, to the effect that he will render himself amenable to the process of the court, or that the sureties will pay to plaintiff the amount of any judgment which he may recover in the action. On filing such bond, the justice shall order the defendant to be discharged from custody. [L. '54, p. 229, § 37; Cd. '81, § 1751; 2 H. C., § 1489.]

CHAPTER IV.

REPLEVIN IN JUSTICE'S COURT.

§ 1796. Plaintiff may Claim Immediate Delivery.

The plaintiff in an action to recover the possession of personal property may, at the time of issuing such summons, or at any time before answer, claim the immediate delivery of such property as provided in this chapter. [L. '54, p. 242, § 109; Cd. '81, § 1809; 2 H. C., § 1490.]

See *infra*, § 1888, claim by third person of property levied upon.

§ 1797. Affidavit Where Delivery Claimed, Contents of.

When a delivery is claimed, an affidavit shall be made by the plaintiff, or by someone in his behalf, showing,—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That the same has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure; and

5. The actual value of the property. [L. '54, p. 242, § 110; Cd. '81, § 1810; 2 H. C., § 1491.]

§ 1798. Order for Delivery.

The justice shall thereon, by an indorsement in writing upon the affidavit, order the sheriff or any constable of the county to take the same from the defendant and deliver it to the plaintiff upon receiving a proper bond. [L. '54, p. 243, § 111; Cd. '81, § 1811; 2 H. C., § 1492.]

§ 1799. Execution of Order—Bond.

Upon the receipt of the affidavit and order, with a bond, executed by two or more sufficient sureties, approved by the sheriff or constable, to the effect that they are bound in double the value of the property as stated in the affidavit, for the prosecution of the action, for the

return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff, the sheriff or constable shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order, and bond, by delivering the same to him personally if he can be found within the county, or to his agent from whose possession the property is taken, or if neither can be found in the county, by leaving them at the usual abode of either within the county, with some person of suitable age and discretion; or if neither have any known place of abode in the county, by putting them into the postoffice, directed to the defendant at the postoffice nearest to him. [L. '54, p. 243, § 112; Cd. '81, § 1812; 2 H. C., § 1493.]

§ 1800. Exceptions to Sureties.

The defendant may, within two days after the service of a copy of the affidavit, order and bond, give notice to the officer that he excepts to the sufficiency of the sureties. If he fail to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify upon one day's notice before the justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify, or new sureties be substituted, and they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section. [L. '54, p. 243, § 113; Cd. '81, § 1813; 2 H. C., § 1494.]

Cited in 20 Wash. 544.

In an action upon a replevin bond in which the sureties did not justify after being excepted to by defendant, under

this section, the sureties are released from all further liability by their failure to justify: *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24.

§ 1801. Return of Property on Giving Bond, etc.

At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof upon giving to the officer a bond, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and serving of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter. [L. '54, p. 243, § 114; Cd. '81, § 1814; 2 H. C., § 1495.]

§ 1802. Justification of Sureties.

The defendant's sureties, upon one day's notice to the plaintiff or his attorney, shall justify before the justice, and upon such justification the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is complete or expressly waived, and may retain the

property until that time; but if they, or others in their place, fail to justify at the time appointed, he shall deliver the property to the plaintiff. [L. '54, p. 244, § 115; Cd. '81, § 1815; 2 H. C., § 1496.]

§ 1803. Officer may Break Open Building or Inclosure.

If the property, or any part thereof, be concealed in a building or inclosure, the officer shall publicly demand its delivery; and if it be not delivered, he shall cause the building or inclosure to be broken open and take the property into his possession. [L. '54, p. 244, § 116; Cd. '81, § 1816; 2 H. C., § 1497.]

§ 1804. Officer to Keep and Deliver Property.

When the officer shall have taken property as in this chapter provided, he shall keep it in a secure place, and deliver [it] to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping the same. [L. '54, p. 244, § 117; Cd. '81, § 1817; 2 H. C., § 1498.]

Cited in 49 Wash. 300.

§ 1805. Proceedings Where Property Claimed by Third Party.

If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or his right to the possession thereof, stating the ground of such title or right, and serve the same upon the officer before the delivery of the property to the plaintiff, the sheriff shall not be bound to keep the property or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim by a bond executed by two sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property, as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless made as aforesaid, and notwithstanding such claim, when so made, he may retain the property a reasonable time to demand such indemnity. [L. '54, p. 244, § 118; Cd. '81, § 1818; 2 H. C., § 1499.]

§ 1806. Return of Order and Affidavit.

The officer shall return the order and affidavit with his proceedings thereon to the justice within five days after taking the property mentioned therein. [L. '54, p. 244, § 119; Cd. '81, § 1819; 2 H. C., § 1500.]

CHAPTER V.

GARNISHEE PROCESS BY OFFICERS.

§ 1807. Affidavit for Garnishment.

Whenever any action shall have been commenced by summons upon contracts express or implied, or notice and complaint in a justice's court, if the plaintiff, or someone in his behalf, shall make and deliver to the officer having such summons, or notice and complaint, an affidavit

stating that the affiant has good reason to believe that some person (naming him) is indebted to the defendant, or has personal property in his possession or under his control belonging to the defendant, or when there is more than one defendant, to any or either of them, not by law exempt from sale on execution, and demand that he shall summon such person as garnishee, such officer shall summon such person in writing to appear before the justice on the return day of such summons, or notice and complaint, to answer touching his liability as garnishee. [L. '88, p. 101, § 1; 2 H. C., § 1501.]

Writ of garnishment by justice: See § 1823, *infra*, and note.
See *infra*, § 1886, garnishment on execution.

§ 1808. Garnishee Summons.

The summons to the garnishee may be substantially as follows:—

The State of Washington, } ss.
— County,

The State of Washington to —.

Whereas, a summons or notice and complaint has been issued by —, a justice of the peace of said county, returnable on the — day of —, A. D. 18—, in favor of —, plaintiff, and against —, defendant; and whereas, the plaintiff (or A B in his behalf) has made oath that you have property in your possession or under your control belonging to the defendant (or are indebted to him). Now, therefore, you are hereby summoned to be and appear before the said justice at his office in said county on the return day of said summons (or notice and complaint), at — o'clock in the — noon of said day, then and there to answer under oath, touching your liability as garnishee.

Given under my hand this — day of —, 18—.

—, Constable or Sheriff.

[L. '88, p. 101, § 2; 2 H. C., § 1502.]

§ 1809. Service of Summons.

The officer shall serve such summons on the garnishee personally, and return the same, with the affidavit, to the justice at the same time that he shall make return of the service of the summons or notice and complaint, and state the day such summons was served on the garnishee. [L. '88, p. 102, § 3; 2 H. C., § 1503.]

§ 1811. Liability of Garnishee.

The garnishee, from the time of the service of such summons, shall stand liable to the plaintiff to the amount of the personal property, money, credits, and effects in his hands or under his control belonging to the defendant, and the amount of his own indebtedness to the defendant, then due or to become due, and not by law exempt from sale on execution. [L. '88, p. 102, § 5; 2 H. C., § 1505.]

§ 1812. Garnishee Action—When Deemed Commenced.

The service of the garnishee summons shall be deemed the commencement of an action against such garnishee; and upon the return of the

constable that such summons has been duly served, the justice shall enter an action in his docket in which the plaintiff in the original action shall be plaintiff and the garnishee defendant. [L. '88, p. 102, § 6; 2 H. C., § 1506.]

§ 1813. Examination of Garnishee.

On the appearance of the garnishee before the justice, the affidavit aforesaid shall be deemed a sufficient complaint in this action, and the justice shall forthwith proceed to examine the said garnishee and his witnesses touching the matters alleged in the affidavit, and shall reduce the answers of said garnishee and his witnesses to writing, and file the same with the papers in the case; such examination may be adjourned by said garnishee as in case of adjournment in justice court in civil actions: Provided, that in lieu of the personal appearance of the garnishee and his examination by the justice, the garnishee may answer the affidavit and writ, in writing, in which case the answer shall be in writing, signed and verified by the garnishee, and make true answer to the several matters set up in the affidavit and such answer shall be filed with the justice of the peace, within the time required by the writ for the garnishee to appear. [L. '88, p. 103, § 7; 2 H. C., § 1507; L. '03, p. 82, § 2.]

§ 1814. Trial, When.

If the plaintiff shall not be satisfied with the answers of the garnishee, or if either party shall desire a trial, the justice shall enter the fact in his docket, and the case shall be proceeded with and tried upon the issue formed by the affidavit and answer, as in other actions commenced by summons; and if, upon the trial of any such issue, property or effects shall be found in the hands of the garnishee, or it shall appear that such garnishee was indebted to the defendant, the justice or jury shall assess the value thereof, and the garnishee may hold the same subject to the further order of the justice. [L. '88, p. 103, § 8; 2 H. C., § 1508.]

§ 1815. Defendant may Participate in Trial.

The defendant in the original action may appear and defend the proceedings against the garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment, or upon any grounds upon which a garnishee might defend the same, and may participate in the trial of any issue between the plaintiff and the garnishee for the protection of his interests. [L. '88, p. 103, § 9; 2 H. C., § 1509.]

§ 1816. Costs.

If, in the action instituted against the garnishee, the plaintiff shall be nonsuited or discontinue his action; or if, upon the answer and trial of the issue between the plaintiff and garnishee, no property or effects shall be found in the hands of the garnishee, or nothing shall be found due from the garnishee to the defendant; or if, in the action against the principal defendant, the plaintiff shall be nonsuited or discontinue his action; or if, on the trial in such action, nothing shall be found due from the defendant to the plaintiff,—then in each of these cases the garnishee

shall recover costs against the plaintiff, and no such costs shall be paid by the defendant. [L. '88, p. 103, § 10; 2 H. C., § 1510.]

§ 1817. Judgment Against Garnishee.

If the plaintiff recover against the defendant in the original action, and the answer of the garnishee when no issue is made thereon, or the finding of the court or jury on an issue show the garnishee at the time of the service of the summons had property in his possession belonging to the defendant, or that he was indebted to him, the justice shall enter an order in his docket requiring the garnishee, within ten days, to pay or deliver to the justice such property or the amount of such indebtedness, or so much thereof as may be necessary to satisfy such judgment, with costs thereof, and the costs of the garnishee proceedings; or if it appears from such answer or finding that the garnishee is to pay or deliver to the defendant any money or property in any other manner or at any other time than immediately, and at the time of service of the summons, the same belonging to the defendant, then the order of the justice shall be that such payment or delivery be so made to the justice for the benefit of the plaintiff. If such garnishee shall pay such indebtedness, and deliver such property as directed by such order, the costs of the garnishee shall be paid out of the money or property received by the justice, unless the garnishee, upon an issue joined with him by the plaintiff, shall have been held liable in a greater amount of property or indebtedness than was disclosed in his answer, in which case he shall not have costs. And all property and effects, except money, delivered to the justice shall be by him ordered to be sold on the execution against the defendant. [L. '88, p. 103, § 11; 2 H. C., § 1511.]

§ 1818. Costs Against Garnishee.

If the garnishee do not deliver over the property or pay the money so found in his hands and belonging to the defendant, as provided in the preceding section, then judgment shall be given against him for the value of such property or money, and costs of suit in the cause in which he is garnishee, and no such costs shall be paid by the defendant. [L. '88, p. 104, § 12; 2 H. C., § 1512.]

§ 1819. Final Judgment—Negotiable Instrument.

No final judgment shall be rendered against the garnishee until final judgment be rendered against the defendant in the original action; but no judgment shall be rendered against a garnishee, or any money be required to be delivered by him to the justice, upon any liability arising out of a debt due [evidenced] by negotiable paper, unless such paper is delivered or the garnishee completely exonerated or indemnified from all liability thereon after he may have satisfied the judgment. [L. '88, p. 104, § 13; 2 H. C., § 1513.]

§ 1820. Default, etc., by Garnishee.

When a garnishee shall fail to appear, or, appearing, shall fail to make full answers upon oath to the interrogatories of the justice touching his liabilities as garnishee, the justice shall enter such fact in his docket, and he shall be adjudged to be indebted to the defendant; and if judg-

ment shall be rendered in favor of the plaintiff, against the defendant, judgment in favor of the plaintiff shall be entered against such garnishee for the amount of the judgment against the defendant, and for all costs in the garnishee proceedings, and no such costs shall be paid by the defendant. The justice may continue the cause to some other day, if necessary for further proceedings. [L. '88, p. 104, § 14; 2 H. C., § 1514.]

§ 1821. Appearance After Default.

If the garnishee shall have failed to appear at the proper time, he may afterward appear and answer at any time before final judgment against him, if he shall first pay all costs in the garnishee suit which have accrued up to that time; and when he shall so appear, the justice shall cause the plaintiff to be notified thereof, so that he may be present at the examination. [L. '88, p. 105, § 15; 2 H. C., § 1515.]

§ 1822. Judgment in Bar.

In all actions brought by the defendant against the garnishee for the recovery of any property, credits, money, or effects delivered up or paid by order of any judgment rendered under this chapter, except costs rendered against the garnishee, such judgment may be pleaded in bar, and the same shall be conclusive between such parties. [L. '88, p. 105, § 16; 2 H. C., § 1516.]

CHAPTER VI.

WRITS OF GARNISHMENT BY JUSTICES.

§ 1823. Writ of Garnishment—When may Issue.

The justices of the peace in the various precincts in this state may issue writs of garnishment, returnable to their respective courts, where the plaintiff sues for a debt which is just, due and unpaid; or where the plaintiff has a judgment wholly or partially unsatisfied in the court from which he seeks to have the writ of garnishment issued. [L. '11, p. 637, § 1. Cf. L. '09, p. 607, § 1.]

§ 1824. Affidavit for Garnishment—Requisites.

Before the issuance of the writ of garnishment, the plaintiff or someone in his behalf, shall make application therefor by affidavit, stating the facts authorizing the issuance of the writ, and that he has reason to believe and does believe that the garnishee is indebted to the defendant or that he has in his possession or under his control personal property or effects belonging to the defendant, or that the garnishee is a corporation and that the defendant is the owner of shares of the capital stock thereof, and that the garnishment applied for is not sued out to injure either the defendant or the garnishee. [L. '11, p. 637, § 2. Cf. L. '09, p. 608, § 2.]

§ 1825. Issuance of Writ—Contents.

When the foregoing requisites have been complied with, the justice of the peace shall, without additional fee, docket the case in the name of the plaintiff, as plaintiff, and of the garnishee as defendant,

and shall immediately issue a writ of garnishment, directed to the garnishee commanding him to appear before the justice who issues the writ, at a certain place, day and hour, which shall not be less than six nor more than twenty days from the date of the issuance of the writ, to answer on oath in what amount, if any, he was indebted to the defendant when such writ was served upon him, and what personal property or effects, if any, of the defendant he had in his possession or under his control when such writ was served upon him; and where it appears from the affidavit for the writ that the garnishee is a corporation in which the defendant is the owner of shares, the writ of garnishment shall further require the garnishee to answer what number of shares, if any, the defendant owned in such corporation when such writ was served upon it. The writ of garnishment shall be served at least five days before the time for answer mentioned therein. [L. '11, p. 637, § 3. Cf. L. '09, p. 608, § 3.]

§ 1826. Form for Writ.

Said writ shall be substantially in the following form:—

The State of Washington, to — Greeting:

Whereas, in the justice court in and for — precinct, — county, state of Washington, before —, justice of the peace, in a certain cause wherein — is plaintiff and — is defendant, the plaintiff claiming an indebtedness (or having a judgment, as the case may be) against the said — of — dollars, besides interest and costs of suit, has applied for a writ of garnishment against you:

Now, therefore, you are hereby commanded to be and appear before the said justice at his office — in said county, on the — day of —, 19—, at — o'clock in the — noon of said day, then and there to answer upon oath in what amount, if any, you were indebted to the said — when this writ was served upon you, and what personal property or effects, if any, of the said — you had in your possession or under your control when this writ was served upon you (and if the garnishee be a corporation in which the defendant is alleged to be the owner of shares, then the writ shall proceed: And further to answer what number of shares, if any, the said — owned in —, a corporation, when this writ was served upon you).

Dated this — day of —, 19—.

— —,
Justice of the Peace.

[L. '11, p. 638, § 4. Cf. L. '09, p. 608, § 4.]

§ 1827. How Issued.

The writ of garnishment shall be dated and signed by the justice of the peace, and the name and office address of the attorney for the plaintiff shall be indorsed thereon, or in case the plaintiff has no attorney, then the name and address of the plaintiff shall be indorsed thereon. The writ, when so issued and indorsed, shall be delivered by the justice of the peace who issues it to the party applying therefor, or to his attorney. [L. '09, p. 609, § 5.]

§ 1828. Service of Writ.

The writ of garnishment may be served by the sheriff or any constable of the county in which the garnishee lives, or it may be served by any citizen of the state of Washington over the age of twenty-one years and not a party to the action in which it is issued, in the same manner as a summons in an action is served. And in case such writ is served by an officer, such officer shall make his return thereon, showing the time, place and manner of service and noting thereon his fees for making such service and shall sign his name to such return. In case such service is made by any person other than an officer, such person shall attach to the original writ his affidavit showing his qualifications to make such service and the time, place and manner of making service, but no fee shall be allowed for the service of such writ unless the same is served by an officer. [L. '09, p. 609, § 6.]

Cited in 73 Wash. 504.

§ 1829. Service upon Bank as Garnishee.

In cases where the writ of garnishment issued under the provisions of this act is directed to a corporation carrying on a general banking business in the state of Washington, the plaintiff, in addition to serving the writ of garnishment upon said garnishee, shall at the same time and as a part of said service deliver to said garnishee a statement in writing signed by the plaintiff or his attorney, stating the place of residence of the defendant and his business, occupation, trade or profession, and unless such statement is so delivered with said writ of garnishment, the service of said writ shall not be deemed complete and the garnishee shall not be held liable thereon. [L. '09, p. 610, § 7.]

§ 1830. Effect of Service—Payment of Debt.

From and after the service of such writ of garnishment, it shall not be lawful for the garnishee to pay to the defendant any debt owing to him at the time of such service, or to deliver to him any personal property or effects belonging to the defendant in his possession or under his control at the time of such service, nor shall the garnishee, if it be a corporation in which the defendant is alleged to be the owner of shares, permit or recognize any sale or transfer of any shares owned by said defendant at the time of such service; and any such payment, delivery, sale or transfer shall be void and of no effect as to so much of said debt, personal property or effects or shares as may be necessary to satisfy the plaintiff's demand. [L. '09, p. 610, § 8.]

§ 1831. Bond to Release Garnishee.

If the defendant in the principal action causes a bond to be executed to the plaintiff, with sureties, to be approved by the justice of the peace issuing the writ, conditioned that he will pay any judgment that may be rendered against him in favor of the plaintiff in said action, and shall file said bond with said justice of the peace, the writ of garnishment shall, upon the filing and approval of said bond, be immediately discharged, and all proceedings had thereunder shall be vacated and said justice shall issue and deliver to said defendant a certificate to the

effect that said writ of garnishment has been discharged, and upon the delivery of said certificate to the garnishee he shall be discharged of any further liability under said writ: Provided, that the garnishee shall not be thereby deprived from recovery of costs in said proceeding to which he would otherwise be entitled under this act. [L. '09, p. 610, § 9.]

§ 1832. Answer of Garnishee.

The answer of the garnishee shall be in writing and signed and verified as other pleadings and shall make true answers to the several matters inquired of in the writ of garnishment and shall be served upon the plaintiff or his attorney and filed with the justice of the peace who issued said writ. [L. '09, p. 611, § 10.]

§ 1833. Discharge of Garnishee.

Should it appear from the answer of the garnishee that he was not indebted to the defendant when the writ of garnishment was served upon him and that he had not in his possession or under his control any personal property or effects of the defendant when the writ was served; and when the garnishee is a corporation in which the defendant is alleged to be the owner of shares of stock, if it shall further appear from such answer that the defendant was not the owner of any such shares when the writ was served, and should the answer of the garnishee not be controverted as hereinafter provided, the court shall enter judgment discharging the garnishee. [L. '09, p. 611, § 11.]

§ 1834. Default of Garnishee—Judgment—Dismissal of Action.

Should the garnishee fail to answer the writ by the time prescribed therein, the court shall, upon application of the plaintiff therefor, declare and enter the default of the garnishee and shall thereafter render judgment as follows:

In case the plaintiff has a judgment against the defendant, judgment shall be rendered against the garnishee for the full amount of such judgment with all accruing interest and costs.

In case judgment has not been rendered in the principal action at the time when the default of the garnishee is declared and entered, final judgment shall not be rendered against the garnishee until the final judgment in the principal action is entered; and if the plaintiff recovers judgment against the defendant, the court shall enter judgment against the garnishee for the full amount of the judgment awarded to the plaintiff against the defendant; but if the plaintiff fails to recover judgment against the defendant, the garnishee shall be discharged without costs. [L. '11, p. 639, § 5. Cf. L. '09, p. 611, § 12.]

§ 1835. Judgment Against Garnishee—Satisfaction.

Should it appear from the answer of the garnishee, or should it be otherwise made to appear as hereinafter provided, that the garnishee was indebted to the defendant in any amount when the writ of garnishment was served upon him, the court shall render judgment for the plaintiff against such garnishee for the amount so admitted or found to be due from the garnishee, less the amount of the costs awarded to the

garnishee, unless the amount so admitted or found to be due shall exceed the amount of the judgment rendered or thereafter rendered in favor of the plaintiff against the defendant, with interest and costs, in which case it shall be for the amount of such judgment rendered or thereafter to be rendered, with interest and costs: Provided, however, that judgment shall not be rendered against the garnishee until the final judgment in the principal action is entered, and if the plaintiff fails to recover judgment against the defendant the garnishee shall be discharged and shall have and recover his costs against plaintiff: Provided, however, if it shall appear from the answer of the garnishee and the same is not controverted, or if it shall appear from the trial hereinafter provided for that the garnishee was indebted to the defendant in any sum at the time of the service of said writ, but that said indebtedness is not matured and is not due and payable, the court shall make an order requiring the garnishee to pay such sum into court when the same becomes due, less the amount of the costs awarded to the garnishee, the date when such payment is to be made to be specified in said order, and in default thereof that judgment shall be entered against the garnishee for the amount of such indebtedness so admitted or found to be due. In case the garnishee shall pay said sum at the time specified in said order, said payment shall operate as a discharge; otherwise judgment shall be entered against him as above provided: Provided further, that if judgment shall be rendered in favor of the principal defendant, or if any judgment rendered against him shall be satisfied prior to the date of payment specified in said order, the garnishee shall not be required to make the payment hereinbefore provided for, nor shall any judgment in such case be against him. [L. '09, p. 612, § 13.]

§ 1836. Execution Against Garnishee.

Execution may be issued on the judgment against the garnishee herein provided for in like manner as upon any other judgment. The amount made upon any such execution shall be paid by the officer executing the same to the justice of the peace from whom such execution was issued, and shall be applied to the satisfaction of such judgment, interest and costs, and also to the satisfaction of the judgment against the defendant, and the surplus, if any, shall be paid to the garnishee. [L. '09, p. 613, § 14.]

§ 1837. Garnishee in Possession of Property—Surrender—Custody.

Should it appear from the answer to the garnishee, or should it be made otherwise to appear, as hereinafter provided, that the garnishee had in his possession or under his control when the writ was served upon him, any personal property or effects of the defendant liable to execution, the court shall render a decree requiring the garnishee to deliver up to the justice on demand, such personal property or effects, or so much of them as may be necessary to satisfy the plaintiff's claim. In cases where a judgment has been rendered in the principal action, such personal property or effects may be sold in like manner as other property is sold upon execution on a judgment. In cases where judgment has not been rendered in the principal action, the justice of the

peace, shall retain such personal property or effects in his possession until the rendition of the judgment therein, and in case judgment is entered in such principal action in favor of the plaintiff, said goods, or effects, or sufficient of them to satisfy said judgment, may be sold in like manner as other property is sold upon an execution issued on a judgment. In case judgment shall be rendered in such action against the plaintiff and in favor of the defendant, such effects and personal property shall be by the justice returned to the defendant. [L. '09, p. 613, § 15.]

§ 1838. Attachment for Contempt.

Should the garnishee adjudged to have effects or personal property of the defendant in his possession or under his control, as provided in the preceding section, fail or refuse to deliver them to the justice on such demand, the garnishee shall, on motion of the plaintiff, be cited to show cause why he should not be attached for contempt of court for such failure or refusal, and should the garnishee fail to show some good and sufficient excuse for such failure and refusal he shall be fined for such contempt and imprisoned until he shall deliver such personal property or effects. [L. '09, p. 614, § 16.]

§ 1839. Corporation Garnishee—Shares of Stock Sold.

Where the garnishee is a corporation and it appears by the answer or otherwise that the defendant was, when the writ of garnishment was served upon it, the owner of any shares of stock in such corporation, the court shall render a decree ordering the sale under execution in favor of the plaintiff against the defendant of such shares of the defendant in such corporation, or so much thereof as may be necessary to satisfy such execution. [L. '09, p. 614, § 17.]

§ 1840. Sales, How Conducted.

The sale so ordered shall be conducted in all respects as other sales of personal property under execution, and the officer making such sale shall execute a transfer of such shares to the purchaser with a brief recital of the judgment of the court under which the same was sold. [L. '09, p. 614, § 18.]

§ 1841. Title on Sale.

Such sale shall be valid and effectual to pass to the purchaser all the right, title and interest which the defendant had in such shares of stock, and the proper officers of such company shall enter such sale and transfer on the books of the company in the same manner as if the sale had been made by the defendant himself. [L. '09, p. 614, § 19.]

§ 1842. Controverting the Answer of the Garnishee—Trial.

If the plaintiff should not be satisfied with the answer of the garnishee, he shall state such fact to the justice of the peace, who shall thereupon enter the fact in his docket, and an issue shall be formed under the direction of the court and tried as other cases: Provided, however, no pleading shall be necessary on such issue other than the affidavit of the plaintiff, the answer of the garnishee and the statement of the plaintiff that he is not satisfied with the answer. [L. '09, p. 614, § 20.]

§ 1843. Attorney's Fees—Costs.

Where the answer is controverted and the garnishee is subsequently discharged upon the trial thereof, his costs, including a reasonable attorney's fee to be fixed by the court, shall be taxed against the plaintiff; and if the garnishee upon his answer being controverted by the plaintiff is held liable to an extent greater than the liability admitted in his answer, the costs of the plaintiff upon such proceeding, including a reasonable attorney's fee to be fixed by the court, shall be taxed against the garnishee. [L. '09, p. 615, § 21.]

§ 1844. Garnishee's Defense Against Defendant.

It shall be a sufficient answer against any claim of the defendant against the garnishee founded on any indebtedness of such garnishee or upon the possession by him of any personal property or effects, or, where the garnishee is a corporation in which the defendant was the owner of shares of stock, for the garnishee to show that such indebtedness was paid or such effects delivered, or such shares of stock were sold under judgment of the court in accordance with the provisions of this act. [L. '09, p. 615, § 22.]

§ 1845. Garnishee's Answer—Identity of Names, How Determined—Trial.

Where the garnishee in his answer states that he was indebted or had personal property or effects in his possession under his control at the time of the service of the writ of garnishment upon him to a person of the same or similar name to the defendant, and stating the place of business or residence of said person, and that he does not know whether or not such person is the same person as the defendant, and prays the court to determine whether or not the person to whom he was indebted or whose personal property or effects he had in his possession is the same person as the defendant, the court, before rendering judgment against the garnishee defendant as hereinbefore provided, shall take proof as to the identity of said persons, and if he should find therefrom that they are not one and the same individual, the garnishee shall be discharged and shall have and recover his costs against the plaintiff; and if he should find that said persons are one and the same individuals, he shall make a similar judgment as to the payment of the money or the delivery of personal property and effects and as to costs of the garnishee as is hereinbefore provided, where the garnishee is held upon his answer. Before any such hearing on the question of identity is had, the plaintiff shall cause the justice of the peace to issue a citation directed to the person to whom the garnishee answers he was indebted or whose personal property or effects the garnishee has answered he had in his possession or under his control, commanding him to appear before the justice of the peace from which it is issued within ten days after the service of the same upon him, and to answer on oath whether or not he is the same person as the defendant in said action. Said citation shall be dated and attested in like manner as a writ of garnishment and be delivered to the plaintiff or his attorney and shall be served in the same manner as a summons in an action is served. If upon the hearing in this section provided for, the court shall find that the defendant or judgment debtor is the same person as the person to whom the garnishee defendant was

indebted, or whose personal property or effects said garnishee defendant had in his possession or under his control, it shall be sufficient answer to any claim of said person against the garnishee founded on any indebtedness of such garnishee or on the possession by him of any personal property or effects for the garnishee to show that such indebtedness was paid or such personal property or effects delivered under the judgment of the court in accordance with the provisions in this act. [L. '09, p. 615, § 23.]

§ 1846. Answer of Garnishee—Defense of Defendant—Exemptions.

It shall not be necessary for the garnishee to plead or set forth in his answer any defense which the defendant might have to the cause of action against him, nor to plead or set forth in his answer any claim of exemption which may be available to the defendant, but this section shall not be construed to preclude the defendant from pleading, claiming or asserting any exemption which may be available to him under the laws of the state of Washington now in force or hereafter to be enacted. [L. '09, p. 616, § 24.]

CHAPTER VII.

TRIAL OF CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1847. Continuance—Not to Exceed Sixty Days.

When the pleadings of the parties shall have taken place, the justice shall, upon the application of either party if the defendant be not under arrest, and sufficient cause be shown on oath, continue the case for any time not exceeding sixty days. If the continuance be on account of absence of testimony, it shall be for such reasonable times as will enable the party to procure such testimony, and shall be at the cost of the party applying therefor, unless otherwise ordered by the justice; and in all other respects shall be governed by the law applicable to continuance in the superior court. [L. '54, p. 232, § 56; Cd. '81, § 1769; 2 H. C., § 1517.]

Cited in 1 Wash. 262, 263; 104 Wash. 650.

If a continuance is granted a defendant for one day in an action before a justice of the peace, he may thereafter appear specially in order to object to the jurisdiction of the court: *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539; and a continuance for more than sixty days

will divest the justice of jurisdiction, unless his docket shows that such continuance was by consent: *Id.*

If defendant fails to use due diligence to secure attendance or depositions of absent witnesses a continuance will be refused: *Oregon R. & Nav. Co. v. Dacres*, 1 Wash. 195, 23 Pac. 415.

§ 1848. Justice to Try Cause Unless Jury Demanded.

Upon issues joined, if a jury trial be not demanded, the justice shall hear the evidence, and decide all questions of law and fact, and render judgment accordingly. [L. '54, p. 237, § 82; Cd. '81, § 1782; 2 H. C., § 1518.]

§ 1849. Jury—Number—Qualifications—Fees.

After the appearance of the defendant, and before the justice shall proceed to inquire into the merits of the cause, either party may demand a jury to try the action, which jury shall be composed of six good and lawful men having the qualifications of jurors in the superior court of the same county, unless the parties shall agree upon a less number: Pro-

vided, that the party demanding the jury shall first pay to the justice the sum of six dollars, which shall be paid over by the justice to the jury before they are discharged, and said amount shall be taxed as costs against the losing party. [Cf. L. '54, p. 235, § 70; L. '62, p. 58, § 1; L. '63, p. 438, § 51; Cd. '81, § 1770; L. '88, p. 118, § 1; 2 H. C., § 1519.]

§ 1850. Time of Jury Trial.

When a jury is demanded, the trial of the case must be adjourned until the time fixed for the return of the jury; if neither party desire an adjournment, the time must be determined by the justice, and must be on the same day, or within the next two days. The jury must be immediately selected as herein provided. [Cf. L. '54, p. 235, § 71; L. '88, p. 118, § 2; 2 H. C., § 1520.]

§ 1851. Selection of Jury.

The justice shall write in a panel the names of eighteen persons, citizens of the county, from which the defendant, his agent or attorney, must strike one name, the plaintiff, his agent or attorney, one, and so on alternately until each party shall have stricken six names, and the remaining six names shall constitute the jury to try such case; and if either party neglect or refuse to aid in striking the jury as aforesaid, the justice shall strike the name in behalf of such party. [Cf. L. '54, p. 235, § 72; Cd. '81, § 1772; L. '88, p. 119, § 3; 2 H. C., § 1521.]

§ 1852. Summons for Jurors.

The justice shall thereupon issue a summons for the jury, in which the following form shall be observed in substance:—

The State of Washington, }
County, of ———. } ss.

The State of Washington to the Sheriff or [any] Constable of said County.

You are hereby commanded to summon ——— to appear before me, at my office in ——— precinct, said county, on the ——— day of ———, A. D. 18—, at ——— o'clock in the ——— noon, to serve as jurors in a case pending before me, then and there to be tried. And this they shall in no wise omit. And have you then and there this writ, with your doings thereon.

Given under my hand this the ——— day of ———, A. D. ———.

A B, Justice of the Peace.

Which summons shall be personally served upon the persons named, and the same shall be returned, with the names of the persons summoned, at the time appointed for the trial of the cause. [Cd. L. '54, p. 236, § 73; Cd. '81, § 1773; L. '88, p. 119, § 4; 2 H. C., § 1522.]

§ 1853. Swearing Jury.

When the jury is selected, the justice shall administer to them an oath or affirmation well and truly to try the cause. [L. '54, p. 236, § 76; Cd. '81, § 1776; 2 H. C., § 1525.]

§ 1854. Delivery of Verdict.

When the jury have agreed on their verdict, they shall deliver the same to the justice, publicly, who shall enter it on his docket. [L. '54, p. 236, § 77; Cd. '81, § 1777; 2 H. C., § 1526.]

§ 1855. Justice may Discharge Jury, When.

Whenever a justice shall be satisfied that a jury, sworn in any civil cause before him, having been out a reasonable time, cannot agree on their verdict, he may discharge them, and issue a new venire unless the parties consent that the justice may render judgment on the evidence before him, or upon such other evidence as they may produce. [L. '54, p. 236, § 78; Cd. '81, § 1778; 2 H. C., § 1527.]

§ 1856. Failure to Appear When Summoned—Penalty.

Every person who shall be duly summoned as a juror, and shall not appear nor render a reasonable excuse for his default, shall be subject to a fine not exceeding ten dollars. [L. '54, p. 236, § 79; Cd. '81, § 1779; 2 H. C., § 1528.]

CHAPTER VIII.

JUDGMENTS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1857. Judgment of Dismissal.

Judgment that the action be dismissed, without prejudice to a new action, may be entered, with costs, in the following cases:—

1. When the plaintiff voluntarily dismisses the action before it is finally submitted;
2. When he fails to appear at the time specified in the notice, upon continuance, or within one hour thereafter;
3. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county; but if the objection be taken and overruled, it shall be cause only of reversal or appeal; if not taken at the trial, it shall be deemed waived, and shall not be the cause of reversal. [Cf. L. '54, p. 236, § 80; L. '63, p. 349, § 61; Cd. '81, § 1780; 2 H. C., § 1529.]

Cited in 1 Wash. 61.

§ 1858. Judgment by Default—Evidence.

When the defendant fails to appear and plead at the time specified in the notice, or within one hour thereafter, judgment shall be given as follows:

1. When the defendant has been served with a true copy of the complaint, judgment shall be given without further evidence for the sum specified therein;
2. In other cases, the justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just, but in no case exceed the amount specified in the complaint.
3. The justice shall have full power at any time after a judgment has been given by default for failure of the defendant to appear and plead at the proper time, to vacate and set aside said judgment for any good cause and upon such terms as he shall deem sufficient and proper. Such judgment shall only be set aside upon five days' notice in writing served upon the plaintiff or the plaintiff's attorney and filed with the justice within ten days after the entry of the judgment. The justice shall hear the application to set aside such judgment either upon affidavits or oral testimony as he may deem proper. In case such judgment is set aside

the making of the application for setting the same aside shall be considered an entry of general appearance in the case by the applicant, and the case shall duly proceed to a trial upon the merits: Provided, that, no justice of the peace shall pay out or turn over money or property received by him by virtue of any default judgment until the expiration of the ten days for moving to set aside such default judgment has expired. [L. '15, p. 141, §1. Cf. L. '54, p. 237, § 81; L. '63, p. 349, § 62; Cd. '81, § 1781; 2 H. C., § 1530.]

Cited in 1 Wash. 508, 511; 12 Wash. 549.

Default judgment rendered by justice

of peace on process served less than required time as void or voidable. 8 Ann. Cas. 1142.

§ 1859. Judgment—Rendition—Entry.

Upon the verdict of a jury, the justice shall immediately render judgment thereon. When the trial is by the justice, judgment shall be entered immediately after the close of the trial, if the defendant has been arrested and is still in custody; in other cases it shall be entered within three days after the close of the trial. [L. '54, p. 237, § 83; Cd. '81, § 1783; 2 H. C., § 1531.]

Cited in 74 Wash. 479.

Judgment—Rendition, Entry and Record: See Remington's Digest, J. P., § 19; McCoy v. Bell, 1 Wash. 504, 20 Pac. 595; State v. White, 8 Wash. 230, 35 Pac. 1100; Mundy v. Kern, 74 Wash. 477, 133 Pac. 1035.

Time of rendition and entry of judgment of justice of the peace sit-

ting without jury. 12 Ann. Cas. 1029.

Entry or record of judgments of justice of peace. 28 L. R. A. 638. Which controls in case of oral announcement of decision by justice of peace and actual entry of record. Ann. Cas. 1912A, 1283.

§ 1860. Tender, Judgment in Case of.

If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with costs then accrued; but if he do not accept such offer before the trial, and fail to recover, on the trial of the action, a sum greater than the offer, such plaintiff shall not recover any costs that may accrue after he shall have been notified of the offer of the defendant, but such costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery, otherwise than as to costs, as above provided. [Cf. L. '54, p. 237, § 84; L. '63, p. 350, § 65; Cd. '81, § 1784; 2 H. C., § 1532.]

§ 1861. Setoff Allowed, to What Extent.

When the setoff of the defendant proved shall exceed the claim of the plaintiff, and such excess in amount exceed the jurisdiction of a justice of the peace, the court shall allow such amount as is necessary to cancel the plaintiff's claim, and give the defendant a judgment for costs; but in such case the court shall not render judgment for any further sum in favor of the defendant. [L. '54, p. 232, § 55; Cd. '81, § 1768; 2 H. C., § 1533.]

See supra, § 1789, pleading setoff.

See infra, § 1873, setoff of mutual judgments.

§ 1862. Judgment for Costs—Attorneys' Fees.

When the prevailing party is entitled to recover costs in a civil action before a justice of the peace, the justice shall add the amount thereof to the judgment; in case of failure of the plaintiff to recover or of dismissal of the action, the justice shall enter up a judgment in favor of the defendant for the amount of his costs; and in case any party so entitled to costs is represented in the action by an attorney, the justice shall include an attorney's fee of five dollars as part of the costs: Provided, however, that the plaintiff shall not be entitled to such attorney fee unless he obtain, exclusive of costs, a judgment in the sum of five dollars or more. [L. '15, p. 143, § 1. Cf. L. '54, p. 337, § 85; Cd. '81, § 1785; 2 H. C., § 1534; L. '93, p. 22, § 1.]

§ 1863. Proceedings Where Title to Land is in Issue.

If it appear on the trial of any cause before a justice of the peace, from the evidence of either party, that the title to lands is in question, which title shall be disputed by the other [party], the justice shall immediately make an entry thereof in his docket, and cease all further proceedings in the cause, and shall certify and return to the superior court of the county a transcript of all the entries made in his docket, relating to the cause, together with all the process and other papers relating to the action, in the same manner and within the same time as upon appeal, and thereupon the parties shall file their pleadings, and the superior court shall proceed in the cause to final judgment and execution, in the same manner as if the said action had been originally commenced therein, and the cost shall abide the event of the suit. [L. '54, p. 235, § 69; Cd. '81, § 1868; 2 H. C., § 1483.]

CHAPTER IX.**FEES AND COMPENSATION OF JUSTICES OF THE PEACE.****§ 1864. Schedule of Justice Fees.**

The fees and compensation of justices of the peace shall be as follows, to wit:

When each case is filed the sum of \$2 shall be paid by the plaintiff, which said sum shall include the docketing of the cause, the issuing of notice and summons, the trial of the case and the entering of judgment: Provided, that no further fee shall be required of either party to the suit for issuing subpoena, for approving any bond, including justification, incident to the case, or for orders and filing of publication of summons, or for any continuance by either party, or for issuing any writ of replevin, attachment and one writ of garnishment, or order, transcript and filings on change of venue. For each additional writ of garnishment a fee of fifty cents shall be charged.

The sum of \$2 shall be paid by the party taking the change of venue to the justice to whom the case is transferred: Provided, that said sum shall include all fees for transcripts of garnishments or other proceedings incident to the main action.

For transcript of judgment the sum of \$1 shall be paid by the party applying therefor, which said sum shall include all fees for transcript of

garnishment or other proceedings incident to the main action and for approval of bonds on appeal.

For hearing of a cause occupying more than one day in the trial thereof an additional fee of two dollars (\$2) shall be charged for each and every day so occupied after the first day of the trial: Provided, this act shall not apply to any continuance granted for any reason or cause other than as stated in this paragraph: Provided further, this provision shall not apply to justices of the peace receiving a fixed salary.

For orders and filings for commission to take depositions....	\$.50
For issuing writ of venire.....	.50
For taking affidavits and acknowledgments, each.....	.25
For taking depositions, each folio.....	.10
For issuing warrants in criminal cases.....	.50
For taking recognizance of bail, including justification.....	.75
For committing to jail.....	.50

[L. '19, p. 394, § 1. Cf. L. '15, p. 372, § 1; L. '93, p. 143, § 1; L. '07, p. 220, § 1.]

Compensation and Fees: See Remington's Digest, J. P., §§ 4, 5. **Right in General:** Furth v. McIntosh, 2 Wash. 108, 26 Pac. 79; Rohde v. Seavey, 4 Wash. 91, 29 Pac. 768; State ex rel. Thurston County v. Grimes, 7 Wash. 445, 35 Pac. 361; Whiting v. Collier, 9 Wash. 412, 37 Pac. 660; Anderson v. Whatcom County, 15 Wash. 47, 45 Pac. 665, 33 L. R. A. 137; Ogden v. Chehalis County, 41 Wash. 45, 82 Pac. 1095.

§ 5. — Recovery of Fees: State ex rel. Banks v. Board of County Commrs., 18 Wash. 160, 51 Pac. 368; State ex rel. Porter v. Headlee, 18 Wash. 220, 51 Pac. 369; State ex rel. Porter v. Headlee, 19 Wash. 477, 53 Pac. 948.

Right of justice of peace to recover fees in separate action. 9 Ann. Cas. 372.

§ 1865. Fees Where Justice Receives Salary.

In any civil action commenced before or transferred to a justice of the peace receiving a salary, the plaintiff may, at the time of such commencement or transfer, pay to such justice the sum of two dollars, which sum shall be all the fees and charges which any party to such action shall be compelled to pay to such justice up to and including the rendition of judgment in such action, unless process in replevin, attachment or garnishment shall issue therein, in which case the party procuring such process may pay to such justice the sum of one dollar as full payment for the fees and charges of such justice incident to the proceedings under such process; but in case said action is transferred from such justice before final judgment, such justice shall repay to any party making such payments any sum in excess of what said party would have been compelled to pay by the last section. [L. '93, p. 143, § 2.]

Cited in 8 Wash. 233.

§ 1866. Compensation Limited to Schedule.

No justice of the peace in any civil action or proceeding shall be entitled to or receive any fees or compensations not provided for by this chapter. [L. '93, p. 144, § 3.]

CHAPTER X.

EXECUTIONS AND PROCEEDINGS THEREON.

§ 1867. Stay of Execution.

The execution upon a judgment by a justice of the peace may be stayed in the manner hereinafter provided, upon reasonable notice to the opposite party, and for the following periods of time, to be calculated from the date of the judgment:—

1. If the judgment be for any sum not exceeding twenty-five dollars, exclusive of costs, one month;

2. If it be for more than twenty-five dollars, two months. [L. '54, p. 238, § 86; Cd. '81, § 1786; 2 H. C., § 1535.]

§ 1868. Bond for Stay.

To entitle any person to such stay of execution, some responsible person, to be approved by the justice, and not being a party to the judgment, must, within five days after rendering of the judgment, enter into a bond before the justice, to the adverse party, in a sufficient sum to secure the payment of the judgment and costs, conditioned to be void upon such payment, at the expiration of the stay. [L. '54, p. 238, § 87; Cd. '81, § 1787; 2 H. C., § 1536.]

§ 1869. Form of Bond.

Such bond shall be signed by the person entering into the same, and may be in the following form:—

Whereas, A B has obtained a judgment before J P, one of the Justices of the peace in and for — county, on the — day of —, 18—, against C D, for — dollars; now, therefore, I, E F, acknowledge myself bound to A B in the sum of — dollars; this bond to be void if such judgment shall be paid at the expiration of — month after the time it was rendered.

Dated the — day of —, 18—.

— —, E. F.

[L. '54, p. 238, § 88; Cd. '81, § 1788; 2 H. C., § 1537.]

§ 1870. Levy Against Property of Principal or Bail.

If, at the expiration of such stay, the judgment be not paid, the execution shall issue against both the principal and bail. If the principal do not satisfy the execution, and the officer cannot find sufficient property belonging to him upon which to levy, he shall levy upon the property of the bail, and in his return shall state what amount of money collected by him on the execution was collected from the bail, and the time when the same was received. [L. '54, p. 238, § 90; Cd. '81, § 1789; 2 H. C., § 1539.]

§ 1871. Bail may Collect from Defendant.

After the return of such execution, the bail shall be entitled, on application to the justice, to have the judgment, or so much thereof as may have been collected from him in satisfaction of the execution, transferred to his use; and he may collect the same from the defendant by

execution, together with the interest at the rate of twelve per cent per annum. [L. '54, p. 238, § 90; Cd. '81, § 1790; 2 H. C., § 1539.]

§ 1872. Execution Revoked Where Judgment Stayed.

If judgment be stayed in the manner above provided after an execution has been issued thereon, the justice shall revoke such execution, in the same manner and with like effect as he is hereinafter directed to revoke an execution after an appeal has been allowed; and if the defendant have been committed, shall order him to be discharged from custody. [L. '54, p. 238, § 91; Cd. '81, § 1791; 2 H. C., § 1540.]

§ 1873. Setoff of Mutual Judgments.

If there be mutual justices' judgments between the same parties, upon which the time for appealing has elapsed on judgment, on the application of either party and reasonable notice given to the adverse party, one may be set off against the other by the justice before whom the judgment against which the setoff is proposed, may be. [L. '54, p. 239, § 92; Cd. '81, § 1792; 2 H. C., § 1541.]

§ 1874. Procedure as to Setoff Rendered Before Another Justice.

If the judgment proposed as a setoff was rendered before another justice, the party proposing such setoff shall produce before such justice a transcript of such judgment, upon which there is a certificate of the justice before whom such may be, that it is unsatisfied in whole or in part, and that there is no appeal, and that such transcript was obtained for the purpose of being set off against the judgment to which it is offered as a setoff. The justice granting such transcript shall make an entry thereof on his docket, and all further proceedings on such judgment shall be stayed, unless such transcript be returned with the proper justice's certificate thereon, that it has not been allowed in setoff. [L. '54, p. 239, § 93; Cd. '81, § 1793; 2 H. C., § 1542.]

§ 1875. Execution for Balance After Setoff.

If any justice shall set off one judgment against another, he shall make an entry thereof on his docket, and execution shall issue only for the balance which may be due after such setoff. If a justice shall allow a transcript of a judgment rendered by another justice to be set off, he shall file such transcript among the papers relating to the judgment in which it was allowed in setoff. If he shall refuse such transcript as a setoff, he shall so certify on the transcript, and return the same to the party who offered it. [L. '54, p. 239, § 94; Cd. '81, § 1794; 2 H. C., § 1543.]

§ 1876. No Execution After Five Years.

Execution for the enforcement of a judgment in a justice's court may be issued on the application of the party entitled thereto, in the manner hereinbefore described; but after the lapse of five years from the date of the judgment no execution shall issue except by leave of the justice before whom such judgment may be, upon reasonable notice to the defendant. [L. '54, p. 240, § 95; Cd. '81, § 1795; 2 H. C., § 1544.]

§ 1877. Execution from Succeeding Justice.

When any judgment shall have been rendered by any justice of the peace, and the same [shall] not be satisfied during his continuance in office, and the docket of such justice shall have been transferred to another justice, or to the successor of the justice rendering such judgment, the justice to whom the docket shall be delivered shall issue execution upon such unsatisfied judgment, in the same manner and with like effect as if he himself had rendered the judgment. [L. '54, p. 240, § 96; Cd. '81, § 1796; 2 H. C., § 1545.]

§ 1878. Execution to Another County.

If the defendant have not goods and chattels in the county in which judgment was rendered sufficient to satisfy the execution, the justice before whom such judgment may be shall, at the request of the party entitled, make out a certified transcript of the same, which may be delivered to a justice in any other county, who shall make an entry thereof in his docket, and issue execution thereon for the amount of the judgment, or such part as shall be unsatisfied, with costs as in other cases. [L. '54, p. 240, § 97; Cd. '81, § 1797; 2 H. C., § 1546.]

This section is in conflict with §§ 450-452.

§ 1879. Execution—Direction, Date, etc.

The execution shall be directed (except when it is otherwise especially provided) to the sheriff or any constable of the county where the justice resides; shall be dated on the day it is issued, and made returnable within thirty days from the date; and it shall be against the goods and chattels of the person against whom the same is issued. [L. '54, p. 240, § 98; Cd. '81, § 1798; 2 H. C., § 1547.]

§ 1880. Amount of Debt, etc., to be Stated.

Before any execution shall be delivered, the justice shall state in his docket, and also on the back of the execution, the amount of the debt, or damages and costs, and of the fees due to each person separately, and the officer receiving such execution shall indorse [thereon] the time of the reception of the same. [L. '53, p. 240, § 99; Cd. '81, § 1799; 2 H. C., § 1548.]

§ 1881. Execution may be Renewed.

If an execution be not satisfied, it may, at the request of the plaintiff, be renewed from time to time by the justice who issues the same, or by the justice to whom his docket is transferred, by an indorsement thereon to that effect, signed by him, and dated when the same shall be made. If any part of such execution has been satisfied, the indorsement of renewal shall express the sum due on the execution. Every such indorsement shall renew the execution in full force in all respects for thirty days, and no longer; and an entry of such renewal shall be made in the docket of the justice. [L. '54, p. 240, § 100; Cd. '81, § 1800; 2 H. C., § 1549.]

§ 1882. Notice of Sale upon Execution.

The officer, after taking goods and chattels into his custody by virtue of an execution, shall, without delay, give public notice by at least three

advertisements, put up at three public places in the county, of the time and place when and where they will be exposed for sale. Such notice shall describe the goods and chattels taken, and shall be put up at least ten days before the day of sale. [L. '54, p. 241, § 101; Cd. '81, § 1801; 2 H. C., § 1550.]

§ 1883. Sale upon Execution—Return.

At the time and place so appointed, if the goods and chattels be present for inspection of bidders, the officer shall expose them to sale at public vendue to the highest bidder; he shall return the execution and have the money before the justice, at the time of making such return, ready to be paid over to the persons respectively entitled thereto. [L. '54, p. 241, § 102; Cd. '81, § 1802; 2 H. C., § 1551.]

§ 1884. Officer not to Buy at Execution Sale.

No officer shall directly or indirectly purchase any goods or chattels at any sale made by him upon execution, and every such purchase shall be absolutely void. [L. '54, p. 241, § 103; Cd. '81, § 1803; 2 H. C., § 1552.]

§ 1885. Execution may Issue Against the Person, When.

If the action be one in which the defendant might have been arrested upon a warrant, an execution against the person of such defendant may be issued, after the return of an execution against his property unsatisfied in whole or in part. An execution against the person may likewise be issued after such return, where the defendant has been arrested upon a warrant and not discharged according to law. [L. '54, p. 241, § 104; Cd. '81, § 1804; 2 H. C., § 1553.]

§ 1886. Garnishees may be Examined Under Oath.

If there be no property found, or if the goods and chattels levied on be not sufficient to satisfy such execution, the officer shall, on demand of the plaintiff, summon, in writing, as garnishees, such persons as may be named to [him by] the plaintiff or his agent, to appear before the justice on the return day of the execution, to answer such interrogatories as may be put to them, touching their liabilities as garnishees, and the like proceedings shall be had thereon before the justice to final judgment as in the proceedings by attachment. [Cf. L. '54, p. 241, § 105; L. '63, p. 354, § 86; Cd. '81, § 1805; 2 H. C., § 1554.]

§ 1887. Execution for Costs.

Any justice of the peace may issue an execution against the prevailing party, to collect fees and costs for which such party may be liable, after an execution has been first issued against the other party, and returned "no property found." [L. '54, p. 241, § 106; Cd. '81, § 1806; 2 H. C., § 1555.]

§ 1888. Claim by Third Person to Property Levied on or Attached.

If any property levied on be claimed by any other person than the defendant in the execution, and the claimant make affidavit of his title or right to the possession of the same, stating the ground of such title or right, and serve the same upon the sheriff or constable while the prop-

erty is in his possession, said sheriff or constable shall not be bound to keep the property, unless the plaintiff, on demand, indemnify him in the same manner as provided in this act for cases where property held under attachment is claimed by persons not parties to the suit; and when such claim is made, the sheriff or constable shall immediately file the claimant's affidavit with the justice, and notify the plaintiff thereof, and unless the property be at once released, the justice shall set the case for trial upon the allegations of the claimant's affidavit, and the case shall proceed and be determined in the same manner as provided in this act for cases where property held under attachment is claimed by persons not parties to the suit. [Cf. L. '54, p. 241, § 107; L. '77, p. 202, § 6; Cd. '81, § 1807; 2 H. C., § 1556.]

"This act" refers to §§ 1737, 1738, of the Code of 1881.

See *supra*, § 1796, claim and delivery.

Cited in 11 Wash. 583; 36 Wash. 180; 57 Wash. 139; 70 Wash. 589, 590; 99 Wash. 182.

The repeal of sections 1737, 1738, of the code of 1881, relating to claim of third party to property attached under section 38, Laws of 1886, did not work

a repeal of this section: *Brotton v. Lunkley*, 11 Wash. 581, 40 Pac. 140.

Upon levy of execution from justice court, this section is not exclusive, section 1889 providing that the claimant to such property may resort to any legal remedy: *Meakim v. Ludwig*, 99 Wash. 180, 169 Pac. 24.

§ 1889. Claimant may Resort to Other Remedies.

Nothing contained in the last section shall be so construed as to prevent the claimant of property levied on by execution from resorting to any legal remedy he may choose to pursue, instead of proceeding in the manner therein prescribed. [L. '54, p. 242, § 108; L. '63, p. 355, § 89; Cd. '81, § 1808; 2 H. C., § 1557.]

Jurisdiction of other courts to en-
join execution sale on judgment of

justice of peace. *Ann. Cas.* 1918C, 284.

CHAPTER XI.

FORMS IN CIVIL ACTIONS IN JUSTICE'S COURT.

§ 1890. Forms—Equivalents may be Used.

The following or equivalent forms may be used by justices of the peace in civil actions and proceedings under this chapter, to wit:—

FORM OF A WARRANT.

The State of Washington, }
County of ———. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to take the body of C D, if he be found in your county, and bring him forthwith before the undersigned, one of the justices of the peace in and for said county, at his office in ———, to answer A B in a civil action; and you are hereby commanded to give notice thereof to the said plaintiff, or his agent or attorney; and have you there and then this writ.

Given under my hand this ——— day of ———, 18—.

FORM OF A SUBPOENA.

The State of Washington, }
 County of ———. } ss.

To ———.

In the name of the state of Washington, you are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, at his office in ———, to give evidence in a certain cause, then and there to be tried, between A B, plaintiff, and C D, defendant, on the part of (the plaintiff or defendant, as the case may be).

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

FORM OF EXECUTION.

The State of Washington, }
 County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D, for the sum of ——— dollars, and ——— dollars costs of suit, was recovered on the ——— day of ———, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B—these are, therefore, in the name of the state of Washington, to command you to levy on the goods and chattels of the said C D (excepting such as the law exempts), and make sale thereof, according to law, to the amount of said sum and costs upon this writ, and the same return to me within thirty days, to be rendered to the said A B for his debt, interests and costs.

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

FORM OF EXECUTION AGAINST THE BODY.

The State of Washington, }
 County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D for the sum of ——— dollars, and for ——— dollars costs of suit, was recovered on the ——— day of ———, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B, and an execution against his property returned unsatisfied,—these are, therefore, in the name of the state of Washington, to command you to take the body of the said C D, and him convey and deliver to the keeper of the jail of said county, who is hereby commanded to receive and keep the said C D in safe custody in prison until the aforesaid sum and all legal expenses be paid and satisfied, or until he be discharged therefrom by due course of law; and of this writ make due return within thirty days.

Given under my hand this ——— day of ———, 18—.

J P, Justice of the Peace.

FORM OF EXECUTION AGAINST PRINCIPAL AND SURETY AFTER EXPIRATION OF
STAY OF EXECUTION.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, judgment against C D for the sum of — dollars, and for — dollars costs of suit, was recovered on the — day of —, 18—, before the undersigned, one of the justices of the peace in and for said county, at the suit of A B; and whereas, on the — day of —, 18—, E F became surety to pay said judgment and costs, in the — month, from the date of the judgment aforesaid, agreeably to law, in the payment of which the said C D and E F have failed,—these are, therefore, in the name, etc. (as in the common form).

FORM OF ORDER IN REPLEVIN.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to take the personal property mentioned and described in the within affidavit and deliver the same to the plaintiff upon receiving a proper undertaking, unless before such delivery the defendant enter into a sufficient undertaking for the delivery thereof to the plaintiff, if delivery be adjudged.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF A WRIT OF ATTACHMENT.

The State of Washington, }
— County, } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are commanded to attach and safely keep the goods and chattels, moneys, effects, and credits of C D (excepting such as the law exempts), or so much thereof as shall satisfy the sum of — dollars, with interest and cost of suit, in whosoever hands or possession the same may be found in your county, and to provide that the goods and chattels so attached may be subject to further proceeding thereon as the law requires; and of this writ make legal service and due return.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF UNDERTAKING FOR ARREST.

Whereas an application has been made by A B, plaintiff, to J P, one of the justices of the peace in and for — county, for a warrant to arrest C D, defendant, founded upon an affidavit of the said plaintiff, setting forth that C D (here state the cause for the arrest of absconding debtor),—now, therefore, we, A B, plaintiff, and E F,

acknowledge ourselves bound to C D in the sum of — dollars to pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of — dollars.

Dated this — day of —, 18—.

A B, E F.

FORM OF UNDERTAKING IN REPLEVIN.

Whereas, A B, plaintiff, has commenced an action before J P, one of the justices of the peace in and for — county, against C D, defendant, for the recovery of certain personal property, mentioned and described in the affidavit of the plaintiff, to wit (here set forth the property claimed),—now, therefore, we, A B, plaintiff, E F, and G H, acknowledge ourselves bound unto C D, in the sum of — dollars for the prosecution of the action for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may for any cause be recovered against the plaintiff.

Dated the — day of —, 18—.

A B, E F, G H.

FORM OF UNDERTAKING IN ATTACHMENT.

Whereas, an application has been made by A B, plaintiff, to J P, one of the justices of the peace in and for — county, for a writ of attachment against the personal property of C D, defendant,—now, therefore, we, A B, plaintiff, and E F, acknowledge ourselves bound to C D, in the sum of — dollars that if the defendant recover judgment in this action the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the said attachment, and not exceeding the sum of — dollars.

Dated the — day of —, 18—.

A B, E F.

FORM OF UNDERTAKING TO DISCHARGE ATTACHMENT.

Whereas, a writ of attachment has been issued by J P, one of the justices of the peace in and for — county, against the personal property of C D, defendant in an action in which A B is plaintiff,—now, therefore, we, C D, defendant, E F and G H, acknowledge ourselves bound unto J K, constable, in the sum of — dollars (double the value of the property) engaging to deliver the property attached, to wit (here set forth a list of articles attached), or pay the value thereof to the sheriff or constable to whom the execution upon a judgment obtained by plaintiff in the aforesaid action may be issued.

Dated this — day of —, 18—.

C D, E F, G H.

FORM OF UNDERTAKING TO INDEMNIFY CONSTABLE ON CLAIM OF PROPERTY BY A THIRD PERSON.

Whereas, L M claims to be owner of and have the right to possession of certain personal property, to wit (here describe it), which has been taken by J K, constable in — county, upon an execution by J P, justice of the peace in and for the county of —, upon, a judgment

obtained by A B, plaintiff, against C D, defendant,—now, therefore, we, A B, plaintiff, E F, and G H, acknowledge ourselves bound unto the said J K, constable, in the sum of — dollars to indemnify the said J K against such claim.

A B, E F.

[L. '54, p. 253, ch. 19; L. '63, p. 370, ch. 17; Cd. '81, § 1885; 2 H. C., § 1558.]

CHAPTER XII.

PROCEEDINGS FOR CONTEMPT BEFORE JUSTICES OF THE PEACE.

§ 1891. When Justice may Punish for Contempt.

In the following cases, and no others, a justice of the peace may punish for contempt:—

1. Persons guilty of disorderly, contemptuous, and insolent behavior toward such justice while engaged in the trial of a cause, or in rendering judgment, or in any judicial proceedings, which tend to interrupt such proceedings or impair the respect due to his authority;

2. Persons guilty of any breach of the peace, noise, or disturbance, tending to interrupt the official proceedings of such justice;

3. Persons guilty of resistance or disobedience to any lawful order or process made or issued by him. [L. '54, p. 248, § 145; Cd. '81, § 1842; 2 H. C., § 1601.]

Power of justice of peace to punish for contempt. See *Ann. Cas.* 316; 1 *L. R. A.* (N. S.) 1135.

§ 1892. Punishment for Contempt.

Punishment for contempt may be by fine not exceeding twenty-five dollars, or by imprisonment in the county jail not exceeding two days, at the discretion of the justice, unless otherwise provided by statute. [L. '54, p. 249, § 146; Cd. '81, § 1843; 2 H. C., § 1602.]

§ 1893. Hearing—Warrant for Offender.

No person shall be punished for a contempt before a justice of the peace until an opportunity shall have been given to him to be heard in his defense; and for that purpose, the justice may issue his warrant to bring the offender before him. [L. '54, p. 249, § 147; Cd. '81, § 1844; 2 H. C., § 1603.]

§ 1894. Summary Arraignment.

If the offender be present, he may be summarily arraigned by the justice, and proceeded against in the same manner as if a warrant had been previously issued, and the offender arrested thereon. [L. '54, p. 249, § 148; Cd. '81, § 1845; 2 H. C., § 1604.]

§ 1895. Form of Warrant.

The warrant for contempt may be in the following form:—

The State of Washington, }
County of ——. } ss.

To the Sheriff or any Constable of said County.

In the name of the state of Washington, you are hereby commanded to apprehend A B, and bring him before J P, one of the justices of the peace of said county, at his office in said county, to show cause why he should not be convicted of a contempt alleged to have been committed on the — day of —, A. D. 18—, before the said justice, while engaged as a justice of the peace in a judicial proceeding.

Dated this — day of —, A. D. 18—.

J P, Justice of the Peace.

[L. '54, p. 249, § 149; Cd. '81, § 1846; 2 H. C., § 1605.]

§ 1896. Form of Judgment.

Upon the conviction of any person for contempt an entry thereof shall be made in the docket of such justice, stating the particular circumstances of the offense, and the judgment rendered thereon, and may be in the following form:—

The State of Washington, }
County of ——. } ss.

Whereas, on the — day of —, A. D. 18—, while the undersigned, one of the justices of the peace of said county, was engaged in the trial of an action between C D, plaintiff, and E F, defendant, in said county, A B, of the said county did interrupt the said proceedings and impair the respect due to the authority of the undersigned, by (here describe the cause particularly); and whereas, the said A B was thereupon required by the undersigned to answer for the said contempt, and show cause why he should not be convicted thereof; and whereas, the said A B did not show cause against the said charge,—be it therefore ordered that the said A B is adjudged to be guilty, and is convicted of the contempt aforesaid, and is adjudged by the undersigned to pay a fine of — dollars (or be imprisoned, etc.).

Dated this — day of —, A. D. 18—.

J P, Justice of the Peace.

[L. '54, p. 249, § 150; Cd. '81, § 1847; 2 H. C., § 1606.]

§ 1897. Warrant of Commitment.

If any person convicted of a contempt be adjudged to be imprisoned, a warrant of commitment shall be issued by the justice. If he be adjudged to pay a fine, a process may be issued to collect the same; and when so collected it shall forthwith be paid by the justice into the county treasury. [L. '54, p. 250, § 151; Cd. '81, § 1848; 2 H. C., § 1607.]

CHAPTER XIII.

WITNESSES AND DEPOSITIONS.

§ 1898. Witnesses may be Subpoenaed Within Twenty Miles.

A subpoena issued by a justice of the peace shall be valid to compel the attendance of a witness in the justice's court, if such witness be within twenty miles of the place of trial. [L. '54, p. 233, § 57; Cd. '81, § 1869.]

§ 1899. How and by Whom Served.

A subpoena may be served by any person above the age of eighteen years, by reading it to the witness, or by delivering to him a copy at his usual place of abode. [L. '54, p. 233, § 58; Cd. '81, § 1870.]

§ 1900. Attachment for Failure to Appear.

Whenever it shall appear to the satisfaction of the justice, by proof made before him, that any person, duly subpoenaed to appear before him in an action, shall have failed, without a just cause, to attend as a witness, in conformity to such subpoena, and the party in whose behalf such subpoena was issued, or his agent, shall make oath that the testimony of such witness is material, the justice shall have the power to issue an attachment to compel the attendance of such witness: Provided, that no attachment shall issue against witness in any civil action, unless his fees for mileage and one day's attendance have been tendered or paid in advance, if previously demanded by such witness from the person serving the subpoena. [L. '54, 233, § 59; Cd. '81, § 1871.]

§ 1901. Service and Costs in Attachment.

Every such attachment may be directed to any sheriff or constable of the county in which the justice resides, and shall be executed in the same manner as a warrant; and the fees of the officer for issuing and serving the same shall be paid by the person against whom the same was issued, unless he show reasonable cause, to the satisfaction of the justice, for his omission to attend; in which case the party requiring such attachment shall pay all costs. [L. '54, p. 233, § 60; Cd. '81, § 1872.]

§ 1902. Damages for Nonattendance.

Every person subpoenaed as aforesaid, and neglecting to appear, shall also be liable to the party in whose behalf he may have been subpoenaed, for all damages which such party may have sustained by reason of his nonappearance: Provided, that such witness had the fees allowed for mileage and one day's attendance paid, or tendered him, in advance, if demanded by him at the time of the service. [L. '54, p. 234, § 61; Cd. '81, § 1873.]

§ 1903. Party to Action as Witness.

A party to an action may be examined as a witness, at the instance of the adverse party, and for that purpose may be compelled in the same manner, and subject to the same rules of examination, as any

other witness, to testify at the trial, or appear and have his deposition taken. [L. '54, p. 243, § 62; Cd. '81, § 1874.]

§ 1904. Testimony of Party may be Rebutted.

The examination of a party thus taken may be rebutted by adverse testimony. [L. '54, p. 234, § 63; Cd. '81, § 1875.]

§ 1905. Proceedings on Party's Refusal to Testify.

If a party refuse to attend and testify at the trial, or give his deposition before trial, when required, his complaint, answer or reply, may be stricken out, and judgment taken against him. [L. '54, p. 234, § 64; Cd. '81, § 1876.]

§ 1906. Examination of Party in His Own Behalf.

A party examined by an adverse party may be examined on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the inquiries put to him by the adverse party, or necessary to qualify or explain his answer thereto, or to discharge, when his answer would charge himself, such adverse party may offer himself as a witness, and he shall be so received. [L. '54, p. 234, § 65; Cd. '81, § 1877.]

§ 1907. When Depositions may be Taken.

Either party, in an action depending before a justice of the peace, may cause a deposition of a witness therein to be taken, when such witness resides, or is about to go more than twenty miles from the place of trial, or is so sick, infirm, or aged, as to make it probable that he will not be able to attend at the trial. [L. '54, p. 234, § 66; Cd. '81, § 1878.]

§ 1908. How Taken and Certified.

The notice shall be served, and the deposition taken, certified, and returned, according to the law regulating the taking of depositions to be read in the superior court. [L. '54, p. 234, § 67; Cd. '81, § 1879.]

§ 1909. How Used on Trial.

The justice shall allow every deposition taken, certified and returned according to law, to be read on the trial of the cause in which it is taken, in all cases where the same testimony, if given verbally before him, could have been received; but no such deposition shall be read on the trial, unless it appears to the justice that the witness, whose deposition is so offered:

1. Is dead, or resides more than twenty miles from the place of trial; or

2. Is unable, or cannot safely attend before the justice, on account of sickness, age, or other bodily infirmity;

3. That he has gone more than twenty miles from the place of trial without the consent or collusion of the party offering the deposition. [L. '54, p. 234, § 68; Cd. '81, § 1880.]

CHAPTER XIV.

APPEALS FROM JUSTICE'S COURT.

§ 1910. Appeal in Civil Actions.

Any person considering himself aggrieved by the judgment or decision of a justice of the peace in a civil action may, in person or by his agent, appeal therefrom to the superior court of the same county where the judgment was rendered or the decision made: Provided, there shall be no appeal allowed unless the amount in controversy exclusive of costs, shall exceed the sum of twenty dollars. [L. '05, p. 41, § 1. Cf. L. '54, p. 252, § 160; Cd. '81, § 1858; L. '91, p. 66, § 1; 2 H. C., § 1630.]

Cited in 11 Wash. 15; 12 Wash. 550; 73 Wash. 35.

Appeals: See Remington's Digest, J. P., §§ 21, 22.

§ 21. Appellate Jurisdiction: State ex rel. Egbert v. Superior Court, 9 Wash. 369, 37 Pac. 489; Mundy v. Kern, 74 Wash. 477, 133 Pac. 1035.

§ 22. Decisions Reviewable—Judgments by Default: State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895.

— **Further Pleadings or New Pleadings:** See Remington's Digest, J. P., § 28; Newberg v. Farmer, 1 W. T. 182; State ex rel. Bagley v. Superior Court, 3 Wash. 705, 29 Pac. 213.

CERTIORARI: See Remington's Digest, J. P., §§ 30—33.

§ 30. Nature and Scope of Remedy in

General: State v. White, 8 Wash. 230, 35 Pac. 1100; Woodbury v. Henningsen, 11 Wash. 12, 39 Pac. 243.

§ 30-1. Existence of or Resort to Other Remedy: State ex rel. Chicago, Mil. & P. S. R. v. Superior Court, 73 Wash. 33, 131 Pac. 466.

§ 31. Decisions and Proceedings Reviewable: Gabriel v. Seattle & M. R. Co., 7 Wash. 515, 35 Pac. 410; State ex rel. Pacific Coast S. S. Co. v. Superior Court, 12 Wash. 548, 41 Pac. 895; State ex rel. Weymouth v. Lockhart, 28 Wash. 460, 68 Pac. 894.

§ 32. Determination and Disposition of Cause: State v. White, 8 Wash. 230, 35 Pac. 1100; State ex rel. Grady v. Lockhart, 18 Wash. 531, 52 Pac. 315.

§ 33. — Affirmance: McEneaney v. Dart, 9 Wash. 682, 38 Pac. 764.

§ 1911. Appeal, How Taken—Bond.

Such appeal shall be taken by filing a notice of appeal with the justice and serving a copy on the adverse party, or his attorney, and unless such appeal be by a county, city, or school district, filing a bond or undertaking, as herein provided, within twenty days after the judgment is rendered, or the decision made. No appeal, except when such appeals are by a county, city, or school district, shall be allowed in any case, unless a bond or an undertaking shall be executed on the part of the appellant, and filed with and approved by the justice, with one or more sureties, in the sum of one hundred dollars, to the effect that the appellant will pay all costs that may be awarded against him on the appeal; or if a stay of proceedings before the justice be claimed, except by a county, city, or school district, a bond of undertaking, with two or more sureties, to be approved by the justice, in a sum equal to twice the amount of the judgment and costs, to the effect that the appellant will pay such judgment, including costs, as may be rendered against him on the appeal. [Cf. L. '54, p. 252, §§ 161, 162; L. '81, p. 8, § 1; Cd. '81, § 1859; L. '91, p. 66, § 2; 2 H. C., § 1631.]

Requisites and Proceedings for Transfer of Cause: See Remington's Digest, J. P., §§ 23, 24; State ex rel. Cline v. Campbell, 5 Wash. 517, 32 Pac. 97; State

ex rel. Gardner v. Superior Court, 9 Wash. 307, 37 Pac. 148. **Notice of Appeal:** McKilver v. Manchester, 1 W. T. 255; State ex rel. Maltby v. Superior

Court, 7 Wash. 223, 34 Pac. 922; State ex rel. Alladio v. Superior Court, 17 Wash. 54, 48 Pac. 733; State ex rel. Fleischner v. Superior Court, 20 Wash. 709, 54 Pac. 937.

Sufficiency of notice of appeal from justice of peace with respect to description of judgment appealed from. 21 Ann. Cas. 1309.

§ 1912. Stay of Proceedings, When.

Upon appeal being taken, and a bond filed to stay all proceedings, the justice shall allow the same, and make an entry of such allowance in his docket, and all further proceedings on the judgment before the justice shall thereupon be suspended; and if in the meantime execution shall have been issued, the justice shall give the appellant a certificate that such appeal has been allowed. [Cf. L. '54, p. 252, § 164; Cd. '81, § 1861; L. '91, p. 67, § 3; 2 H. C., § 1632.]

Supersedeas or Stay of Proceedings: See Remington's Digest, J. P., § 25; Seattle Coal Co. v. Lewis, 1 W. T. 488.

§ 1913. Release of Property on Certificate of Appeal.

On such certificate being presented to the officer holding the execution, he shall forthwith release the property of the defendant that may have been taken on execution; and if the body of the defendant have been taken on execution he shall be discharged from imprisonment. [L. '54, p. 252, § 165; Cd. '81, § 1862; 2 H. C., § 1633.]

§ 1914. Transcript—Jurisdiction—Procedure in Superior Court.

Within ten days after the appeal has been taken in a civil action or proceeding, the appellant shall furnish the superior court with a transcript of all the entries made in the justice's docket relating to the case, together with all the processes and other papers relating to the action, and file[d] with the justice, which shall be certified by such justice to be correct; and upon the filing of such transcript, the superior court shall become possessed of the cause, and shall proceed in the same manner, as near as may be, as in actions originally commenced in that court, except as herein otherwise provided. [Cf. L. '54, p. 252, § 166; Cd. '81, § 1863; L. '91, p. 67, § 4; 2 H. C., § 1634.]

Cited in 9 Wash. 307; 17 Wash. 56; 25 Wash. 204; 41 Wash. 413.

Sound Co-op. Colony, 1 Wash. 57, 24 Pac. 27.

Return, Record of Transcript: See Remington's Digest, J. P., § 26; Mullen v. Mullen, 1 W. T. 192; Knoff v. Puget

Power of superior court with respect to transcript of justice's judgment filed in that court. Ann. Cas. 1914A, 415.

§ 1915. Pleadings in Superior Court on Appeal.

The issue before the justice shall be tried in the superior court without other or new pleadings unless otherwise directed by the court. [L. '54, p. 253, § 167; Cd. '81, § 1864; 2 H. C., § 1635.]

Cited in 3 Wash. 709.

It is discretionary with the superior court under this and section 1788, supra, to allow amendments to pleadings used before the justice: State ex rel. Bagley

v. Superior Court, 3 Wash. 705, 29 Pac. 213.

Unless issues are changed thereby, amendments in pleadings should be liberally allowed on appeals from justices' courts: Newberg v. Farmer, 1 W. T. 182.

§ 1916. Attachment for Certified Transcript.

Upon an appeal being taken and allowed the superior court may, by rule and attachment, compel the justice to make and deliver to the appellant a certified transcript of the proceedings, upon paying to such justice the fees allowed by law for making such transcript, and whenever the court is satisfied that the return of the justice is substantially erroneous or defective, it may, by rule and attachment, compel him to amend the same. [Cf. L. '54, p. 253, § 168; Cd. '81, § 1865; L. '91, p. 67, § 5; 2 H. C., § 1636.]

§ 1917. Appeal not to be Dismissed for Defective Bond, When.

No appeal allowed by justice shall be dismissed on account of the bond being defective, if the appellant will, before the motion is determined, execute and file in the superior court such a bond as he should have executed at the time of taking the appeal, and pay all costs that shall have accrued by reason of such defect. [L. '54, p. 253, § 169; Cd. '81, § 1866; 2 H. C., § 1637.]

§ 1918. Judgment Against Appellant and Sureties, When.

In all cases of appeal to the superior court if, on the trial anew in such court, the judgment be against the appellant in whole or in part, such judgment shall be rendered against him and his sureties in the bond for the appeal. [L. '54, p. 253, § 170; Cd. '81, § 1867; 2 H. C., § 1638.]

Cited in 1 Wash. 25; 34 Wash. 155.

Sureties on appeal bond from justice's court, by signing the bond, submit themselves to the jurisdiction of the court,

and, are concluded by the judgment rendered against the principal and themselves without further notice: *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013.

§ 1919. Appeal in Criminal Cases—Notice.

Every person convicted before a justice of the peace of any offense may appeal from the judgment, within ten days thereafter, to the superior court. The appeal shall be taken by orally giving notice thereof at the time the judgment is rendered, or by serving a written notice thereof upon the justice at any time after the judgment, and within the time allowed for taking the appeal; when the notice is given orally, the justice shall enter the same in his docket. The appellant shall be committed to the jail of the county until he shall recognize or give a bond to the state, in such reasonable sum with such sureties as said justice may require, with condition to appear at the court appealed to, and there prosecute his appeal, and to abide the sentence of the court thereon, if not revised by a higher court. [Cf. L. '54, p. 261, § 177; L. '77, p. 203, § 7; Cd. '81, § 1898; L. '91, p. 67, § 6; 2 H. C., § 1639.]

Bail and recognizances, see *infra*, §§ 1952, 1957, 1957½.

Cited in 49 Wash. 437; 80 Wash. 337; 111 Wash. 423.

Where the accused, convicted in a police court, has on appeal been discharged from custody on giving bond to appear and prosecute his appeal, he is not entitled to a dismissal of the charge

because more than sixty days elapsed without trial after the taking of the appeal, where he made no demand for trial, since he was bound to demand trial on appeal for his own benefit, under this section: *State v. Parmeter*, 49 Wash. 435, 95 Pac. 1012.

Appeal and Proceedings: See Remington's Digest, Crim. Law, §§ 60-2—60-4.

§ 60-2. — **Appeal and Trial de Novo:** State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716; State v. Hagimori, 57 Wash. 623, 107 Pac. 855; State v. Hamshaw, 61 Wash. 390, 112 Pac. 379; Seattle v. Molin, 99 Wash. 210, 169 Pac. 318; Seattle v. Savage, 103 Wash. 71, 174 Pac. 1183; State v. Koerner, 103 Wash. 516, 175 Pac. 175.

§ 60-3. — **Proper Mode of Review:** State v. White, 8 Wash. 230, 35 Pac. 1100;

Everett v. Cowles, 97 Wash. 396, 166 Pac. 786.

§ 60-4. — **Diligence—Dismissal:** State v. Buffum, 94 Wash. 25, 161 Pac. 832; State v. Greenwald, 102 Wash. 593, 173 Pac. 636; State v. Koerner, 103 Wash. 516, 175 Pac. 175.

Where the justice's transcript was not filed for nearly six months, a criminal appeal will be dismissed on motion of the state: State v. Berg, 111 Wash. 422, 191 Pac. 400.

§ 1920. Fees not Required in Advance—Failure to Prosecute, Effect of.

The appellant in a criminal action shall not be required to advance any fees in claiming his appeal, nor in prosecuting the same; but if convicted in the appellate court, or if sentenced for failing to prosecute his appeal, he may be required, as a part of the sentence, to pay the costs of prosecution. If the appellant shall fail to enter and prosecute his appeal, he shall be defaulted on his recognizance, if any was taken, and the superior court may award sentence against him for the offense whercof he was convicted, in like manner as if he had been convicted thereof in that court; and if he be not then in custody, process may be issued to bring him into court to receive sentence. [Cf. L. '54, p. 261, § 179; Cd. '81, § 1900; L. '91, p. 68, § 7; 2 H. C., § 1640.]

Cited in 49 Wash. 437; 80 Wash. 337; 100 Wash. 288; 111 Wash. 423.

§ 1921. Justice to Recognize Witnesses—Transcript.

Upon an appeal being taken in a criminal action, the justice shall require the witnesses to give recognizances for their appearance in the superior court, or if they are not present, indorse their names on the copy of proceeding. He shall, on such appeal, make and certify a copy of the conviction and other proceedings in the case, and transmit the same, together with the recognizance and an abstract bill of the costs, to the clerk of the court appealed to, who shall issue a subpoena for the witnesses, if they are not under recognizance. [Cf. L. '54, p. 261, § 178; L. '73, p. 384, § 197; Cd. '81, § 1899; L. '91, p. 68, § 8; 2 H. C., § 1641.]

Money deposit in lieu of recognizance, see *infra*, § 1957½.

Cited in 88 Wash. 549; 100 Wash. 288; 111 Wash. 423.

§ 1922. Appeal from Order for Security to Keep the Peace.

An appeal may be taken from the order of a magistrate requiring a person to give security, to keep the peace, or for good behavior. Such appeal shall be taken in the same manner and subject to the same conditions as appeals from justices' courts in criminal actions, and the magistrate may require recognizances of the appellant and the witness, as in appeals in such criminal actions. [Cf. L. '54, p. 106, §§ 18, 19; L. '63, p. 385, §§ 191, 192; Cd. '81, §§ 1911, 1912; L. '91, p. 68, § 9; 2 H. C., § 1642.]

Cited in 23 Wash. 88.

§ 1923. Proceedings on Such Appeal—New Bonds—Costs.

The court before which such appeal is prosecuted may affirm the order of the justice or discharge the appellant, or may require the appellant to enter into a new recognizance, with sufficient sureties, in such sum and for such time as the court shall think proper, and may also make such order in relation to the costs of prosecution as may be deemed just and reasonable. [L. '54, p. 155, § 20; Cd. '81, § 1913; 2 H. C., § 1643.]

§ 1924. Failure to Prosecute Such Appeal, Effect of.

If any party appealing from such order of a magistrate shall fail to prosecute his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, without an affirmance of the judgment or order of the magistrate, and also shall stand as security for costs which shall be ordered by the court appealed to to be paid by the appellant. [Cf. L. '54, p. 105, § 21; Cd. '81, § 1914; L. '91, p. 68, § 10; 2 H. C., § 1644.]

PROCEDURE IN CRIMINAL ACTIONS.

TITLE XIII.

PROCEDURE IN CRIMINAL ACTIONS.

CHAPTER I.—PRACTICE IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

- | | |
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| 1925. Justice to issue warrant of arrest, when. | 1931. Judgment not to be given without evidence. |
| 1926. Offense committed in view of justice, proceedings. | 1932. Continuance to be granted, how—Costs, etc. |
| 1927. Either side may demand jury. | 1933. Judgment, how rendered and satisfied. |
| 1928. Proceedings on verdict of guilty. | 1934. Stay of execution, manner of procuring. |
| 1929. Plea of guilty. | |
| 1930. Justice to summon witnesses. | |

CHAPTER II.—FORMS IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

1935. Forms in criminal actions—Equivalents authorized.

CHAPTER III.—PROCEEDINGS TO PREVENT THE COMMISSION OF CRIME.

- | | |
|---|---|
| 1936. Power to preserve peace. | 1943. Costs—How payment enforced, etc. |
| 1937. Duty of justice when complaint made. | 1944. Defendant discharged on giving security. |
| 1938. Examination of witnesses—Transcript of testimony. | 1945. Recognizances to be transmitted and filed. |
| 1939. Magistrate to issue warrant, when. | 1946. Recognizances without process, when. |
| 1940. Recognizance in cases of apprehended danger. | 1947. Portion of penalty remitted, when. |
| 1941. Commitment of defendant to jail, when. | 1948. Surety may surrender principal, when—Effect of. |
| 1942. Magistrate to discharge, when—Costs. | |

CHAPTER IV.—EXAMINATION OF PERSONS CHARGED WITH CRIME BEFORE MAGISTRATES.

- | | |
|--|---|
| 1949. Examination of offenses before magistrate. | 1958. Magistrates may associate other magistrates. |
| 1950. Officer may pursue and retake prisoner. | 1959. Witnesses to be recognized, when. |
| 1951. Recognizance with or without examination. | 1960. Witnesses to recognize with sureties, when. |
| 1952. Hearing and adjournment—Bail. | 1961. Recognizance of minor or married woman. |
| 1953. Testimony, how taken. | 1962. Commitment of witnesses on default of bond—Depositions. |
| 1954. Defendant entitled to discharge, when—Costs. | 1963. Magistrate to make return—Penalty. |
| 1955. Defendant recognized to appear before justice, when. | 1964. Offense may be compromised, when. |
| 1956. Bail to justify, when required. | 1965. Action on forfeiture of recognizance. |
| 1957. Defendant to be discharged on bail, when. | 1966. Abstract of costs to be forwarded with papers. |
| 1957½. Money deposit in lieu of bail. | |

CHAPTER V.—PROCEEDINGS AGAINST VAGRANTS.

- | | |
|--|-------------------------------|
| 1967. Vagrancy, defined. | 1969. Arrest without warrant. |
| 1968. Proceedings for examination of vagrancy. | |

CHAPTER V-A.—BASTARDY PROCEEDINGS.

- | | |
|--|--|
| 1970. Complaint against putative father. | 1971. Hearing before justice—Bond—Action on. |
|--|--|

PROCEDURE IN CRIMINAL ACTIONS.

- | | |
|--|---|
| 1972. Prosecuting attorney—Control of. | 1979-2. Commitment for contempt—Hear- |
| 1973. Discharge on recognizance bond. | ing. |
| 1974. Mother's testimony. | 1979-3. Disposition of judgment money. |
| 1975. Docketing in superior court. | 1979-4. Default in paying installments— |
| 1976. Trial. | Judgment for. |
| 1977. Judgment of discharge. | 1979-5. Commitment for contempt—Modi- |
| 1978. Judgment ordering support of | fication of judgment. |
| child—Bond. | 1979-6. Limitation on prosecution. |
| 1979. Act cumulative with criminal | 1979-7. Mother's death not to abate ac- |
| proceedings. | tion. |
| 1979-1. Execution in absence of security | 1979-8. Judgment in case of child's |
| bond. | death. |
| | 1979-9. Custody of child. |

CHAPTER VI.—JUVENILE OFFENDERS—COMMITMENT TO STATE TRAINING SCHOOL.

- | | |
|--|--|
| 1980. Juvenile offender committed, when. | 1984. Warrant of commitment must state |
| 1981. Proceedings in case of conviction | what—Expense. |
| before justice—Order to show | 1985. Proceedings in lower court—How |
| cause. | reviewed. |
| 1982. Order to show cause, how served— | 1986. Term of confinement—Effect of dis- |
| Fees. | charge. |
| 1983. Examination, hearing and commit- | |
| ment by warrant. | |

CHAPTER VII.—DELINQUENT CHILDREN AND JUVENILE COURTS.

- | | |
|---|---|
| 1987-1. Scope of act—"Dependent child" | 1987-10. Private hearings—Judgment of |
| —"Delinquent child." | conviction. |
| 1987-2. Juvenile courts—Jurisdiction— | 1987-11. Child not to be detained in jail. |
| Jury trials—Special sessions— | 1987-12. Justice court cases transferred to |
| Court commissioners. | juvenile court. |
| 1987-3. Probation officers. | 1987-13. Detention rooms. |
| 1987-4. Expenses of probation officers. | 1987-14. Construction of act. |
| 1987-5. Petition to take charge of child. | 1987-15. Court may change order. |
| 1987-6. Summons—Hearing. | 1987-16. Fees not allowable. |
| 1987-7. Publication of summons. | 1987-17. Penalty for delinquency of child |
| 1987-8. Commitment of child—Support | —Bond. |
| by parent. | 1987-18. Board of visitation. |
| 1987-9. Award and adoption of child. | |

CHAPTER VII-A.—CUSTODY AND TREATMENT OF DELINQUENT AND DISEASED WOMEN.

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|--|--|
| 1988. Women's Industrial Home and | 1995. Duties of superintendent—Employ- |
| Clinic. | ees. |
| 1989. Board of Directors—Appointment | 1996. Commitment of female offenders— |
| and compensation. | Delinquent or dependent minors. |
| 1990. Site for institution—Acquisition. | 1997. Parole and discharge of inmates. |
| 1991. Building plans—Bids for contracts. | 1998. Violation of parole—Arrest. |
| 1992. Transfers of inmates of state | 1999. Escape of inmates. |
| school for girls. | 2000. Transfer to state prison, etc. |
| 1993. Management of institution—Sal- | 2001. Discharge. |
| aries—Annual Reports. | 2002. Infant children of inmates. |
| 1994. Superintendent—Bond and compen- | 2003. Appropriation. |
| sation. | 2004. Partial invalidity. |

CHAPTER VIII.—LIMITATION OF CRIMINAL ACTIONS AND REPEALS.

- | | |
|--|--|
| 2005. Limitation on criminal actions other | 2006. Repeal and amendment of criminal |
| than murder. | statutes—Saving clause presumed. |

CHAPTER IX.—PARTIES TO CRIMINAL ACTIONS.

- | | |
|--|---|
| 2007. Distinctions relating to accessory | 2010. Who may be tried and punished. |
| abolished. | 2011. Term "person," defined. |
| 2008. Accessory after the fact—Who | 2011-1. Corporation charged with crime. |
| may be. | 2011-2. Appearance by corporation. |
| 2009. Accessory after fact tried though | 2011-3. Judgment against corporation. |
| principal not. | |

PROCEDURE IN CRIMINAL ACTIONS.

CHAPTER X.—VENUE OF CRIMINAL ACTIONS.

- | | |
|--|--|
| 2012. Criminal actions, where commenced. | 2017. Venue of action against accessory after the fact. |
| 2013. Jurisdiction when offense committed in two or more counties. | 2018. Change of venue, proceedings to obtain. |
| 2014. Offenses committed on county boundaries. | 2019. Discretion of court—Duty of clerk. |
| 2015. Venue of stolen property taken into another county. | 2020. Change upon consent of parties. |
| 2016. Jurisdiction of homicide in either county, when. | 2021. Recognizance of defendant and witnesses on change. |

CHAPTER XI.—FORMS OF CRIMINAL ACTIONS.

- | | |
|--|---|
| 2022. Pleadings—Forms abolished. | 2024. All prosecutions may be by information. |
| 2023. The charge must be by information or indictment. | |

CHAPTER XII.—INDICTMENTS AND PROCEEDINGS BY INFORMATION.

- | | |
|---|---|
| 2025. Challenge to panel of grand jurors. | 2035. Complainant not to be present, when. |
| 2026. Challenge to individual grand juror. | 2036. Malicious and frivolous prosecution—Costs. |
| 2027. Venire when panel discharged. | 2037. Inquiry into persons in prison, etc. |
| 2028. Discharge of juror—Panel to be filled. | 2038. Duty to hear evidence. |
| 2029. Oath of grand jury—Form. | 2039. Fact of indictment found not to be disclosed, when. |
| 2030. Foreman—Powers of—Clerk of grand jury. | 2040. Secrecy of proceedings, charge as to. |
| 2031. Grand jury charged by court—Advice to. | 2041. Grand jury may be resummoned, when. |
| 2032. Prosecuting attorney to attend, etc. | |
| 2033. Duties of grand jury. | |
| 2034. Jurors to communicate personal knowledge of offenses. | |

CHAPTER XIII.—FINDINGS AND PRESENTMENT OF INDICTMENTS.

- | | |
|--|--|
| 2042. Twelve jurors must concur—Indorsement. | 2048. Effect of finding "not a true bill." |
| 2043. Names of witnesses indorsed, defendant entitled to copy. | 2049. Presentment defined. |
| 2044. Indictment at instance of private prosecutor—Costs. | 2050. Information—Filing, indorsement, etc. |
| 2045. Custody and inspection of. | 2051. Verification of information. |
| 2046. Secrecy as to indictment. | 2052. Commitment or recognizance of defendant held to answer. |
| 2047. Indictment found "not a true bill," filing, etc. | 2053. Duty of prosecuting attorney relating to preliminary examinations. |

CHAPTER XIV.—REQUISITES OF INDICTMENTS AND INFORMATIONS.

- | | |
|---|---|
| 2054. First pleading. | 2067. Presumptions of law, etc., need not be stated. |
| 2055. Contents of indictment or information. | 2068. Judgment, how pleaded. |
| 2056. Form of indictment. | 2069. Private statute, how pleaded. |
| 2057. Indictment or information must be direct and certain. | 2070. Pleading in indictment, etc., for libel. |
| 2058. True name inserted, when. | 2071. Pleading in forgery where instrument destroyed or withheld. |
| 2059. One crime to be charged, and in one form only. | 2072. Pleadings in indictment, etc., for perjury. |
| 2060. Statement as to time when offense committed. | 2073. Against several—Conviction or acquittal against one or more. |
| 2061. Statement as to person injured or intended to be. | 2074. Pleading in indictment, etc., for larceny or embezzlement. |
| 2062. Animal—Description—Sufficiency. | 2075. Pleading in indictment, etc., for selling obscene literature. |
| 2063. Construction of words and phrases. | 2076. Ownership of property, how pleaded—Variance. |
| 2064. Words of the statute need not be strictly pursued. | |
| 2065. Requisites of indictments, etc. | |
| 2066. Former defects or imperfections, how regarded. | |

PROCEDURE IN CRIMINAL ACTIONS.

CHAPTER XV.—PROCEEDINGS BEFORE ARRAIGNMENT.

- | | |
|---|---|
| 2077. Warrant of arrest to issue, when. | 2087. Officer may take recognizances, etc. |
| 2079. Bail to be indorsed on warrant. | 2088. Recognizance certified and recorded, effect of. |
| 2080. Service of criminal process. | 2089. Deposit of money in lieu of bail. |
| 2081. Warrant of arrest by telegraph. | 2090. Forfeiture of bail. |
| 2082. Officer may break door, etc., to make arrest. | 2091. Rights of defendant in capital cases. |
| 2083. Officer to exhibit warrant. | 2092. Rights of defendant charged with a felony. |
| 2084. Force may be used. | |
| 2085. Pursuit of prisoner, assistance commanded. | |
| 2086. Taking and entering recognizance. | |

CHAPTER XVI.—ARRAIGNMENT, PLEADINGS AND PROCEEDINGS THEREON.

- | | |
|--|---|
| 2093. Arraignment of defendant. | 2110. Plea of guilty must be put in by defendant. |
| 2094. Defendant may appear by counsel, when. | 2111. Substitution of plea. |
| 2095. Right to have counsel. | 2112. Plea of not guilty, effect of. |
| 2096. Defendant to declare his true name. | 2113. Conviction or acquittal operates as a bar, when. |
| 2097. Entry of true name. | 2114. Judgment on demurrer no bar—Exception. |
| 2098. Pleading on arraignment—Time for answer. | 2115. Refusal to plead—Plea of not guilty to be entered. |
| 2099. Grounds of motion to set aside indictment. | 2116. On charge of murder jury must be impaneled. |
| 2100. Grounds not allowed, when. | 2118. Conviction necessary before punishment. |
| 2101. Grounds of motion to set aside information. | 2126. Compromise of misdemeanor, when. |
| 2102. Must demur or plead on denial of motion. | 2127. Compromising criminal actions, when and how. |
| 2103. Effect of order for resubmission. | 2128. Offenses not to be compromised except as herein provided. |
| 2104. Order no bar to another prosecution. | 2129. Restoration of stolen property—Duty of officer. |
| 2105. Grounds of demurrer. | 2130. Recompense for securing and keeping stolen property. |
| 2106. Judgment on demurrer final, when. | |
| 2107. Effect of failure to plead after demurrer overruled. | |
| 2108. The three pleas of defendant. | |
| 2109. Pleas, how entered—Form of. | |

CHAPTER XVII.—TRIALS AND VERDICTS IN CRIMINAL ACTIONS.

- | | |
|---|--|
| 2134. Trial docket. | 2149. Immunity of witnesses in cases of bribery, grafting, etc. |
| 2135. Continuance, when granted. | 2150. Not applicable to proceedings before committing magistrate or justice. |
| 2136. Subpoena for state witnesses—Continuance for state. | 2151. Confession as evidence. |
| 2137. Issues to be tried by jury—Practice as in civil cases. | 2152. Rules of evidence same as in civil actions. |
| 2137-1. Alternate jurors—Drawing—Qualifications—Attendance. | 2153. Proof of marriage in adultery, bigamy, etc. |
| 2138. Peremptory challenges, number allowed defendant. | 2154. Receiving stolen property—Averments and proof necessary. |
| 2139. Peremptory challenges allowed state. | 2156. Variance as to ownership of property. |
| 2140. Challenges to panel, when allowed. | 2158. Court to decide questions of law, rules of practice. |
| 2141. Challenges for cause. | 2159. Custody of jury. |
| 2142. Conscientious scruples of juror as to capital punishment. | 2160. Court may order view of place of crime. |
| 2143. Oath to jury, form of. | 2161. Separate trial. |
| 2144. Jury may be waived except in capital cases. | 2162. Discharging one defendant to give evidence—Effect of. |
| 2145. Personal presence of defendant during trial. | 2163. Mistake in charge, defendant to be held, when. |
| 2146. Trial in defendant's absence, when. | 2164. Venue may be corrected and action certified to proper county. |
| 2147. Competency of witnesses—Exceptions. | |
| 2148. Compelling attendance of witnesses—Defendant as witness—Failure to testify. | |

PROCEDURE IN CRIMINAL ACTIONS.

- | | |
|---|---|
| 2165. Discharge of jury without prejudice to further prosecution. | 2171. Rendition of verdict. |
| 2166. When conviction or acquittal a bar. | 2172. Form of verdict — Punishment fixed by court. |
| 2167. Jury may find any degree of offense. | 2173. "Criminally insane," defined—Mental irresponsibility. |
| 2168. In other cases degree of guilt. | 2174. Insanity—How pleaded. |
| 2169. Verdict as to one or more where several are charged. | 2175. Special verdict on acquittal, when plea of insanity interposed. |
| 2170. Reconsideration where jury mistakes the laws. | 2176. Verdict—Findings—Discharge or commitment. |

CHAPTER XVIII.—NEW TRIAL AND ARREST OF JUDGMENT.

- | | |
|---|--|
| 2181. When new trial may be granted. | 2185. Defendant may be recommitted after arrest of judgment. |
| 2182. Application, how made. | 2186. Exceptions as in civil cases. |
| 2183. Judgment may be arrested, when. | |
| 2184. Judgment arrested without motion, when. | |

CHAPTER XIX.—JUDGMENT AND THE ENFORCEMENT THEREOF.

- | | |
|--|---|
| 2187. Judgment on verdict. | 2206. Judgment of fine and costs, how enforced. |
| 2188. Judgment a lien on realty, when. | 2207. Certified transcript—Mittimus. |
| 2189. Fines — Disposition — Penalty for neglect to pay over. | 2208. Form of sentence to penitentiary. |
| 2190. Judgment pronounced, when. | 2209. Fine and costs, how worked out. |
| 2194. Certain criminals may be sentenced to reformatory. | 2210. Death warrant, contents, return. |
| 2195. Indeterminate sentence to reformatory. | 2212. Death penalty, how executed. |
| 2196. Presence of defendant, when necessary. | 2213. Order to sheriff to deliver to state penitentiary. |
| 2197. Warrant for defendant, when. | 2214. Custody and execution of condemned at penitentiary. |
| 2198. Defendant to be informed of verdict. | 2215. Record of death warrant and return by superintendent. |
| 2199. Bench-warrant, forfeiture of bail, etc. | 2216. Return of warrant to clerk of court. |
| 2200. Commitment until fine and costs paid. | 2217. Return of execution of order by sheriff. |
| 2201. Execution as in civil actions for fines and costs. | 2218. Clerk to file returns. |
| 2202. Recognizance to keep the peace—Exception. | 2219. Sheriff to keep prisoner pending issuance of warrant. |
| 2203. Proceedings upon breach of bond. | 2220. Repeal—Exception. |
| 2204. Stay upon judgment sixty days. | 2221. Saving clause. |
| 2205. Qualification and liability of sureties. | 2222. Proceedings on failure to execute death sentence. |
| | 2223. Governor may grant pardons, etc. |
| | 2224. Final record shall contain what. |

CHAPTER XX.—COSTS IN CRIMINAL CASES.

- | | |
|---|--|
| 2225. Costs—How taxed where complaint unfounded or malicious. | 2228. Cost bills, how made and certified. |
| 2226. Enforcing costs against complainant. | 2229. Payment of amount stated in cost bill. |
| 2227. Jury fee to be taxed to defendant, when. | 2230. Costs and other moneys collected belong to county. |

CHAPTER XXI.—FORFEITURE OF RECOGNIZANCES IN CRIMINAL ACTIONS.

- | | |
|---|--|
| 2231. Forfeiture of recognizance—Judgment—Execution. | 2234. Recognizances before magistrate—Forfeiture—Action. |
| 2232. Stay of execution on forfeited recognizance. | 2235. Action on recognizance not to be barred, etc. |
| 2233. Judgment vacated on defendant's production, when. | 2236. Costs, liability for—How taxed and paid. |

CHAPTER XXII.—SEARCH-WARRANTS.

- | | |
|---|--|
| 2237. When issued. | 2240. Execution of warrant, custody and disposition of property. |
| 2338. Additional grounds for issuing warrant. | 2240-1. Search-warrant necessary. |
| 2239. To whom directed—Contents of. | 2240-2. Penalty for search without warrant. |

CHAPTER XXIII.—PROCEEDINGS RELATING TO FUGITIVES FROM JUSTICE.

- | | |
|--|---|
| 2241. Governor's agent to demand fugitive—Proceedings. | 2244. Examination by court or magistrate. |
| 2242. Demand on governor—Proceedings. | 2245. Discharge, when. |
| 2243. Warrant for fugitive—Issuance of. | 2246. Complainant liable for costs, when. |

CHAPTER XXIV.—REWARDS FOR THE APPREHENSION OF FUGITIVES.

- | | |
|--|--|
| 2247. Standing rewards by governor for certain offenses. | 2250. Payment of rewards offered by commissioners. |
| 2248. Auditor to draw warrant. | 2251. Conflicting claims for, how determined. |
| 2249. Rewards by county commissioners, when. | 2252. Validation of county warrants for rewards. |

CHAPTER I.

PRACTICE IN CRIMINAL ACTIONS IN JUSTICE'S COURT.

§ 1925. Justice to Issue Warrant of Arrest, When.

Any justice shall, on complaint on oath in writing before him charging any person with the commission of any crime or misdemeanor of which he has jurisdiction, issue a warrant for the arrest of such person, and cause him to be brought forthwith before him for trial. [L. '54, p. 260, § 172; Cd. '81, § 1888; 2 H. C., § 1559.]

See *supra*, § 46, jurisdiction in criminal cases.

Cited in 101 Wash. 154.

Summary Trial and Conviction—Rights of Accused: See Remington's Digest, *Crim. Law*, § 60; *State v. White*, 8 Wash. 230, 35 Pac. 1100; *State ex rel. Belt v. Kennan*, 25 Wash. 621, 66 Pac. 62.

A superior court judge, sitting as a committing magistrate, has no authority, over objection, to inquire into a charge of gross misdemeanor in view of this chapter, giving justices exclusive jurisdiction: *State ex rel. Murphy v. Taylor*, 101 Wash. 148, 172 Pac. 217.

§ 1926. Offense Committed in View of Justice, Proceedings.

When any offense is committed in view of any justice, he may, by verbal direction to any constable, or if no constable is present, to any citizen, cause such constable or citizen to arrest such offender, and keep him in custody for the space of one hour, unless such offender shall sooner be taken from such custody by virtue of a warrant issued on complaint on oath. But such person so arrested shall not be confined in jail nor put upon any trial until arrested by virtue of such warrant. And on the return of any warrant issued by him, it shall be the duty of the justice to docket the cause, and unless continuance be granted forthwith to hear and determine the cause, and either acquit, convict and punish, or hold to bail the offender, if the offense be bailable, and prove to be one which should be tried in the superior court, or in default of bail, commit him to jail, as the facts and law may justify. [L. '54, p. 260, §§ 173, 174; Cd. '81, § 1889; 2 H. C., § 1560.]

Cited in 23 Wash. 88; 101 Wash. 154.

§ 1927. Either Side may Demand Jury.

In all trials for offenses within the jurisdiction of a justice of the peace, the defendant or the state may demand a jury, which shall consist of six or a less number, agreed [upon] by the state and accused, to be impaneled and sworn as in civil cases, or the trial may be by the justice. When the complaint is for a crime or misdemeanor in the exclusive jurisdiction of the superior court, the justice hears the case as a committing magistrate, and no jury shall be allowed. [L. '54, p. 260, § 174; L. '73, p. 382, § 188; L. '75, p. 51, § 2; Cd. '81, § 1890; L. '91, p. 18, § 1; 2 H. C., § 1561.]

Right to jury trial, see Const., Art. I, § 21, and notes.

Cited in 40 Wash. 405; 101 Wash. 154.

§ 1928. Proceedings on Verdict of Guilty.

Such justice or jury, if they find the prisoner guilty, shall assess his punishment; or if, in their opinion, the punishment they are authorized to assess is not adequate to the offense, they may so find, and in such case the justice shall order such defendant to enter [into] recognizance to appear in the superior court of the county, and shall also recognize the witnesses, and proceed as in proceedings by a committing magistrate. [Cf. L. '54, p. 260, § 174; Cd. '81, § 1891; L. '91, p. 18, § 2; 2 H. C., § 1562.]

See *infra*, § 1957, recognizance to appear before superior court.

Cited in 27 Wash. 687; 101 Wash. 155.

Judgment, Sentence and Record: See *State v. White*, 8 Wash. 230, 35 Pac. 1100; *Casey, In re*, 27 Wash. 686, 68 Pac. 185.
Remington's Digest, Crim. Law, § 60-1;

§ 1929. Plea of Guilty.

The defendant may plead guilty to any offense charged. [L. '54, p. 260, § 174; Cd. '81, § 1892; 2 H. C., § 1563.]

Cited in 112 Wash. 203.

§ 1930. Justice to Summon Witnesses.

In all cases arising under this chapter, if the offense charged involve injury to a particular person who is within the county, it shall be the duty of the justice of the peace to summon the injured person, and all others whose testimony may be deemed material, as witnesses at the trial, and to enforce their attendance by attachment if necessary. [Cf. L. '54, p. 260, § 174; Cd. '81, § 1894; L. '91, p. 18, § 3; 2 H. C., § 1564.]

Cited in 112 Wash. 203.

There can be no plea of former jeopardy, where the justice did not comply with this section: *State v. Collins*, 112 Wash. 201, 191 Pac. 831.

§ 1931. Judgment not to be Given Without Evidence.

No justice shall assess a fine, or enter a judgment thereon, until a witness or witnesses have been examined to state the circumstances of the transaction. [Cf. L. '54, p. 260, § 174; Cd. '81, § 1893; L. '91, p. 19, § 4; 2 H. C., § 1565.]

Cited in 112 Wash. 203.

§ 1932. Continuance to be Granted, How—Costs, etc.

Continuance may be granted, either on application of the defendant or the prosecuting witness, under the same rules as in civil cases; the cost of such continuance shall abide the event of the prosecution in all cases, and the justice shall recognize the defendant and the witnesses to appear from time to time, in the same manner as is provided in other criminal examinations before him. [Cf. L. '54, p. 261, § 176; Cd. '81, § 1895; L. '91, p. 19, § 5; 2 H. C., § 1566.]

See *infra*, § 1955, recognizance of defendant and witnesses.

§ 1933. Judgment, How Rendered and Satisfied.

In all cases of conviction, unless otherwise provided in this chapter, the justice shall enter judgment for the fine and costs against the defendant, and may commit him to jail, to be placed at hard labor until the judgment is satisfied, or the payment thereof be secured as provided by section 1934, and further proceedings therein shall be had as in like cases in the superior court; but the defendant shall not be imprisoned for a longer aggregate time than one day for every three dollars of the fine and costs; and a defendant who has been committed shall be discharged at any time upon the payment of such part of the fine and costs as remains unpaid after deducting from the whole amount any previous payment, and three dollars for every day he has been imprisoned upon the commitment. [Cf. L. '54, p. 261, § 176; Cd. '81, § 1896; L. '91, p. 19, § 6; 2 H. C., § 1567.]

§ 1934. Stay of Execution, Manner of Procuring.

Every defendant may stay the execution for the fine and costs for thirty days by procuring sufficient sureties, to be approved by the justice, to enter into recognizance before him for the payment of the fine and costs; the entry of such recognizance shall be made on the docket of the justice, and signed by the sureties, and shall have the same effect as a judgment, and if the same be not paid in thirty days, the justice shall proceed as in like cases in the superior court. [L. '54, p. 261, § 176; Cd. '81, § 1897; 2 H. C., § 1568.]

CHAPTER II.**FORMS IN CRIMINAL ACTIONS IN JUSTICE'S COURT.****§ 1935. Forms in Criminal Actions—Equivalents Authorized.**

The following or equivalent forms may be used by justices of the peace in criminal proceedings under this act:—

FORM OF A WARRANT.

The State of Washington, }
County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day complained in writing under oath to the undersigned, one of the justices of the peace in and for said county,

that on the — day of —, 18—, at —, in said county (here insert the substance of the complaint, whatever it may be),—therefore, in the name of the state of Washington, you are commanded forthwith to apprehend the said C D, and bring him before me, to be dealt with according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF A SEARCH-WARRANT.

The State of Washington, }
County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day made complaint on oath to the undersigned, one of the justices of the peace in and for said county, that the following goods and chattels, to wit (here describe them), the property of the said A B, have been within — days past, or were on the — day of —, by some person or persons unknown, stolen, taken, and carried away out of the possession of the said A B, in the county aforesaid; and also, that the said A B verily believes that the said goods or a part thereof are concealed in or about the house of C D, in said county (describe the premises to be searched),—therefore, in the name of the state of Washington, you are commanded that, with the necessary and proper assistance, you enter into the said house (describe the premises to be searched), and then diligently search for the said goods and chattels; and if the same or any part thereof be found on such search, bring the same, and also the same [said] C D, forthwith before me, to be disposed of according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF COMMITMENT WHERE JUSTICE ON THE TRIAL SHALL FIND THAT HE HAS NOT JURISDICTION IN THE CASE.

The State of Washington, }
County of —. } ss.

To any Constable and the Keeper of the Jail of said County.

Whereas, C D, of —, etc., has been brought this day before the undersigned, one of the justices of the peace in and for said county, charged, on the oath of A B, with having, on the — day of —, 18—, in said county, committed the offense of (here state the offense charged in the warrant), and in the progress of the trial of said charge, it appearing to the said justice that the said C D has been guilty of the offense of (here state the new offense found on the trial), committed at the time and place aforesaid; and whereas the said C D has failed to give bail in the sum of — dollars, for his appearance to answer at the next session of the superior court, as required by me,—therefore, in the name of the state of Washington, etc. (as in the last form), to receive the said C D into your custody in the said jail, and him there safely keep until he be discharged by due course of law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF WARRANT TO KEEP THE PEACE.

The State of Washington, }
 County of ———. } ss.

To the Sheriff or any Constable of said County.

Whereas, A B has this day complained in writing under oath to the undersigned, one of the justices of the peace in and for said county, that he has just cause to fear and does fear C D, late of the said county, will (here state the threatened injury or violence, as sworn to),— therefore, in the name of the state of Washington, you are commanded to apprehend the said C D, and bring him forthwith before me, to show cause why he should not give surety to keep the peace and be of good behavior towards all people of this state, and the said A B especially, and further to be dealt with according to law.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

FORM OF COMMITMENT UPON SENTENCE.

The State of Washington, }
 County of ———. } ss.

To any Constable and the Keeper of the County Jail of said County.

Whereas, at the justice's court held at my office in said county for the trial of C D, for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county, committed (here state the offense), and upon conviction the said court did adjudge and determine that the said C D should be imprisoned in the county jail of said county, for — days, therefore, you, the said constable, are commanded, in the name of the state of Washington, forthwith to convey and deliver the said C D to the said keeper; and you, the said keeper, are hereby commanded to receive the said C D into your custody in said jail and him there safely keep until the expiration of said — days, or until he shall thence be discharged by due course of law.

Dated this — day of —, 18—.

J P, Justice of the Peace.

FORM OF CERTIFICATE OF CONVICTION.

The State of Washington, }
 County of ———. } ss.

At a justice's court held at my office in said county before me, one of the justices of the peace in and for said county, for the trial of C D, for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county committed (here insert the offense), and upon conviction, the said court did adjudge and determine that the said C D should pay a fine of — dollars (or be imprisoned, as the case may be), and the said fine has been paid to me.

Given under my hand this — day of —, 18—.

J P, Justice of the Peace.

The State of Washington, }
 County of —. } ss.

To the Sheriff or any Constable of said County.

Whereas, at a justice's court held at my office in said county for the trial of C D for the offense hereinafter stated, the said C D was convicted of having on the — day of —, 18—, in said county committed (here state the offense), and upon conviction the said court did adjudge and determine that the said C D should pay a fine of — dollars, and — dollars costs; and whereas, the said fine and costs have not been paid,—these are, therefore, in the name of the state of Washington, to command you to levy on the goods and chattels, etc. (as in execution in civil cases).

[Cf. L. '54, p. 262, § 181; L. '60, p. 281, § 181; Cd. '81, § 1902; L. '91, p. 19, § 7; 2 H. C., § 1569.]

Cited in 30 Wash. 615.

Preliminary Warrant.—Under this section and sections 1939 and 1949, *infra*, which require only the substance of the complaint to be recited in a warrant of arrest for misdemeanor, a warrant is not void on its face when it authorizes

the officer to arrest defendant for defacing a building, described as the property of B. "and divers other persons," further reciting that it was not the property of the defendant: *State v. Yourex*, 30 Wash. 611, 71 Pac. 203.

CHAPTER III.

PROCEEDINGS TO PREVENT THE COMMISSION OF CRIME.

§ 1936. Power to Preserve Peace.

Justices of the peace shall have power to cause all laws made for the preservation of the public peace to be kept; and in the execution of that power may require persons to give security to keep the peace, or for their good behavior, or both, in the manner herein provided. [L. '54, p. 104, § 11; Cd. '81, § 1903; 2 H. P. C., § 26.]

Cited in 23 Wash. 86.

§ 1937. Duty of Justice When Complaint Made.

Whenever complaint shall be made to any such magistrate that any person has threatened to commit an offense against the property or person of another, the magistrate shall examine the complaint, and any witness who may be produced on oath, and reduce such complaint to writing, and the same shall be subscribed by the complainant. [L. '54, p. 104, § 12; Cd. '81, § 1904; 2 H. C., § 1570.]

Cited in 16 Wash. 353.

§ 1938. Examination of Witnesses—Transcript of Testimony.

It shall be the duty of every magistrate examining a person charged with an offense, or with an intention to commit an offense, to examine all the witnesses he shall deem material, and reduce their testimony to writing, a copy of which, whether the accused is discharged, committed, or held to bail, or shall take an appeal, he shall transmit to the clerk of the court having jurisdiction of the offense. [Cf. Cd. '81, § 1905; L. '91, p. 22, § 8; 2 H. C., § 1571.]

§ 1939. Magistrate to Issue Warrant, When.

If, upon the examination, it shall appear that there is just cause to fear that such offense may be committed, the magistrate shall issue a warrant, under his hand, reciting the substance of the complaint, and requiring the officer to whom it may be directed forthwith to apprehend the person complained of and bring him before such magistrate, or some other magistrate or court having jurisdiction of the cause. [L. '54, p. 104, § 13; Cd. '81, § 1906; 2 H. C., § 1572.]

See *supra*, § 50, definition of magistrate.

Cited in 30 Wash. 615.

§ 1940. Recognizance in Cases of Apprehended Danger.

The magistrate before whom any person is brought upon charge of having made threats as aforesaid shall, as soon as may be, hear and examine the complaint; and if it shall appear that there is just cause to fear that any such offense will be committed by the party complained of, he shall be required to enter into recognizance, with sufficient sureties, in such sum as the magistrate shall direct, towards all the people of the state, and especially towards the person requiring such security, for such term as the magistrate shall order, not exceeding one year, but he shall not be ordered to recognizance for his appearance at the superior court unless he is charged with some offense for which he ought to be held to answer at said court. [L. '54, p. 104, § 14; Cd. '81, § 1907; 2 H. C., § 1573.]

See *infra*, § 1946, recognizance without process.

See *infra*, § 2202, recognizance after conviction.

§ 1941. Commitment of Defendant to Jail, When.

If the person so ordered to recognize shall fail to enter into such recognizance, the magistrate shall commit him to the county jail during the period for which he was required to give security, or until he shall so recognize, stating in the warrant the cause of commitment, with the sum and time for which security was required. [L. '54, p. 104, § 15; Cd. '81, § 1908; 2 H. C., § 1574.]

§ 1942. Magistrate to Discharge, When—Costs.

If, upon examination, it shall appear that there is not just cause to fear that any such offense will be committed by the party complained of, he shall be forthwith discharged; and if the magistrate shall deem the complaint unfounded, frivolous, or malicious, he may order the complainant to pay the costs of prosecution, who shall thereupon be answerable to the magistrate and the officer for their fees, as for his own debt. [L. '54, p. 104, § 16; Cd. '81, § 1909; 2 H. C., § 1575.]

See *infra*, § 1954, taxing costs to complainant.

See *infra*, § 2225, where complaint unfounded, costs, how taxed.

Cited in 8 Wash. 450; 70 Wash. 644.

The provisions authorizing the taxing of costs to complaining witnesses apply only to examinations before magistrates, and complaints submitted to grand

juries: *Town of Ilwaco v. Miller*, 8 Wash. 449, 36 Pac. 269. See *Permstick*, *In re*, 3 Wash. 672, 29 Pac. 350, 28 Am. St. Rep. 80.

§ 1943. Costs—How Payment Enforced, etc.

When no order respecting the costs is made by the magistrate, they shall be allowed and paid in the same manner as costs before justices in criminal prosecutions; but in all cases where a person is required to give security for the peace, or for his good behavior, the magistrate may further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged. [L. '54, p. 105, § 17; Cd. '81, § 1910; 2 H. C., § 1576.]

Cited in 23 Wash. 87.

The provision that a defendant who is bound over to keep the peace shall stand committed until the costs are paid, does

not prevent the judgment from being a lien, nor the issuance of execution for such costs: *Clallam County v. Hall*, 23 Wash. 85, 62 Pac. 443.

§ 1944. Defendant Discharged on Giving Security.

Any person committed for not finding sureties or refusing to recognize as required by the magistrate may be discharged by any judge or justice of the peace, on giving such security as was required. [L. '54, p. 105, § 22; Cd. '81, § 1915; 2 H. C., § 1577.]

§ 1945. Recognizances to be Transmitted and Filed.

Every recognizance taken pursuant to the foregoing provisions shall be transmitted to the superior court for the county within ten days, and shall be there filed on record by the clerk. [Cf. L. '54, p. 105, § 23; Cd. '81, § 1916; L. '91, p. 22, § 9; 2 H. C., § 1578.]

§ 1946. Recognizances Without Process, When.

Every person who shall, in the presence of any magistrate, or before any judge of a court of record, make an affray, or threaten to kill or beat another, or to commit any violence or outrage against his person or property, and every person who, in the presence of such judge or magistrate, shall contend with hot and angry words to the disturbance of the peace, may be ordered, without process or other proof, to recognize for keeping the peace or being of good behavior for a term not exceeding three months, and in case of refusal, may be committed as before directed. [Cf. L. '54, p. 105, § 24; Cd. '81, § 1917; L. '91, p. 22, § 10; 2 H. C., § 1579.]

§ 1947. Portion of Penalty Remitted, When.

Whenever, upon a suit brought on any such recognizance, the penalty thereof shall be adjudged forfeited, the court may remit such portion of the penalty, on the petition of any defendant, as the circumstances of the case shall render just and reasonable. [L. '54, p. 106, § 25; Cd. '81, § 1918; 2 H. C., § 1580.]

§ 1948. Surety may Surrender Principal, When—Effect of.

Any surety in recognizance to keep the peace or for good behavior, or both, shall have the same authority and right to take and surrender his principal as if he had been bail for him in a civil cause, and upon such surrender shall be discharged and exempt from all liability for any act of the principal, subsequent to such surrender, which would

be a breach of the condition of the recognizance; and the person so surrendered may recognize anew, with sufficient sureties, before any justice of the peace, for the residue of the term, and thereupon shall be discharged. [L. '54, p. 106, § 26; Cd. '81, § 1919; 2 H. C., § 1581.]

Cited in 23 Wash. 86.

CHAPTER IV.

EXAMINATION OF PERSONS CHARGED WITH CRIME BEFORE MAGISTRATES.

§ 1949. Examination of Offenses Before Magistrate.

Upon complaint being made to any justice of the peace, or judge of the superior court, that a criminal offense has been committed, he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any offense has been committed of which the superior court has exclusive jurisdiction, the magistrate shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the person issuing the warrant, unless he shall be absent or unable to attend thereto, then before some other magistrate of the county, to be dealt with according to law, and in the same warrant may require the officer to summon such witnesses as shall be therein named, to appear and give evidence on the examination. [L. '54, p. 106, § 27; Cd. '81, § 1921; 2 H. C., § 1582.]

Cited in 30 Wash. 615; 43 Wash. 19, 20; 101 Wash. 155.

See notes to § 1925, *supra*.

Preliminary Complaint: See Remington's Digest, Crim. Law, §§ 57, 58; *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State ex rel. Romano v. Yahey*, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071. **Persons Who may Make:** *State ex rel. Romano v. Yahey*, 43 Wash. 15, 85 Pac. 990, 9 Ann. Cas. 1071.

A superior judge, sitting as a committing magistrate has no authority to inquire into a gross misdemeanor charge under this chapter: *State ex rel. Murphy v. Taylor*, 101 Wash. 148, 172 Pac. 217.

Right of public prosecutor to have preliminary examination before magistrate dismissed. **L. R. A.** 1918C, 209.

Right of justice of peace to sit as magistrate on Sunday. **Ann Cas.** 1916B, 15.

§ 1950. Officer may Pursue and Retake Prisoner.

If any person against whom a warrant may be issued for an alleged offense committed in any county shall, either before or after the issuing of such warrant, escape from or be out of the county, the sheriff or other officer to whom such warrant may be directed may pursue and apprehend the party charged in any county in this state, and for that purpose may command aid and exercise the same authority as in his own county. [L. '54, p. 107, § 28; Cd. '81, § 1922; 2 H. C., § 1583.]

§ 1951. Recognizance With or Without Examination.

The magistrate before whom such accused person shall be brought, when the offense is bailable, may, at the request of such person, with or without examination, allow him to enter into recognizance, with sufficient sureties, to be approved by the magistrate, conditioned for his appear-

ance in the superior court having jurisdiction of the offense. [Cf. L. '54, p. 107, § 29; Cd. '81, § 1923; L. '91, p. 22, § 11; 2 H. C., § 1584.]

Cited in 107 Wash. 693.

§ 1952. Hearing and Adjournment—Bail.

If the defendant shall not enter into recognizance with sureties, the magistrate shall proceed to hear and examine the complaint, and may adjourn the examination from time to time, not exceeding in all ten days from the time such defendant shall have been brought before him, and in case of such adjournment the magistrate may, if the offense be bailable, take a recognizance, with sufficient sureties for the appearance of the defendant at such further examination; and if he fail to enter into such recognizance, he shall be ordered into custody until the time appointed for such examination. [L. '54, p. 107, § 30; Cd. '81, § 1924; 2 H. C., § 1585.]

§ 1953. Testimony, How Taken.

The testimony of the witness examined shall be reduced to writing by the magistrate, or under his direction, when he shall think it necessary, and shall be signed by the witness. [L. '54, p. 109, § 40; Cd. '81, § 1933; 2 H. C., § 1586.]

§ 1954. Defendant Entitled to Discharge, When—Costs.

If it should appear, upon the whole examination, that no offense has been committed, or that there is not probable cause for charging the defendant with an offense, he shall be discharged; and if in the opinion of the magistrate the complaint was malicious or without probable cause, and there was no reasonable ground therefor, the costs shall be taxed against the party making the complaint. [L. '54, p. 107, § 31; Cd. '81, § 1925; 2 H. C., § 1588.]

See supra, § 1942, taxing costs to complaining witness.

See infra, § 2225, costs, how taxed when complaint unfounded.

Cited in 8 Wash. 450; 19 Wash. 348; a county for costs in juvenile court proceedings: Pierce County v. Magnuson, 70 Wash. 644.

Judgment cannot be awarded against Wash. 639, 127 Pac. 302.

§ 1955. Defendant Recognized to Appear Before Justice, When.

If it shall appear that an offense has been committed of which a justice of the peace has jurisdiction, and one which would be sufficiently punished by a fine not exceeding one hundred dollars, if the magistrate having the complaint is a justice of the peace, he shall cause the complaint to be ordered [altered], and proceed as in like cases before a justice of the peace; or if any other magistrate, he shall certify the papers, with a statement of the offense appearing to be proved, to the nearest justice of the peace, and shall, by order, require the defendant and the witnesses to enter into recognizances, with sufficient sureties, to be approved by the magistrate, for their appearance before such justice at the time and place stated in the order; and such justice shall proceed to the trial of the action as if originally commenced before him.

[Cf. L. '54, p. 107, § 32; Cd. '81, § 1926; L. '91, p. 23, § 12; 2 H. C., § 1589.]

See supra, § 1928, proceedings on verdict.

Cited in 101 Wash. 155.

§ 1956. Bail to Justify, When Required.

Bail shall, when required, justify as in civil cases. [L. '54, p. 129, § 178; Cd. '81, § 1169; 2 H. C., § 1590.]

See supra, § 765, qualifications of bail.

§ 1957. Defendant to be Discharged on Bail, When.

If it appear that a bailable offense has been committed, the magistrate shall order the defendant to enter into recognizance, with sufficient sureties, for his appearance in the superior court, to answer the charge, and if he shall not do so, or the offense be not bailable, he shall commit him to jail. The justice of the peace who committed the person, or the judge of the superior court to which the party is held to answer, may admit to bail in the amount required, and approve the sureties. The recognizance shall be conditioned in effect that the defendant will appear in the superior court to answer said charge whenever the same shall be prosecuted, and at all times, until discharged according to law, render himself amenable to the orders and process of the superior court, and if convicted, render himself in execution of the judgment. [Cf. L. 54, p. 108, §§ 33, 34; Cd. '81, § 1927; L. '91, p. 23, § 13; 2 H. C., § 1591.]

See supra, § 1928, order for recognizance in lieu of verdict.

See infra, § 2052, appearance to answer information or indictment.

See infra, § 2053, duty of prosecuting attorney in cases of preliminary examination.

See infra, § 2088, recognizance certified and recorded, effect of.

§ 1957½. Money Deposit in Lieu of Bond.

Justices of the peace or committing magistrates may accept money as bail from persons charged with bailable offenses, and for the appearance of witnesses in all cases provided by law for the recognizance of witnesses. The amount of such bail or recognizance in each case shall be determined by the court in its discretion, and may from time to time be increased or decreased as circumstances may justify. The money to be received and accounted for in the same manner as provided by law for the superior courts. [L. '19, p. 153, § 1.]

Cited in 107 Wash. 694.

This action authorizing justices and committing magistrates to accept cash in

lieu of bail has no retroactive effect: Kellogg v. Witte, 107 Wash. 691, 182 Pac. 575.

§ 1958. Magistrates may Associate Other Magistrates.

Any magistrate to whom complaint is made, or before whom any defendant is brought, may associate with himself one or more magistrates of the same county, and they may, together, execute the powers and duties before mentioned; but no fees shall be taxed for such associates. [L. '54, p. 108, § 35; Cd. '81, § 1928; 2 H. C., § 1592.]

§ 1959. Witnesses to be Recognized, When.

Where the person arrested is held to bail or committed to jail or forfeits his recognizance, the magistrate shall recognize the witnesses for the prosecution to be and appear in the superior court to which the party is recognized, bailed, or committed, whenever their attendance shall be required. [Cf. L. '54, p. 108, § 36; Cd. '81, § 1929; L. '91, p. 23, § 14; 2 H. C., § 1593.]

§ 1960. Witnesses to Recognize With Sureties, When.

If the magistrate shall be satisfied that there is good cause to believe that any such witness will not perform the condition of his recognizance unless other security be given, such magistrate may order the witness to enter into recognizance with such sureties as may be deemed necessary for his appearance at court. [L. '54, p. 108, § 37; Cd. '81, § 1930; 2 H. C., § 1594.]

§ 1961. Recognizance of Minor or Married Woman.

When any married woman or minor is a material witness, any other person may be allowed to recognize for the appearance of such witness, or the magistrate may, in his discretion, take the recognizance of such married woman or minor in a sum not exceeding fifty dollars, which shall be valid and binding in law, notwithstanding the disability of coverture or minority. [L. '54, p. 108, § 38; Cd. '81, § 1931; 2 H. C., § 1595.]

§ 1962. Commitment of Witnesses on Default of Bond—Depositions.

All witnesses required to recognize with or without sureties shall, if they refuse, be committed to the county jail by the magistrate, there to remain until they comply with such orders or be otherwise discharged according to law. Provided, that when the magistrate is satisfied that any witness required to recognize with sureties is unable to comply with such orders, he shall immediately take the deposition of such witness and discharge him from custody upon his own recognizance. The testimony of the witness shall be reduced to writing by the justice or some competent person under his direction, and he shall take only the exact words of the witness; the deposition, except the cross-examinations, shall be in the narrative form, and upon the cross-examination the questions and answers shall be taken in full. The defendant must be present in person when the deposition is taken, and shall have an opportunity to cross-examine the witnesses; he may make any objections to the admission of any part of the testimony, and all objections shall be noted by the justice; but the justice shall not decide as to the admissibility of the evidence, but shall take all the testimony offered by the witness. The deposition must be carefully read to the witness, and any corrections he may desire to make thereto shall be made in presence of the defendant, by adding the same to the deposition as first taken; it must be signed by the witness, certified by the justice, and transmitted to the clerk of the superior court, in the same manner as depositions in civil actions. And if the witness is not present when required to testify in the case, either before the grand jury or upon the trial in the superior court, the dep-

osition shall be submitted to the judge of such superior court, upon the objections noted by the justice, and such judge shall suppress so much of said deposition as he shall find to be inadmissible, and the remainder of the deposition may be read as evidence in the case, either before the grand jury or upon the trial in the court. [Cf. L. '54, p. 108, § 39; L. '77, p. 203, § 8; Cd. '81, § 1932; L. '91, p. 24, § 15; 2 H. C., § 1596.]

See Const., Art. I, § 22, right to meet witnesses face to face.

§ 1963. Magistrate to Make Return—Penalty.

It shall be the duty of all magistrates within this state, before whom any person or persons shall be committed or held to bail to answer to [for] any crime, to return their proceedings, duly certified, including a copy of all recognizances taken by them, to the clerk of the superior court within ten days after the final hearing and commitment, or holding to bail, as aforesaid; and any justice of the peace who shall fail or neglect to make such return shall not be entitled to receive any fees or costs in such case. [Cf. L. '54, p. 109, § 41; Cd. '81, § 1934; L. '91, p. 25, § 16; 2 H. C., § 1597.]

§ 1964. Offense may be Compromised, When.

When any person shall be committed to prison, or shall be under examination or recognizance to answer any charge for a misdemeanor for which the party injured may have a remedy by civil action, except where the offense was committed upon a sheriff or other officer, justice, or violently or with intent to commit a felony, if the party injured shall appear before the magistrate who made the commitment or took the recognizance or is conducting the examination, and acknowledge in writing that he has received satisfaction for the injury, the magistrate may, in his discretion, on payment of all costs which may have accrued, discharge the recognizance or supersede the commitment by an order under his hand, and may also discharge all recognizance and supersede the commitment of all witnesses in the case. [L. '54, p. 109, § 42; Cd. '81, § 1935; 2 H. C., § 1598.]

See *infra*, §§ 2126–2128, compromising offenses.

§ 1965. Action on Forfeiture of Recognizance.

When any person under recognizance in any criminal prosecution, either to appear and answer before a justice, or to testify in any court, shall fail to perform the condition of any recognizance, his default shall be recorded; and it shall be the duty of the prosecuting attorney to proceed at once, by action against the person bound by recognizance, or such of them as he may elect. [L. '54, p. 109, § 43; Cd. '81, § 1936; 2 H. C., § 1599.]

See *infra*, § 2234 et seq., action on forfeited recognizance.

§ 1966. Abstract of Costs to be Forwarded With Papers.

In all cases where any magistrate shall order a defendant to recognize for his appearance before a justice of the peace or the superior court, he shall forward with the papers in the case an abstract of

the costs that have accrued in the case, and such costs shall be subject to the final determination of the case. [L. '54, p. 109, § 44; Cd. '81, § 1937; 2 H. C., § 1600.]

CHAPTER V.

PROCEEDINGS AGAINST VAGRANTS.

§ 1967. Vagrancy, Defined.

The following persons are vagrants: All persons who tell fortunes, or who keep houses where lost and stolen goods may be found; all common prostitutes, and keepers of bawdy-houses or houses for the resort of prostitutes; all habitual drunkards, gamesters, or other disorderly persons; all persons wandering about and having no visible calling or business to maintain themselves; all persons going about as collectors of alms for charitable institutions under any false or fraudulent pretense; all persons playing or betting in any street, or public or open place, at or with any table or instrument of gaming at any game or pretended game of chance. [L. '75, p. 89, § 1; Cd. '81, § 1271; 2 H. C., § 1608.]

This section is repealed (see § 2304, *infra*); but is retained for the reference in the next section, which may still be in force. See § 2688, *infra*.

What amounts to vagrancy. 14 A. L. B. 1482.

§ 1968. Proceedings for Examination of Vagrancy.

Upon complaint made on oath to any justice of the peace against any person as being such vagrant within his local jurisdiction, as defined in the last preceding section, he shall issue a warrant for the arrest of such person, and the complaint, warrant, arrest, and examination shall be governed by the provisions of this code relating to the examination and commitment for trial of persons charged with offenses, so far as the same may be applicable. [Cf. L. '75, p. 90, § 2; Cd. '81, § 1272; L. '91, p. 25, § 17; 2 H. C., § 1609.]

§ 1969. Arrest Without Warrant.

All peace officers shall arrest any vagrant whom they may find at large, and take him before some justice of the peace of the county, city, or town in which the arrest is made. [L. '75, p. 90, § 3; Cd. '81, § 1273; 2 H. C., § 1610.]

CHAPTER V-A.

BASTARDY PROCEEDINGS.

§ 1970. Complaint Against Putative Father.

When an unmarried woman shall be pregnant or delivered of a child which shall not be the issue of lawful wedlock, complaint may be made in writing by said unmarried woman, her father, mother or guardian, to any justice of the peace in the county of which she has been a resident for thirty days last past and where she may be so pregnant or delivered, or where the person accused may be found, accusing, under oath, a person with being the father of such child, and it shall be the

duty of such justice forthwith to issue a warrant against the person so accused and cause him to be brought forthwith before such justice. [L. '19, p. 709, § 1.]

Sections 1970 to 1979 of Rem. & Bal. Code are repealed, and this chapter is inserted.

Right of nonresident mother to maintain bastardy proceedings. 18 Ann. Cas. 574.

§ 1971. Hearing Before Justice—Bond—Action on.

Upon the appearance of the accused, it shall be the duty of such justice to examine the woman, if then present, under oath, in the presence of the man alleged to be the father of the child, touching the charge against him, or, if the woman be not then present, to fix a date for such examination not more than ten days thereafter and to require the accused to give a bond with sufficient surety conditioned that he will appear to answer such charge upon such date, or upon any other date to which such examination may be continued; and in default of the giving of such bond such justice shall cause the accused to be committed to the county jail. The accused shall have the right to controvert such charge and evidence may be heard as in the case of trial of civil actions before such justice. If such justice shall be of the opinion that sufficient cause appears, it shall be his duty to bind the person so accused in bond with sufficient surety payable to the state of Washington and conditioned that he will appear in the superior court of such county, at such time or times as the judge thereof may fix or order, to answer such complaint, and abide the judgment and orders of the court; or failing therein, that he will pay such sums of money and to such person as may be adjudged by such court; and the justice shall transmit such bond, together with the transcript of his proceedings, the complaint and the other papers in the case, without delay to the clerk of the superior court of such county. And if the accused shall fail to give a bond as required, such justice shall commit him to jail until discharged by law. Such bond, or any bond given by said accused on any continuance or arrest, may be put in suit by any person in whose favor the court may adjudge any sum of money in such proceeding. [L. '19, p. 710, § 2.]

§ 1972. Prosecuting Attorney—Control of.

Such proceeding shall be entitled in the name of the state of Washington; and shall be prosecuted in both justice court and the superior court by the prosecuting attorney of the county where brought, and shall not be dismissed except by such prosecuting attorney upon a showing to the court that the provisions herein contemplated to be made for the maintenance, care, education and support of the child have been made. [L. '19, p. 711, § 3.]

§ 1973. Discharge on Recognizance Bond.

Any person committed to jail for failure to give such bond may be discharged from custody by filing at any time after his commitment, with the clerk of the superior court such bond, to the satisfaction of the said clerk; and a certificate of the clerk to the sheriff shall be

sufficient to authorize him to discharge the accused from custody. [L. '19, p. 711, § 4.]

§ 1974. Mother's Testimony.

The testimony of the mother, or mother to be, shall be by such justice reduced to writing, read carefully to such witness and be by her signed, and shall, by such justice, be returned to the superior court with the other papers in the proceeding, to be used by either party thereto. [L. '19, p. 711, § 5.]

Necessity of corroboration of prosecuting witness in bastardy proceedings.
1 A. L. R. 635.

§ 1975. Docketing in Superior Court.

Upon the filing of the transcript, complaint and other papers in the superior court, the clerk thereof shall docket the same, and said complaint shall stand as the complaint therein, and issue shall be joined thereon as now provided in civil actions. [L. '19, p. 711, § 6.]

§ 1976. Trial.

If the accused in the superior court denies the charge, the issue may be tried by the court or by jury if demanded by either party. [L. '19, p. 711, § 7.]

Exhibition of child to jury on issue
of paternity. 6 Ann. Cas. 560; 19

Ann. Cas. 536; L. R. A. 1917B,
1148; 1 A. L. R. 622.

§ 1977. Judgment of Discharge.

If on the trial of the issue joined, the finding or verdict shall be that the child is not the child of the accused, then the judgment of the court shall be that he be discharged: Provided, however, that no court costs shall be required of the complainant for the proceeding before such justice or the superior court. [L. '19, p. 711, § 8.]

§ 1978. Judgment Ordering Support of Child—Bond.

In the event the issue be found against the accused, or whenever he shall, in open court, have confessed the truth of the accusation against him, he shall be charged by the order and judgment of the court to pay a sum to be therein specified, during each year of the life of such child, until such child shall have reached the age of sixteen years, for the care, education and support of such child, and shall also be charged thereby to pay the expenses of the mother incurred during her sickness and confinement, together with all costs of the suit, for which costs execution shall issue as in other cases. And the accused shall be required by said court to give bond, with sufficient surety, to be approved by the judge of said court, for the payment of such sums of money as shall be so ordered by said court. Said bond shall be made payable to the people of the state of Washington, and conditioned for the true and faithful payment of such yearly sums, in equal quarterly installments, to the clerk of said court, which said bond shall be filed and preserved by the clerk of said court. [L. '19, p. 712, § 9.]

§ 1979. Act Cumulative with Criminal Proceedings.

In addition to the proceedings for enforcing the support of the child heretofore provided for, the accused may be prosecuted in any criminal proceeding now or hereafter to be provided for by the laws of the state of Washington, relating to the support of minor children by parents or other persons upon whom such children may be dependent for care, education or support. [L. '19, p. 712, § 10.]

§ 1979-1. Execution in Absence of Security Bond.

If the accused shall fail or refuse to give such a bond as may be required by such superior court by virtue of the provisions of section 1978, such court shall at any time thereafter, upon application of the mother or guardian, render judgment against the accused for any sum or sums then due and unpaid under the terms of such order and judgment, and execution thereon shall issue from said court; Provided, that the rendition and collection of judgment as aforesaid shall not be construed to bar or hinder the taking of similar proceedings for the collection of judgment for the nonpayment of any sum or sums becoming due and unpaid thereafter. [L. '19, p. 712, § 11.]

§ 1979-2. Commitment for Contempt—Hearing.

If the accused shall refuse and neglect to give such security as may be ordered by the court, under the provisions of section 1978, he shall be committed to the county jail for contempt of court, there to remain until he shall comply with such order, or until otherwise discharged by due course of law. Any person so committed may at any time petition the court for a hearing as to his inability to comply with the order of the court and the court shall thereupon fix a time for the hearing of such petition which hearing shall be not less than ten days after the date of service of said petition on the prosecuting attorney. The prosecuting attorney may however waive the said ten-day period in whole or in part. At the hearing the defendant shall be examined on oath in reference to the facts set forth in such petition and his ability to comply with such judgment and order, and any other legal evidence in reference to such matters may be produced by any of the parties interested. If it appears that the defendant is unable to comply with such judgment and order, the court may direct his discharge from custody, upon his making affidavit that he has not in his own name any property, real or personal, and has no such property conveyed or concealed, or in any manner disposed of with design to secure the same to his use or to avoid in any manner compliance with such judgment and order. If upon such hearing it appears that the defendant has property, but not sufficient to comply with such judgment and order, the court may make such order concerning the same, in connection with such discharge, as justice may require. [L. '19, p. 713, § 12.]

§ 1979-3. Disposition of Judgment Money.

The judgment money, when received by said clerk either by payment by the accused or by execution against the accused or against the sureties, shall be paid to the mother or guardian of such child, if a

guardian therefor be appointed, and shall be laid out for the support, care and education of such child in such manner as shall be directed by the court. [L. '19, p. 714, § 13.]

§ 1979-4. Default in Paying Installments—Judgment for.

Whenever default shall be made in the payment of the quarterly installments, or any part thereof, specified in the bond provided for in section 1978, the superior court of the county wherein such bond is filed shall, at the request of the mother, guardian, or any person interested in the support of such child, issue a citation to the principal or sureties in such bond requiring them to appear on some day in said citation mentioned and show cause, if any there be, why execution should not issue against them for the amount of the installment or installments due and unpaid on said bond. And if the amount due on such installment or installments shall not be paid at or before the time mentioned for showing cause, as aforesaid, such court shall render judgment in favor of the people of the state of Washington, and the complainant or guardian, against the principal and sureties who have been served with such citation for the amount unpaid of the installment or installments on the bond, and the cost of such proceeding, and execution shall issue in due form from said court upon said judgment. [L. '19, p. 714, § 14.]

§ 1979-5. Commitment for Contempt—Modification of Judgment.

Such court shall also have the power, in case the accused does not obey the order thereof, and in case of default in the payment when due, of any installment or installments, or any part thereof, in the conditions of the said bond mentioned, to adjudge the accused guilty of contempt of court by reason of the nonpayment as aforesaid, and order him to be committed to the county jail in such county until the amount of said installment or installments so due shall be fully paid, together with all the costs of such commitment, but the commitment of the accused shall not operate to stay or defeat the obtaining of judgment and collection thereof by execution: Provided, that the rendition and collection of judgment, as aforesaid, shall not be construed to bar or hinder the taking of similar proceedings for the collection of subsequent installments on said bond as they shall become due or remain unpaid. Provided further, that any judgment entered herein may be modified at any time upon proper showing to the court. [L. '19, p. 714, § 15.]

§ 1979-6. Limitation on Prosecution.

No prosecution under this act shall be brought after two years from the birth of the child: Provided, the time during which any person accused shall be absent from the state shall not be computed. [L. '19, p. 715, § 16.]

§ 1979-7. Mother's Death not to Abate Action.

The death of the mother shall not abate the proceeding, if the child be living; but a suggestion of record of the fact shall be made, and the testimony of the mother taken in writing before aforesaid justice may be read in evidence by either party, and shall have the same

force as though she were living and had testified to the same in court. [L. '19, p. 715, § 17.]

§ 1979-8. Judgment in Case of Child's Death.

The death of such child shall not cause the abatement or bar to any prosecution hereunder; but the court trying the same, on conviction, shall give judgment for such sum as shall be deemed just. [L. '19, p. 715, § 18.]

§ 1979-9. Custody of Child.

If the mother be a suitable person she shall be awarded the custody and control of said child; if she be not a suitable person, the court may deliver the care and custody of said child to any reputable person, including the accused, charitable or state institution. Such order and judgment may further provide, in the discretion of the court, that the surname of the accused shall henceforth be the lawful surname of such child. [L. '19, p. 715, § 19.]

CHAPTER VI.

JUVENILE OFFENDERS—COMMITMENT TO STATE TRAINING SCHOOL.

§ 1980. Juvenile Offender Committed, When.

When a boy of sane mind between the ages of eight and sixteen years, or a girl of sane mind between the ages of eight and eighteen (18) years shall, in any court of record in this state, be found guilty of any crime except murder or manslaughter, or who for want of proper paternal care is growing up in mendicancy or vagrancy, or is incorrigible, and complaint thereof is made and properly sustained, the court may if in its opinion the accused is a proper subject therefor, instead of entering judgment cause an order to be entered that said boy or girl be sent to the state training school, in pursuance of the provisions of this act, and a copy of said order under the seal of said court shall be sufficient warrant for carrying said boy or girl to the said school and for his or her commitment to the custody of the superintendent thereof. [L. '05, p. 39, § 1. Cf. L. '91, p. 195, § 1; 1 H. C., § 1227.]

Compare § 2276, same subject.

See *infra*, § 4626, causes for commitment to state training school.

See *infra*, § 10319, incorrigibles in truant school to be committed to training school.

Cited in 3 Wash. 611, 613; 19 Wash. 309.

Rights and Privileges as to Prosecutions: See Remington's Digest, Infants, § 15; Barbee, *In re*, 19 Wash. 306, 53 Pac. 155; Packenham v. Reed, 37 Wash. 258, 79 Pac. 786.

Under section 10305, *infra*, and this section a child sixteen years of age who, upon conviction of robbery, has been committed to the state training school, and has been found incorrigible and returned to the court which committed him, but sent back by the court to the school whence he was taken and confined in the jail of the county where

the school is located, is entitled to be discharged therefrom on habeas corpus, but he should be redelivered to the trustees of the school; and *semble*, that the trustees should return him to the court for sentence under the judgment of conviction for robbery: Mason, *In re*, 3 Wash. 609, 28 Pac. 1025.

Commitment to Reformatory: See Remington's Digest, Reformatories, § 2; Barbee, *In re*, 19 Wash. 306, 53 Pac. 155; State v. Rasch, 24 Wash. 332, 64 Pac. 531; State v. Packenham, 40 Wash. 403, 82 Pac. 597.

§ 1981. Proceedings in Case of Conviction Before Justice—Order to Show Cause.

When a boy of sane mind between the ages of eight and sixteen years or a girl of sane mind between the ages of eight and eighteen years, shall be convicted before a justice of the peace or other inferior court of any crime, mendicancy, vagrancy or incorrigibility, it shall be the duty of said magistrate before whom he or she may be convicted to forthwith send such boy or girl, together with all the papers filed in his office upon the subject, under the control of some officer, to a judge of a court of record. He shall then issue an order to the parent or guardian of said boy or girl, or such person as may have him or her in charge, or with whom she or he has last resided, or any known to be near related to him or her, or if she or he be alone or friendless then to such person as said judge may appoint to act as guardian for the purposes of the case[s], requiring him or her to appear at the time and place stated in said order to show cause why said boy or girl should not be committed to the said state training school for training and reformation. [L. '91, p. 195, § 2; 1 H. C., § 1228; L. '05, p. 40, § 2.]

Compare § 2276, *infra*, commitment to training school.

Cited in 19 Wash. 310; 24 Wash. 333; 37 Wash. 258; 40 Wash. 405.

§ 1982. Order to Show Cause, How Served—Fees.

Said order shall be served by the sheriff or other qualified officer by delivering a copy thereof personally to the party to whom it is addressed, or leaving it with some person of full age at the place of residence or business of said party, and immediate returns shall be made to said judge of the time and manner of such service. The fees of the sheriff or other officer under this chapter shall be the same as now or may hereafter be allowed by law for like services. [L. '91, p. 196, § 3; 1 H. C., § 1229.]

Cited in 19 Wash. 311.

§ 1983. Examination, Hearing and Commitment by Warrant.

At the time and place mentioned in said order, or at the time and place to which it may be adjourned, if the parent or guardian to whom said order may be addressed shall appear, then in his or her presence, or if he or she fail to appear, then in the presence of some competent person whom the said judge shall appoint as guardian for the purposes of the case, it shall be lawful for the said judge to proceed to take the voluntary examination of said boy or girl, and to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing the said judge shall be satisfied that the boy or girl is a fit subject for the state training school, he may commit him or her to said school by warrant. [L. '91, p. 196, § 4; 1 H. C., § 1230.]

Cited in 19 Wash. 311; 24 Wash. 333; 58 Wash. 341.

§ 1984. Warrant of Commitment must State What—Expense.

The judge shall certify in the warrant the place in which said boy or girl resided at the time of his or her arrest, also his or her age as near as can be ascertained, and command the said officer to take the said boy or girl, and deliver him or her without delay to the superintendent of said school, or other persons in charge thereof at the place where the same is located and established; and such certificate, for the purpose of this act, shall be conclusive evidence of his or her residence or age; accompanying this warrant, the judge shall transmit to the superintendent, by the officer executing it, a statement of the nature of the complaint, together with such other particulars concerning the boy or the girl as the judge is able to ascertain: Provided, the expense of conveying any boy or girl so committed to said state training school, or returning him or her to his or her parent or guardian after his or her release therefrom, shall be at the expense of the state. [L. '91, p. 196, § 5; 1 H. C., § 1231.]

See *infra*, § 10920, transportation of incorrigibles.

§ 1985. Proceedings in Lower Court—How Reviewed.

The proceedings of any judge or court may be reviewed on writ of error by the superior court, and proceedings before any superior court or judge thereof may be reviewed by the supreme court, in the manner provided by law for reviewing criminal cases in these courts. [L. '91, p. 197, § 6; 1 H. C., § 1232.]

Cited in 37 Wash. 259.

§ 1986. Term of Confinement—Effect of Discharge.

Each boy committed to the state training school shall remain there until he arrives at the age of eighteen years, and each girl committed to the state training school shall remain there until she arrives at the age of nineteen years, unless sooner paroled or legally discharged. The discharge of any boy having arrived at the age of eighteen years or of any girl having arrived at the age of nineteen years, shall be a complete release from all penalties incurred by conviction of the offense for which he or she was committed. [L. '91, p. 197, § 7; 1 H. C., § 1233; L. '05, p. 40, § 3.]

See *infra*, § 2276, commitment on conviction of crime.

See *infra*, § 10305, inmate to be returned, when.

Cited in 3 Wash. 613, 614.

CHAPTER VII.**DELINQUENT CHILDREN AND JUVENILE COURTS.****§ 1987-1. Scope of Act—"Dependent Child"—"Delinquent Child."**

This act shall be known as the "Juvenile Court Law" and shall apply to all minor children under the age of eighteen years who are delinquent or dependent; and to any person or persons who are responsible for or contribute to, the delinquency or dependency of such children.

For the purpose of this act the words "dependent child" shall mean any child under the age of eighteen years:

(1) Who is found begging, receiving or gathering alms, whether actually begging or under the pretext of selling, or offering anything for sale; or

(2) Who is found in any street, road or public place for the purpose of so begging, gathering or receiving alms; or

(3) Who is a vagrant; or

(4) Who is found wandering and not having any home or any settled place of abode, or any proper guardianship, or any visible means of subsistence; or

(5) Who has no parent or guardian; or who has no parent or guardian willing to exercise, or capable of exercising, proper parental control; or

(6) Who is destitute; or

(7) Whose home by reason of neglect, cruelty or depravity of its parents or either of them, or on the part of its guardian, or on the part of the person in whose custody or care it may be, or for any other reason, is an unfit place for such child; or

(8) Who frequents the company of reputed criminals, vagrants or prostitutes; or

(9) Who is found living or being in any house of prostitution or assignation; or

(10) Who habitually visits any billiard-room or pool-room; or any saloon, or place where spirituous, vinous, or malt liquors are sold, bartered, or given away; or

(11) Who persistently refuses to obey the reasonable and proper orders or directions of its parents or guardian; or

(12) Who is incorrigible; that is, who is beyond the control and power of its parents, guardian, or custodian by reason of the vicious conduct or nature of said child; or

(13) Whose father, mother, guardian or custodian is an habitual drunkard; or do not properly provide for such child, and it appears that such child is destitute of a suitable home or of adequate means of obtaining an honest living, or who is in danger of being brought up to lead an idle, dissolute or immoral life; or where such child is without proper means of support; or

(14) Who is an habitual truant, as defined in the school laws of the state of Washington; or

(15) Who uses intoxicating liquor as a beverage, or who uses tobacco in any form, or who uses opium, cocaine, morphine, or other similar drug, without the direction of a competent physician; or

(16) Who from any cause is in danger of growing up to lead an idle, dissolute or immoral life; or

(17) Who wanders about in the night-time without being on any lawful business or occupation; or

(18) Any child under the age of twelve years found peddling or selling any article, or singing or playing on any musical instrument

for gain upon the public street, or giving any public entertainment, or who accompanies, or is used in aid of, any person so doing: Provided, that this act shall not prohibit the giving of entertainments by regularly organized schools or societies where twelve or more musical instruments are used.

The words "delinquent child" shall include any child under the age of eighteen years who violates any law of this state, or any ordinance of any town, city, county or city and county of this state defining crime; or who habitually uses vile, obscene, vulgar, profane or indecent language, or is guilty of immoral conduct; or who is found in or about railroad yards or tracks; or who jumps on or off trains or cars; or who enters a car or engine, without lawful authority.

For the purpose of this act only, all delinquent and dependent children within the state shall be considered wards of this state and their persons shall be subject to the custody, care, guardianship and control of the court as hereinafter provided. [L. '13, p. 520, § 1. Cf. L. '09, p. 668, § 1; L. '05, p. 34, § 1 et seq.]

Cited in 82 Wash. 150, 156; 95 Wash. 193; 98 Wash. 515; 103 Wash. 37, 38; 105 Wash. 685, 686; 106 Wash. 620, 621; 107 Wash. 561; 108 Wash. 639; 112 Wash. 262.

Juvenile Delinquents: See Remington's Digest, Infants, § 2; Barbee, In re, 19 Wash. 306, 53 Pac. 155; State v. Rasch, 24 Wash. 332, 64 Pac. 531; Weber v. Doust, 84 Wash. 330, 146 Pac. 623.

This section makes the age, not minority, the controlling element, and applies to a girl under eighteen years of age married to a man of full age, notwithstanding section 10549, infra, declaring "all females married to a person of full age shall be deemed and taken to be of full age": Lundy, In re, 82 Wash. 148, 143 Pac. 885, Ann. Cas. 1916E, 1007.

This act is not punitive in its nature or purpose, but protective, and while strictly construed as to restraint of liberty without due process, is, in other respects, to be liberally construed to effectuate its beneficent purpose: Lundy, In re, 82 Wash. 148, 143 Pac. 885, Ann. Cas. 1916E, 1007.

This section applies to restaurants where such liquors are sold, and it is immaterial that the delinquent child under the age of eighteen habitually visited such restaurant as a singer for hire; as singing by juveniles in such places is no necessary part of the business and is without any exemplary element: Lundy, In re, 82 Wash. 148, 143 Pac. 885, Ann. Cas. 1916E, 1007.

Proceedings Affecting Custody: See Remington's Digest, Infants, § 4; State ex rel. De Bit v. Mackintosh, 98 Wash. 438, 167 Pac. 1090; Gilder, In re, 98

Wash. 514, 167 Pac. 1093; Chartrand's Estate, In re, 103 Wash. 36, 173 Pac. 728; State ex rel. De Bit v. Superior Court, 103 Wash. 183, 173 Pac. 1014.

See, also, Jurisdiction of Courts—Statutes—Construction: McClain v. Superior Court, 112 Wash. 260, 191 Pac. 852.

Under this section, it is discretionary for the court to inquire into the interest of a party seeking the relief before directing process, which does not issue as a matter of right: State ex rel. Mead v. Superior Court, 108 Wash. 636, 185 Pac. 628.

Section 2312, infra, requiring prosecutions to be brought to trial within sixty days, has no application to proceedings under this section: Chartrand, In re, 107 Wash. 560, 182 Pac. 610.

A complaint charging that a boy seventeen years of age associates with disorderly boys and was disorderly at a public school during school hours, sufficiently states facts constituting dependency as defined by this section: State ex rel. Raddue v. Superior Court, 106 Wash. 619, 180 Pac. 875.

Constitutionality of statute creating juvenile court. 5 Ann. Cas. 96; 7 Ann. Cas. 831; 14 Ann. Cas. 819; Ann. Cas. 1914A, 1227; Ann. Cas. 1915D, 701.

Establishment of, and procedure in, juvenile courts. Ann. Cas. 1916E, 1010, 1022, 1025, 1028; Ann. Cas. 1918D, 751, 754.

Effect of partial invalidity of statutes relating to juvenile offenders and courts. Ann. Cas. 1916D, 67.

Juvenile vagrancy. 14 A. L. R. 1507.

§ 1987-2. Juvenile Courts—Jurisdiction—Jury Trials—Special Sessions—Court Commissioners.

The superior courts in the several counties of this state shall have original jurisdiction in all cases coming within the terms of this act. In all trials under this act, any person interested therein may demand a jury trial, or the judge of his own motion may order a jury to try the case. In counties containing thirty thousand or more inhabitants, the judges of the superior court shall, at such times as they may determine, designate one or more of their number whose duty it shall be to hear all cases arising under this act. A special session to be designated as the "juvenile court session" shall be provided for the hearing of such cases and the findings of the court shall be entered in a book or books kept for the purpose, and known as the "juvenile record," and the court may, for convenience, be called the "juvenile court." In counties in which there is no resident judge of the superior court the court commissioner shall have the power, authority and jurisdiction, concurrent with the superior court and the judge thereof, to hear all matters relating to dependent and delinquent children arising under the juvenile court law, and if he shall find that the best interests of any such dependent or delinquent child will be subserved by committing him to the care of some reputable citizen of good moral character until such time as the judge may attend and hold court in the county he shall be authorized and empowered so to do; but if he shall find that the best interests of said child require that he be committed to a suitable institution or to some training school or industrial school as provided by law, or to the care of some association willing to receive him, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected or delinquent children, he shall refer the case to the judge of the superior court for hearing as soon as the same can be conveniently heard. [L. '21, p. 491, § 1. Cf. L. '13, p. 522, § 2.]

Cited in 106 Wash. 624.

The jury is waived if no demand is made, where the child is represented at

the hearing: State ex rel. Raddue v. Superior Court, 106 Wash. 619, 180 Pac. 875.

§ 1987-3. Probation Officers.

The court or judge designated as provided in section 1987-2, shall appoint or designate one or more discreet persons of good character to serve as probation officers during the pleasure of the court, said probation officers to receive no compensation from the public treasury. In case a probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said probation officer in advance when the child is to be brought before said court; it shall be the duty of said probation officers to make such investigations as may be required by the court. The probation officer or officers shall inquire into the antecedents, character, family history, environments and cause of dependency or delinquency of every alleged dependent or delinquent child brought before the juvenile court and shall make his report in writing to the judge thereof, shall be present in order to represent the interests of the child when the case is heard, shall

furnish the court such information and assistance as the judge may require, and shall take such charge of the child before and after the trial as may be directed by the court. In counties containing twenty thousand or more inhabitants when it shall appear that there is a necessity for such county officer, the court may appoint one or more persons to act as probation officers, and one or more persons who shall have charge of detention rooms or house of detention, all of whom shall be paid as compensation for their services, such sums as may be fixed by the board of county commissioners, and who shall be paid as other county officers are paid; all probation officers shall possess all the powers conferred upon sheriffs and police officers to serve process and make arrests for the violation of any state law or city ordinance, relative to the care, custody, and control of delinquent and dependent children. [L. '21, p. 148, § 1. Cf. L. '13, p. 522, § 3.]

Cited in 106 Wash. 623.

§ 1987-4. Expenses of Probation Officers.

The probation officers, and assistant probation officers, and deputy probation officers in all counties of the state shall be allowed such necessary incidental expenses as may be authorized by the judge of the juvenile court, and the same shall be a charge upon the county in which the court appointing them has jurisdiction, and the expenses shall be paid out of the county treasury upon a written order of the judge of the juvenile court of said county directing the county auditor to draw his warrant upon the county treasurer for the specified amount of such expenses. [L. '13, p. 523, § 4.]

§ 1987-5. Petition to Take Charge of Child.

Any person may file with the clerk of the superior court a petition showing that there is within the county, or residing within the county, a dependent or delinquent child and praying that the superior court deal with such child as provided in this act: Provided, that in counties having paid probation officers, such officers shall, as far as possible, first determine if such petition is reasonably justifiable. Such petition shall be verified and shall contain a statement of facts constituting such dependency or delinquency, as defined in section 1987-1, and the names and residence, if known to the petitioner, of the parents, guardian, or custodian of such dependent or delinquent child. There shall be no fee for filing such petitions. [L. '13, p. 524, § 5.]

Cited in 106 Wash. 620.

§ 1987-6. Summons—Hearing.

Upon the filing of an information, or the petition, the clerk of the court shall issue a summons requiring the person having custody or control of the child, or with whom the child may be, to appear with the child at a place and time stated in the summons, which time shall not be less than twenty-four hours after service. The parents of the child, if living, and their residence is known, or its legal guardian, if there be one or if there is neither parent nor guardian, or if his or her residence is not known, then some relative, if there be one, and his resi-

dence is known, shall be notified of the proceedings; and in any case the judge shall appoint some suitable person or association to act in behalf of the child. If the person summoned as herein provided, shall fail without reasonable cause to appear and abide the order of the court, or bring the child, he shall be proceeded against as for contempt of court. In case the summons cannot be served or the parties served fail to obey same, and in any case when it shall be made to appear to the court that said summons will be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of the child, or with whom the child may be, or against the child itself. On return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner. Pending the final disposition of the case, the child may be retained in the possession of the person having charge of same, or may be kept in some suitable place provided by the city or county authorities, or by any association having for one of its objects the care of delinquent and dependent children. [L. '13, p. 524, § 6.]

Cited in 106 Wash. 622.

A judgment finding the dependency of a child cannot be attacked on the mere conclusion that the child was not represented at the hearing, as required by this section, where it appears that his mother was given due notice and brought the

child to court for the purpose, there being nothing to show she was not competent to represent him or that the probation officer was not present as required by law: State ex rel. Raddue v. Superior Court, 106 Wash. 619, 180 Pac. 875.

§ 1987-7. Publication of Summons.

In any case where it shall appear by the petition or verified statement, that the person standing in the position of natural or legal guardian of the person of any child, is a nonresident of this state, or that the name or place of residence or whereabouts of such person is unknown, as well as in all cases where, after due diligence, the officer has been unable to make service of the summons or notice provided for in section 1987-6, the court may, by order, direct the clerk of the court to publish a notice four consecutive weeks in some newspaper printed in the county and having a general circulation therein. Such notice shall be directed to the parent, parents, or other person claiming the right to the custody of the child, if their names are known, and if unknown, the phrase "To Whom It May Concern" shall be used and apply to, and be binding upon, any such persons whose names are unknown. The name of the court, the name of the child (or children if of one family), the date of the filing of the petition and the date of hearing, which shall not be less than twenty days from the date of the last publication, and the object of the proceeding in general terms, shall be set forth and the whole shall be subscribed by the clerk. There shall be filed with the clerk an affidavit showing due publication of the notice and the cost of publication shall be paid by the county at not to exceed the rate paid by the county for other legal notices. The publication of notice shall be deemed equivalent to personal service upon all persons, known or unknown, who have been designated as provided in this section. [L. '13, p. 525, § 7.]

Cited in 106 Wash. 622.

§ 1987-8. Commitment of Child—Support by Parent.

When any child under the age of eighteen years shall be found to be delinquent or dependent, within the meaning of this act, the court may, at any time, make an order committing the child to some suitable institution, or to the care of some reputable citizen of good moral character, or to the care of some training school or industrial school as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for or obtaining homes for dependent, neglected, or delinquent children: Provided, such order may be temporary or permanent in the discretion of the court and may be revoked or modified as the circumstances of the case may thereafter require. In any case in which the court shall find the child dependent or delinquent, it may in the same or subsequent proceeding upon the parent or parents, guardian, or other person having custody of said child, being duly summoned or voluntarily appearing, proceed to inquire into the ability of such persons or person to support the child or contribute to its support, and if the court shall find such person or persons able to support the child or contribute thereto, the court may enter such order or decree as shall be according to equity in the premises, and may enforce the same by execution, or in any way in which a court of equity may enforce its decrees. If it be found, however, that the parent or parents or guardian of a dependent or delinquent child is unable to pay the whole expense of maintaining such child, and in cases where the child is committed to one of the institutions or associations above mentioned, the court may, in the order providing for the custody of such child, direct such additional amount as may be necessary to support such child to be paid from the county treasury of the county for the support of such person. The amount so ordered to be paid from the treasury of said county shall not exceed in the case of any one person, the sum of twelve dollars per month; Provided, further, that no order for the payment of all or part of the expense of support and maintenance of a dependent or delinquent child from the county treasury shall be effective for more than six months, unless a new order is secured at the expiration of that period. [L. '13, p. 525, § 8.]

Cited in 103 Wash. 39; 112 Wash. 262.

§ 1987-9. Award and Adoption of Child.

In any case where the court shall award a child to the care of any association or individual, the child shall, unless otherwise ordered, become a ward and be subject to the guardianship of the association or individual to whose care it is committed; such association shall have authority, with the assent of the court, to place such child in a family home, either temporarily or for adoption. With the written consent of the parents, or other person having the right, under the laws of this state, to dispose of a dependent or delinquent child, the court may make an order or decree of adoption transferring to any suitable person or persons, willing to receive such child, all the rights of the parent or other guardian. The order of the court made upon such consent

will be binding upon the child and its parents or guardian, or other person, the same as if such person were in court and consented thereto, whether made a party to the proceedings or not. The estate or property rights of any child shall not be affected nor subject to guardianship by the provisions of this act. The jurisdiction of the court shall continue over every child brought before the court, or committed pursuant to this act, and the court shall have power to order a change in the care or custody of such child, if at any time it is made to appear to the court that it would be for the best interests of the child to make such change. [L. '13, p. 527, § 9.]

Cited in 98 Wash. 441; 112 Wash. 262, 264.

The superior court has jurisdiction of proceedings to adopt a child after its

permanent custody has been awarded to an association, under this section: McClain v. Superior Court, 112 Wash. 260, 191 Pac. 852.

§ 1987-10. Private Hearings—Judgment of Conviction.

The hearings may be conducted in any room provided for the purpose in the courthouse, or building where sessions of the court are held and, as far as practicable, such cases shall not be heard in conjunction with other business of the court. At the hearing of any case involving a child, the court shall have power to exclude the general public from the room where the hearing is had, admitting thereto only such persons as may have a direct interest in the case. Any child may have a private hearing upon the question of its dependency or delinquency, and upon the request of said child, or either of its parents, or guardian, or custodian, such hearing may be had privately. An order of court adjudging a child dependent or delinquent under the provisions of this act shall in no case be deemed a conviction of crime. The probation officer's investigation record and report in each case, shall be withheld from public inspection, but such records shall be kept open to the inspection of such child, its parents, or guardian, or its attorney, and to such other persons as may secure a special order of the court therefor. Such records shall be kept as unofficial records of the court and shall be destroyed at any time in the discretion of any judge presiding in said court on or before the child shall arrive at the age of twenty-one years. After acquiring jurisdiction over any child, the court shall have power to make an order with respect to the custody, care or control of such child, or any order, which in the judgment of the court, would promote the child's health and welfare. In any case of a delinquent or dependent child, the court may continue the hearing from time to time, and may commit the child to the care or guardianship of a probation officer, duly appointed by the court, and may allow such child to remain at its own home subject to the visitation of the probation officer, such child to report to the probation officer as often as may be required and subject to being returned to the court for further proceedings whenever such action may appear to be necessary, or the court may commit the child to the care and guardianship of the probation officer, to be placed in a suitable family home, in case provision is made by voluntary contribution or otherwise for the payment of the board of the child until a suitable provision may be made for the child in a home without such

payment, or the court may commit the child to a suitable institution for the care of delinquent or dependent children. In no case shall a child be committed beyond the age of twenty-one years. A child committed to such institution shall be subject to the control thereof and the said institution shall have the power to parole such child, on such conditions as may be prescribed, and the court shall have power to discharge such child from custody, whenever, in the judgment of the court, his or her reformation shall be complete; or the court may commit the child to the care and custody of some association that will receive such child, embracing in its objects the care of neglected, delinquent, and dependent children. [L. '13, p. 527, § 10.]

See notes to § 1987-1, *supra*.

Cited in 98 Wash. 515, 516; 103 Wash. 39; 106 Wash. 621, 622; 112 Wash. 263.

§ 1987-11. Child not to be Detained in Jail.

No court or magistrate shall commit a child under sixteen years of age to a jail, common lock-up, or police station; but if such child is unable to give bail, it may be committed to the care of the sheriff, police officer, or probation officer, who shall keep such child in some suitable place or house or school of detention provided by the city or county, outside the inclosure of any jail or police station, or in the care of any association willing to receive it and having as one of its objects the care of delinquent, dependent or neglected children. When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same building with such adult convicts, or to bring such child into any yard or building in which such adult convicts may be present. [L. '13, p. 529, § 11.]

Cited in 105 Wash. 685—687.

The word "commit" in this section refers only to detentions pending hearing, and a child may be prosecuted for crime and sentenced to the penitentiary, although not confined in a building with adult convicts; and the fact that the state has not made proper provisions, does not prevent such sentence: *State ex rel. Sowders v. Superior Court*, 105 Wash. 684, 179 Pac. 79.

A boy under sixteen years of age may be committed to the state penitentiary, notwithstanding this section, providing that such a child shall not be confined in any building with adult convicts: *State v. Sowders*, 109 Wash. 10, 186 Pac. 260.

Under Rem. & Bal. Code, § 1998, superseded by this section, a minor husband convicted of nonsupport should be confined apart from adult convicts: *State v. McPherson*, 72 Wash. 371, 130 Pac. 481, Ann. Cas. 1914D, 587.

§ 1987-12. Justice Court Cases Transferred to Juvenile Court.

When, in any county where a court is held as provided in section 1987-2, a child under the age of eighteen years is arrested with or without warrant, such child may, instead of being taken before a justice of the peace or police magistrate, be taken directly before such court; or if the child is taken before a justice of the peace or police magistrate, it shall be the duty of such justice of the peace or police magistrate to transfer the case to such court, and the officer having the child in charge shall take the child before that court, and in any such case, the court may proceed to hear and dispose of the case in the same manner as if the child had been brought before the court upon petition as here-

inbefore provided. In any such case, the court shall require notice to be given and investigation to be made as in other cases under this act, and may adjourn the hearing from time to time for such purpose. If, upon investigation, it shall appear that a child has been arrested upon the charge of having committed a crime, the court, in its discretion, may order such child to be turned over to the proper officers for trial under the provisions of the criminal code. [L. '13, p. 529, § 12.]

Cited in 105 Wash. 686, 687.

Jurisdiction of another court over child as affected by assumption of

jurisdiction by juvenile court. 14 A. L. R. 147.

§ 1987-13. Detention Rooms.

Counties containing more than fifty thousand inhabitants shall, and counties containing a lesser number of inhabitants may, provide and maintain at public expense, a detention room or house of detention, separated or removed from any jail, or police station, to be in charge of a matron, or other person of good character, wherein all children within the provisions of this act shall, when necessary, be sheltered. [L. '13, p. 530, § 13.]

Cited in 113 Wash. 338.

Section 11229, *infra*, has no application to the validity of a contract to erect

a detention house under this section: Hughes v. McVay, 113 Wash. 333, 191 Pac. 565.

§ 1987-14. Construction of Act.

This act shall be liberally construed to the end that its purpose may be carried out, to wit: that the care, custody and discipline of a dependent or delinquent child as defined in this act shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can be properly done, the dependent or delinquent child as defined in this act shall be placed in an approved family and may become a member of the family, by adoption or otherwise. No dependent or delinquent child as defined in this act shall be taken from the custody of its parent, parents or legal guardian, without the consent of such parent, parents or guardian, unless the court shall find such parent, parents or guardian is incapable or has failed or neglected to provide proper maintenance, training and education for said child; or unless said child has been tried on probation in said custody, and has failed to reform, or unless the court shall find that the welfare of said child requires that his custody shall be taken from said parent or guardian. In this act, the words used in any gender shall include all other genders, and the word "county" shall include "city and county," the plural shall include the singular and singular shall include the plural. [L. '13, p. 530, § 14.]

Cited in 112 Wash. 263.

§ 1987-15. Court may Change Order.

Any order made by the court in the case of a dependent or delinquent child may at any time be changed, modified or set aside, as to the judge may seem meet and proper. [L. '13, p. 530, § 15.]

Cited in 98 Wash. 441; 103 Wash. 186; 112 Wash. 263.

Under this section, and § 1987-9, a change of custody may be ordered in

habeas corpus proceedings: State ex rel. De Bit v. Mackintosh, 98 Wash. 438, 167 Pac. 1090.

§ 1987-16. Fees not Allowable.

No fees shall be charged or collected by any officer or other person for filing petition, serving summons, or other process under this act. [L. '13, p. 531, § 16.]

§ 1987-17. Penalty for Delinquency of Child—Bond.

In all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having custody of such child, or any other person who shall by any act or omission, encourage, cause or contribute to the dependency or delinquency of such child shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year, or by both such fine and imprisonment, and the juvenile court shall have jurisdiction of all such misdemeanors: Provided, however, that the court may suspend sentence for a violation of the provisions of this section and impose conditions as to conduct in the premises of any person so convicted, and make such suspension to depend upon the fulfillment by such person of such conditions, and, in case of the breach of such conditions, or any thereof, the court may impose sentence as though there had been no such suspension. The court may also, as a condition of such suspension, require a bond in such sum as the court may designate, to be approved by the judge requiring same, to secure the performance by such persons on the conditions imposed by the court on such suspension. Such bond shall, by its terms, be made payable to the state of Washington, and any moneys received for a breach thereof shall be paid into the county treasury. [L. '13, p. 531, § 17. Cf. L. '09, p. 595, § 1; L. '07, p. 16, § 1.]

Cited in 95 Wash. 190, 192.

Under this section it is not necessary to allege that the child was dependent or delinquent prior to the commission of defendant's acts "causing" delinquency, or that the acts charged contributed to a pre-existing state or condition of delinquency; especially in view of section 1987-1, supra, defining a dependent child as one who from any cause is in danger of growing up to lead an idle or immoral life: State v. Adams, 95 Wash. 189, 163 Pac. 403.

Sufficiency of Evidence: See, State v. Adams, 95 Wash. 189, 163 Pac. 403.

A prosecution for contributing to the delinquency of a child, under Rem. & Bal. Code, § 2004, superseded by this section, is properly tried in the criminal

and not the juvenile department of the superior court, where there is nothing to indicate that the accused was a juvenile: State v. Williams, 73 Wash. 678, 132 Pac. 415.

This section, in providing punishment for the parents or persons having custody of a delinquent child "or any other person responsible for, or by any act" causing or contributing to the delinquency of such child, is not subject to the rule of ejusdem generis, in view of the evident intent of the legislature to make the same apply to others than those in loco parentis, and also in view of the rule that where particular words exhaust a class, following general words must refer to some larger class: State v. Plastino, 67 Wash. 374, 121 Pac. 851.

§ 1987-18. Board of Visitation.

In each county, the judge presiding over the juvenile court sessions, as defined in this act, may appoint a board of four reputable citizens, who shall serve without compensation, to constitute a board of visitation, whose duty it shall be to visit as often as twice a year all institutions, societies and associations within the county receiving children under this

act, as well as all homes for children or other places where individuals are holding themselves out as caretakers of children, also to visit other institutions, societies and associations within the state receiving and caring for children, whenever requested to do so by the judge of the juvenile court: Provided, the actual expenses of such board may be paid by the county commissioners when members thereof are requested to visit institutions outside of the county seat, and no member of the board shall be required to visit any institutions outside the county unless his actual traveling expenses shall be paid as aforesaid. Such visits shall be made by not less than two members of the board, who shall go together or make a joint report. The board of visitors shall report to the court from time to time the condition of children received by or in charge of such institutions, societies, associations, or individuals. It shall be the duty of every institution, society, or association, or individual receiving and caring for children to permit any member or members of the board of visitation to visit and inspect such institution, society, association or home where such child is kept, in all its departments, so that a full report may be made to the court. [L. '13, p. 531, § 18.]

Cited in 105 Wash. 685.

CHAPTER VII-A.

CUSTODY AND TREATMENT OF DELINQUENT AND DISEASED WOMEN.

§ 1988. Women's Industrial Home and Clinic.

There is hereby established a public institution of the state to be known as the "Women's Industrial Home and Clinic," for the purpose of receiving, taking into custody, detaining, confining, caring for, training, reforming, treating and curing such delinquent or diseased women as may be committed to it as provided by law. Said institution shall consist of such lands and buildings as may be authorized by law, and shall be located, constructed, equipped, maintained and managed by a board of five directors, two of whom shall at all times be women, appointed by the governor. [L. '19, p. 570, § 1.]

§ 1989. Board of Directors—Appointment and Compensation.

Within sixty days after the taking effect of this act the governor shall appoint five directors, three of whom shall at all times be members of the state board of control, and two of whom shall be women. The women members shall be appointed for terms ending, one on May 31, 1922, and one on May 31, 1924, and upon the expiration of their respective terms the governor shall appoint a successor for a term of five years. The governor shall also fill by appointment any vacancies that shall occur for any unexpired term or terms. All such appointments shall be for fitness and of a nonpartisan character. The governor shall have the power to remove any of said directors for cause. Such directors shall receive no compensation for their services, but shall be paid their actual and necessary traveling expenses incurred while engaged in the performance of their official duties. Three members of the board of directors shall constitute a quorum for the transaction of business. [L. '19, p. 570, § 2.]

§ 1990. Site for Institution—Acquisition.

The board of directors are hereby authorized, and it shall be their duty to acquire by purchase, gift, or appropriation in the name of the state, a suitable site for said institution of not less than two hundred acres of arable land, to the end that, so far as practicable, the food of the inmates of the institution may be produced thereon, which land shall have an ample supply of water and shall be conveniently accessible to transportation facilities: Provided, the board may, if practicable, take over and use for such institution any site now owned by the state, and the board may, pending the selection of a permanent site and the construction of the necessary buildings, purchase, lease or otherwise acquire and use temporarily any site and buildings that may be suitable for the purposes of this act. [L. '19, p. 571, § 3.]

§ 1991. Building Plans—Bids for Contracts.

The directors shall cause to be prepared plans and specifications for remodeling or erecting on such site necessary buildings for a suitable plant for the institution, which plans shall provide for cottages to be arranged for the proper classification of inmates as to the character and needs of such inmates, including proper hospital and clinic facilities, and the directors shall furnish and equip the same ready for use.

Contracts shall be made by the directors, and those involving an expenditure of over five hundred dollars (\$500) shall be duly advertised and competitive bids received thereon, no member of the board of directors to have financial interest therein. In connection with the remodeling or erecting of the various cottages and buildings comprising the plant of the institution no building permit shall be required from the municipal corporation in which such institution may be located.

When such buildings have been prepared and equipped and the necessary staff of officers organized, the directors shall so certify to the governor, who shall thereupon issue a public proclamation that the institution is ready for the reception of inmates, and shall cause a copy of such proclamation to be sent to each judge of the superior court and to each justice of the peace in the state. [L. '19, p. 571, § 4.]

§ 1992. Transfers of Inmates of State School for Girls.

The superintendent of the State School for Girls may transfer to the Women's Industrial Home and Clinic such female persons over sixteen years of age as may in the judgment of such superintendent and the board of directors of said Women's Industrial Home and Clinic be better cared for at said institution. [L. '19, p. 572, § 5.]

§ 1993. Management of Institution—Salaries—Annual Reports.

The directors shall have control of said institution, determine the policy of the same, and make necessary rules and regulations for the care, support, discipline, detention, training, education and labor of the inmates, including a system of general and vocational instruction, domestic science and employment in useful trades: Provided, that no system of contract labor shall be established.

Said board of directors shall provide proper recreational facilities, form a board of parole and discharge, cause to be kept proper records, including those of inmates, establish a credit system which shall provide that not less than twenty-five per cent of the sum accredited to any inmate shall be paid to her at the time of her absolute release from said institution.

Said board shall fix the salaries of the officers of said institution; appoint from their own number a president and secretary who shall hold office for such length of time as the board may determine: hold meetings at least quarterly at said institution, and audit the accounts of the superintendent quarterly.

The directors shall report annually to the governor the general and financial condition of said institution, with such recommendations as they may desire to make, a copy of which report shall be sent to the secretary of state. [L. '19, p. 572, § 6.]

§ 1994. Superintendent—Bond and Compensation.

The directors shall appoint and remove at discretion a superintendent of said institution who shall be a woman, not of their number, and who before entering upon the duties of her office shall give a bond to the state with sufficient surety in the sum of five thousand dollars (\$5,000), and shall be sworn to faithful performance of her duties. The superintendent shall receive such compensation as shall be fixed by the directors and shall reside at the institution. [L. '19, p. 573, § 7.]

§ 1995. Duties of Superintendent—Employees.

The superintendent shall manage said institution and shall have control over the inmates thereof, working for the speedy return of the offender to community life as a healthy, law-abiding, self-respecting and self-supporting member thereof. She shall make rules and regulations for the administration of said institution, subject to the approval of the board of directors. The superintendent shall also, subject to the board of directors, determine the number and character, select, appoint and assign the duties, of all subordinate officers of the institution, who shall be women as far as practicable, and shall be sworn to a faithful performance of their duties.

There shall be a deputy superintendent, a resident physician and clerk. The clerk of the institution shall give a bond to the state with sufficient surety in the sum of five thousand dollars (\$5,000). The resident physician shall be legally qualified to practice medicine and surgery in the state of Washington, and shall have power to call consulting physicians when necessary. [L. '19, p. 573, § 8.]

§ 1996. Commitment of Female Offenders—Delinquent or Dependent Minors.

From and after the proclamation of the governor, provided for in section 1991, all women over sixteen years of age belonging to any of the following classes sentenced to imprisonment by any court of criminal jurisdiction may be committed to and confined in, and all women over eighteen years of age belonging to any of the following classes

sentenced to imprisonment by any court of criminal jurisdiction must be committed to and confined in said institution:

First: Women convicted of or who plead guilty to the commission of felonies, except murder in the first and second degree, arson in the first degree, and robbery, who have not been twice before convicted in this state or elsewhere of crimes which under the laws of this state would amount to felonies.

Second: Women convicted of or who plead guilty to the commission of gross misdemeanors or misdemeanors as defined by law.

The court imposing sentence on offenders of either of the above classes shall not fix the time of such commitment. Commitment to such institution shall be executed, within one week after sentence is imposed, by a woman guard appointed by the court for that purpose or sent from said institution on notice of the issuance of the commitment. The expenses of such commitment shall be paid in the same way as commitment to other penal institutions of the state. The trial court shall cause a record of the case to be sent with commitment papers on blanks furnished by the institution.

Any girl between the ages of sixteen and eighteen years who shall be found to be delinquent or dependent under the provisions of chapter VII of this Title, may be committed to said institution, and if committed, the commitment shall be executed by a juvenile officer, or a woman guard from said institution.

The duration of such commitment for Class 1, including the time spent on parole, shall not exceed the maximum term specified by law for the crime for which the offender was sentenced, and in such cases it shall be the duty of the trial court to specify the maximum term for which the offender may be held under commitment.

The duration of such commitment for all other classes shall not exceed three years unless, in the opinion of a board of experts composed of one jurist and two physicians one of whom shall be a recognized neurologist, a longer detention shall be recommended.

If, through oversight or otherwise, any person be sentenced to confinement in said institution for a definite period of time, such sentence shall not for that reason be void but the person so sentenced shall be entitled to the benefits and subject to the liabilities of this act in the same manner and to the same extent as if sentence had been given in the terms required by this section; and in such cases said board of directors shall deliver to such offender a copy of this act and written information of her relation to said board.

Immediately upon the arrival of any person committed to said institution a careful physical and mental examination of such person shall be made by a competent physician. [L. '19, p. 574, § 9.]

§ 1997. Parole and Discharge of Inmates.

Said board of directors shall constitute a board of parole and discharge. Any inmate of the institution who has been in confinement within said institution may upon recommendation of the superintendent be allowed to go on parole in the discretion of the majority of said board of parole, under the following conditions: That she is in good physical

condition and free from any contagious diseases, has ability to earn an honest living, has a satisfactory institutional record based on the merit system, and a proper home to which she may go, or suitable employment has been secured in advance by the board of parole. Each person paroled or discharged from the institution shall be given, if the superintendent deems it best, suitable clothing and transportation expenses and, if such person has no money to her credit, not less than five dollars (\$5) in money.

Authority is conferred on said board of parole to establish such rules and regulations as it may deem necessary, setting forth the conditions upon which inmates may be discharged upon parole, and to enforce such rules and regulations and provide suitable supervision by agents of the institution. [L. '19, p. 575, § 10.]

§ 1998. Violation of Parole—Arrest.

While upon parole each inmate of said institution shall remain in the legal custody and under the control of the board of directors, and subject at any time to be taken back to said institution for any reason that shall seem sufficient to said board. Whenever any paroled inmate of said institution shall violate her parole and be returned to the institution, she may be required to serve the unexpired term of her maximum sentence, including the time she was out on parole, or any part thereof, in the discretion of the board of directors, or she may be paroled again if said board of parole so decide. The request of said board of directors, or any person authorized by the rules of said board, shall be sufficient warrant to authorize any officer of said institution or any officer authorized by law to serve criminal process within this state, to return any inmate on parole into actual custody; and it shall be the duty of police officers, constables and sheriffs to arrest and hold any paroled inmate when so requested, without any written warrant, and, for the performance of such duty, the officer performing the same, except officers of said institution, shall be paid by the board of directors of said institution out of the institution funds such reasonable compensation as is provided by law for similar services in other cases. [L. '19, p. 576, § 11.]

§ 1999. Escape of Inmates.

If any inmate shall escape from said institution or from any keeper or officer having her in charge or from her place of work while engaged in working outside of said institution, she shall be returned to said institution when arrested, and may be disciplined in such manner as the board of directors may determine. All the provisions of section 1998 relating to the arrest and return of paroled inmates shall apply to the arrest and return of escaped inmates. [L. '19, p. 577, § 12.]

§ 2000. Transfers to State Prison, etc.

The board of directors may transfer to the state prison any inmate of said institution who shall appear to said board to be incorrigible, or whose presence in said institution may be seriously detrimental to its well-being: Provided, such inmate was originally so committed, subject

to be returned upon requisition of the board of directors. The directors may transfer to any other appropriate state institution any inmate whose welfare the board, after proper study and examination of her case, shall decide may be best cared for at such other institution. Whenever any inmate of said institution shall be, in the judgment of the board of directors, in need of special medical attention, such inmate may be transferred to a hospital or other appropriate state institution, subject to return upon requisition of the board of directors. The board of directors may transfer to any of the Washington hospitals for the insane any inmate of said institution who may be insane, but no inmate of said institution shall be transferred except upon the written certificate of two competent physicians not connected with the institution, to the effect that such inmate has become insane, and any inmate declared to be insane shall have a right to appeal to the superior court for the county in which said institution is located from said order of transfer. Upon the written certification of the superintendent of any of the Washington hospitals for the insane that an inmate transferred has become cured of her insanity, the directors shall, by requisition, require the return of such inmate to said institution. [L. '19, p. 577, § 13.]

§ 2001. Discharge.

If it shall appear to said board of directors, acting as a board of parole and discharge, that any inmate on parole, although not having yet reached her maximum term, has maintained a satisfactory parole record and will continue, if discharged, to lead an orderly life, said board, by a unanimous vote of all the members present at any stated meeting thereof, may discharge such inmate from said institution. [L. '19, p. 578, § 14.]

§ 2002. Infant Children of Inmates.

If any woman committed to said institution is, at the time of her commitment, the mother of a child under two years of age, or shall give birth to a child while an inmate of said institution, such child may be retained in said institution, until it attains the age of two years, when the board of directors shall cause such child to be placed in an asylum or home for children, or in the care and custody of some relative or proper person willing to assume such care, and if necessary, the board may pay the reasonable cost of maintenance of said child, until the mother shall be discharged. Any child over the age of two years at the time of the commitment of its mother to said institution, may, if found delinquent or dependent, be committed to proper care and custody under the provisions of the juvenile court law. [L. '19, p. 578, § 15.]

§ 2003. Appropriation.

There is hereby appropriated out of any money in the state treasury, not otherwise appropriated, the sum of one hundred fifty thousand dollars (\$150,000), or so much thereof as may be necessary to carry out the provisions of this act, for the construction and maintenance of the Women's Industrial Home and Clinic. [L. '19, p. 578, § 16.]

§ 2004. Partial Invalidity.

If any provision or section of this act is, for any reason, held to be invalid or unconstitutional, such holding shall not affect the validity of the act as a whole, or any other part thereof. [L. '19, p. 579, § 17.]

CHAPTER VIII.

LIMITATION OF CRIMINAL ACTIONS AND REPEALS.

§ 2005. Limitation on Criminal Actions Other Than Murder.

Prosecutions for the offenses of murder and arson, where death ensues, may be commenced at any period after the commission of the offense; for offenses the punishment of which may be imprisonment in the penitentiary, within three years after their commission; and for all other offenses, within one year after their commission: Provided, that any length of time during which the party charged was not usually and publicly resident within this state shall not be reckoned within the one and three years respectively: And further provided, that where an indictment has been found, or an information filed, within the time limited for the commencement of a criminal action, if the indictment or information be set aside, the time of limitation shall be computed from the setting aside of such indictment or information. [Cf. L. '54, p. 77, § 10; Cd. '81, § 779; L. '91, p. 46, § 2; 2 H. C., § 1188.]

Cited in 19 Wash. 436; 56 Wash. 385.

The act of February 24, 1891, relating to criminal procedure, was not designed to provide a complete system repealing the existing laws; but only to make the existing laws harmonious with the changes brought about by the constitution: State ex rel. Repath v. Caldwell, 9 Wash. 336, 37 Pac. 669.

LIMITATION OF PROSECUTIONS:
See Remington's Digest, Crim. Law, §§ 40—43.

§ 40. **Limitations Applicable:** State v. Erving, 19 Wash. 435, 53 Pac. 717.

§ 41. **Commencement of Period of Limitation—Commission of Offense in General:** State v. Erickson, 54 Wash. 472, 103 Pac. 796.

§ 42. **Commencement of Prosecution:** State v. Erving, 19 Wash. 435, 53 Pac. 717.

§ 43. — **Amendment After Appeal from Justice Court:** State v. Poyner, 57 Wash. 489, 107 Pac. 181.

When prosecution deemed commenced within statute of limitations. 1 **Ann. Cas.** 319.

Computation of limitation of time against prosecution. 12 **Ann. Cas.** 60.

Remedy of accused not brought to trial within constitutional or statutory period. **Ann. Cas.** 1912D, 1273.

Exclusion of time of pendency of prior indictment in computation of limitation period. 3 **A. L. R.** 1330.

§ 2006. Repeal and Amendment of Criminal Statutes—Saving Clause Presumed.

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing

act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed, or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein. [L. '01, Ex. Sess., p. 13, § 1.]

Cited in 55 Wash. 406; 56 Wash. 398; 58 Wash. 432.

The saving clause of this section is constitutional; and a pending prosecution for practicing medicine without a license is not affected by Rem. Code, § 8386, repealing former laws before trial and conviction of the accused (overruling *Id.* on rehearing): State v. Hanover, 55 Wash. 403, 107 Pac. 388.

This section was a general savings clause applicable to the repeal or amendment of all criminal statutes unless a contrary intention is expressly declared therein, and is sufficient to continue in

force the laws repealed by the penal code of 1909, during the interim between the passage and the taking effect of such penal code: State v. Newcomb, 58 Wash. 414, 109 Pac. 355.

Under this section, and section 2294, *infra*, it is not essential to a prosecution for such prior offense that it was pending when the penal code of 1909 took effect: State v. Lorenzy, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

Statutes prescribing effect of repeal of criminal statute on prosecutions for prior offenses. 6 Ann. Cas. 891.

CHAPTER IX.

PARTIES TO CRIMINAL ACTIONS.

§ 2007. Distinctions Relating to Accessory Abolished.

No distinction shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, and all persons concerned in the commission of an offense, whether they directly counsel the act constituting the offense, or counsel, aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals. [L. '54, p. 98, § 125; Cd. '81, § 956; 2 H. C., § 1189.]

Cited in 3 Wash. 178, 179; 7 Wash. 340; 12 Wash. 350; 19 Wash. 467; 20 Wash. 502; 21 Wash. 356; 48 Wash. 262; 66 Wash. 467; 82 Wash. 674; 86 Wash. 281; 94 Wash. 216; 104 Wash. 298; 105 Wash. 422, 424.

Although this section abolishes the distinction between accessories and principals, it is a fatal variance to charge defendant with burglary as a principal, and prove that he was an accessory before the fact: State v. Morgan, 21 Wash. 355, 58 Pac. 215.

Under this section a defendant may be convicted under an information charging him with larceny as principal, although the evidence shows that he was not present at the commission of the crime, but advised and counseled it with the intention of receiving the benefits of the property taken: State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

Principals and Accomplices: See Remington's Digest, Crim. Law, §§ 17—22.

In General: State v. Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133; State v. Boysen, 30 Wash. 338, 70 Pac. 740; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989; State v. Klein, 94 Wash. 212, 162 Pac. 52; State v. Ferry Line Auto Bus Co., 93 Wash. 614, 161 Pac. 467.

As an accessory is tried as a principal, he cannot object to instructions concerning accomplices because he did not do the actual stealing: State v. Vane, 105 Wash. 421, 178 Pac. 456.

§§ 19, 20. — **Accessories Before the Fact:** State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Robinson, 12 Wash. 349, 41 Pac. 51, 902; State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

See, also, State v. Vane, 105 Wash. 421, 178 Pac. 456.

§§ 21, 22. **Prosecution and Punishment of Principals and Accessories:** *State v. Gifford*, 19 Wash. 464, 53 Pac. 709; *State v. Webb*, 20 Wash. 500, 55 Pac. 935; *State v. McFadden*, 48 Wash. 259, 93 Pac. 414, 14 L. R. A. (N. S.) 1140.

Criminal responsibility of one co-operating in offense which he is incapable of committing personally. 5 A. L. R. 782.

§ 2008. Accessory After the Fact—Who may be.

Every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, to the offender, who, after the commission of any felony, shall harbor, conceal, or maintain, or assist any principal felon or accessory before the fact, or shall give the offender any other aid, knowing that he had committed a felony, or had been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed accessory after the fact, and shall, on conviction thereof, be imprisoned in the county jail not more than one year, or be fined in any sum not exceeding five hundred dollars. [L. '54, p. 98, § 126; Cd. '81, § 957; 2 H. C., § 1190.]

§ 2009. Accessory After Fact Tried Though Principal not.

Every person who shall become an accessory after the fact to any felony may be indicted, convicted, and punished, whether the principal felon shall or shall not have been convicted previously, or shall or shall not be amenable to justice by any court having jurisdiction to try the principal felon. [Cf. L. '54, p. 98, § 127; Cd. '91, § 958; L. '81, p. 65, § 97; 2 H. C. § 1376.]

§ 2010. Who may be Tried and Punished.

Every person, whether an inhabitant of this state, or of any other state, territory, or county, may be tried and punished under the laws of this state for an offense committed by him therein, except when such offense is cognizable exclusively in the courts of the United States. [L. '91, p. 47, § 3; 2 H. C., § 1191.]

It is no less a crime to murder a foreigner than a citizen at a place within the admiralty jurisdiction of the United States courts: *Smith v. United States*, 1 W. T. 262.

An Indian who has severed his tribal relations may be prosecuted in the courts of this state, whether the offense was committed within or without the limits of a reservation: *State v. Williams*, 13 Wash. 335, 43 Pac. 15.

An Indian who retains his tribal relations may be prosecuted in the courts of this state for offenses committed at a

place within the limits of an Indian reservation: *Id.*

A foreign subject accused of murder in the first degree committed within the state jurisdiction is not entitled to a removal of the prosecution to the United States court: *State v. Champoux*, 33 Wash. 339, 74 Pac. 557.

A territorial district court, in the exercise of its jurisdiction, under the laws of the territory, had jurisdiction to try and punish any person who committed murder on San Juan island: *Watts v. United States*, 1 W. T. 288; *Watts v. Territory*, 1 W. T. 409.

§ 2011. Term "Person," Defined.

When the term "person" or other word is used to designate the party whose property is the subject of an offense, or against whom any act is done with intent to defraud or injure, the term may be construed to include the United States, this state, or any state or territory, or any

public or private corporation, as well as an individual. [L. '54, p. 99, § 134; Cd. '81, § 964.]

Liability of corporation to indictment for homicide. 16 *Ann. Cas.* 840; *Ann. Cas.* 1915B, 621; 21 *L. R. A. (N. S.)* 998; 45 *L. R. A. (N. S.)* 344.

Criminal liability of corporation for act of misfeasance other than homicide. *Ann. Cas.* 1916C, 459. Criminal responsibility of corporation in hands of receiver. 21 *Ann. Cas.* 694; 26 *L. R. A. (N. S.)* 710.

§ 2011-1. Corporation Charged With Crime.

Whenever an indictment or information shall be filed in any superior court against a corporation charging it with the commission of a crime, a summons shall be issued by the clerk of such court, signed by one of the judges thereof, commanding the sheriff forthwith to notify the accused thereof, and commanding it to appear before such court at such time as shall be specified in said summons. Such summons and a copy of the indictment or information shall be at once delivered by such clerk to said sheriff and by him forthwith served and returned in the manner provided for service of summons upon such corporation in a civil action. Whenever a complaint against a corporation, charging it with commission of a crime, shall be made before any justice of the peace or municipal judge, a like summons, signed by such justice of the peace or municipal judge, shall be issued, which, together with a copy of said complaint, shall be delivered to the sheriff at once and by him forthwith served as herein provided. [L. '11, p. 106, § 1.]

§ 2011-2. Appearance by Corporation.

Upon such service being made such corporation shall appear at the time designated, by one of its officers or by counsel; and upon such appearance, and thereafter, the same course shall be pursued, as nearly as may be, as upon the appearance of an individual to indictment, information or complaint and warrant charging him with the same offense. Upon failure of the corporation to make such appearance said court shall cause to be entered a plea of "not guilty," and upon appearance made or plea entered the corporation shall be deemed forthwith continuously present in court until the case shall be finally disposed of. [L. '11, p. 106, § 2.]

§ 2011-3. Judgment Against Corporation.

If the corporation shall be found guilty and a fine imposed, it shall be entered and docketed by the clerk, or justice of the peace or municipal judge as a judgment against the corporation, and it shall be of the same force and effect and be enforced against such corporation in the same manner as a judgment in a civil action. [L. '11, p. 106, § 3.]

CHAPTER X.

VENUE OF CRIMINAL ACTIONS.

§ 2012. Criminal Actions, Where Commenced.

Except as otherwise specially provided by statute, all criminal actions shall be commenced and tried in the county where the offense was committed. [Cf. L. '79, p. 75, § 10; Cd. '81, § 780; L. '91, p. 47, § 4; 2 H. C., § 1192.]

Cited in 23 Wash. 576; 15 Wash. 17.

Locality of Offense: See Remington's Digest, Crim. Law, § 27; Shapoonmash v. United States, 1 W. T. 188; Smith v. United States, 1 W. T. 262; Watts v. United States, 1 W. T. 288.

Degree of proof of venue in criminal cases. L. R. A. 1918B, 1187; Ann. Cas. 1912B, 939.

Jurisdiction of criminal offenses committed in territory out of which new county is created. 4 Ann. Cas. 555; Ann. Cas. 1914B, 348.

§ 2013. Jurisdiction When Offense Committed in Two or More Counties.

When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county. [L. '54, p. 99, § 129; Cd. '81, § 959; 2 H. C., § 1193.]

Cited in 26 Wash. 654.

Offenses Committed Partly in One County and Partly in Another: See Remington's Digest, Crim. Law, §§ 31, 32; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Mardesich, 79 Wash. 204, 140 Pac. 573; State v. Hazzard, 75 Wash. 5, 134 Pac. 514. **Organization of New District:** Leschi v. Territory, 1 W. T. 13; McAllister v. Territory, 1 W. T. 360.

Validity of statutes fixing place of prosecution of crime committed in two counties. 4 Ann. Cas. 1194.

Constitutionality of statute fixing venue of offense committed while upon a public conveyance, or at a station or depot upon the route thereof. 11 A. L. R. 1020.

§ 2014. Offenses Committed on County Boundaries.

Offenses committed on the boundary line of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment or information to have been committed in either of them, and may be prosecuted and punished in either county. [Cf. L. '54, p. 99, § 130; Cd. '81, § 960; L. '91, p. 47, § 5; 2 H. C., § 1194.]

§ 2015. Venue of Stolen Property Taken into Another County.

When property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county, the jurisdiction is in either county. [L. '54, p. 99, § 131; Cd. '81, § 961; 2 H. C., § 1195.]

Cited in 14 Wash. 553; 55 Wash. 589.

Locality of Offense—Larceny and Burglary: See Remington's Digest, Crim. Law, § 30; State v. Kyle, 14 Wash. 550, 45 Pac. 147; State v. Carroll, 55 Wash. 588, 104 Pac. 814, 133 Am. St. Rep. 1047, 19 Ann. Cas. 1234.

Validity of statute making offense subject to prosecution in county other than where committed. 9 Ann. Cas. 615; 19 Ann. Cas. 1236; 7 L. R. A. (N. S.) 669; L. R. A. 1918F, 965.

§ 2016. Jurisdiction of Homicide in Either County, When.

If any mortal wound is given or poison administered in one county, and death, by means thereof, ensue in another, the jurisdiction is in either. [L. '54, p. 99, § 132; Cd. '81, § 962; 2 H. C., § 1196.]

§ 2017. Venue of Action Against Accessory After the Fact.

An accessory after the fact to a felony may be tried either in the county in which he shall have become an accessory, or in the county in which the felony shall have been committed. [Cf. Cd. '81, § 958; L. '91, p. 47, § 6; 2 H. C., § 1197.]

See supra, § 1940, trial of accessory.

See infra, § 2262, venue and trial of accessories.

§ 2018. Change of Venue, Proceedings to Obtain.

The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence; nor in any case unless the judge is satisfied the ground upon which the application is made does exist. [L. '54, p. 117, § 98; Cd. '81, § 1072; L. '91, p. 47, § 7; 2 H. C., § 1198.]

See notes to § 209, supra.

Cited in 23 Wash. 291; 40 Wash. 609; 65 Wash. 248; 88 Wash. 347; 97 Wash. 306.

CHANGE OF VENUE: See Remington's Digest, Crim. Law, §§ 35—39. **Grounds—Disqualification of Judge:** State v. Hawkins, 23 Wash. 289, 63 Pac. 258; State v. Strodemier, 40 Wash. 608, 82 Pac. 915.

§ 36. — **Local Prejudice:** State v. Champoux, 33 Wash. 339, 74 Pac. 557; State v. Hillman, 42 Wash. 615, 85 Pac. 63; State v. Welty, 65 Wash. 244, 118 Pac. 9; State v. Wright, 97 Wash. 304, 166 Pac. 645.

§ 37. **Application—Affidavits and Other Proofs:** State v. Straub, 16 Wash. 111, 47 Pac. 227; State v. Champoux, 33 Wash. 339, 74 Pac. 557.

§ 38. **County or District to Which**

Change may be Made: McAllister v. Territory, 1 W. T. 360; Puyallup v. Snyder, 13 Wash. 572, 43 Pac. 635.

§ 39. **Jurisdiction and Proceedings After Change:** Smith v. United States, 1 W. T. 262; State v. Lyts, 25 Wash. 347, 65 Pac. 530; State ex rel. Adams v. Grimes, 80 Wash. 14, 141 Pac. 184.

County to which venue may be changed in absence of statute requiring change to be to nearest or adjoining county. 9 Ann. Cas. 177.

Mandamus to compel change of venue in criminal case. L. R. A. 1917F, 914.

Change of venue on application of the state in criminal prosecution as matter of right or of discretion. 21 Ann. Cas. 1203.

§ 2019. Discretion of Court—Duty of Clerk.

When the affidavit is founded on prejudice of the judge, the court may, in its discretion, grant a change of venue to some other county, or may continue the cause until such time as it can be tried by another judge in the same county; if the affidavit is founded upon excitement or prejudice in the county against the defendant, the court may, in its discretion, grant a change of venue to the most convenient county. The clerk must, upon the granting of a change of the place of trial, make a transcript of the proceedings and order of court, and, having sealed up the same with the original papers, deliver them to the sheriff, who must without delay, deposit them in the clerk's office of the proper county, and make his return accordingly. [Cf. L. '54, p. 117, § 99; Cd. '81, § 1073; L. '91, p. 47, § 8; 2 H. C., § 1199.]

Cited in 23 Wash. 291; 65 Wash. 248; 88 Wash. 347; 97 Wash. 306. ritory, 1 W. T. 360; Edwards v. State, 2 Wash. 291, 26 Pac. 258; State v. Straub, 16 Wash. 111, 47 Pac. 227.

Discretion of Court: McAllister v. Ter-

§ 2020. Change upon Consent of Parties.

The court may, at its discretion, at any time, order a change of venue or place of trial to any county in the state, upon the written consent or agreement of the prosecuting attorney and the defendant. [L. '73, p. 235, § 237; Cd. '81, § 1075; 2 H. C., § 1200.]

§ 2021. Recognizance of Defendant and Witnesses on Change.

When a change of venue is ordered, if the offense be bailable, the court shall recognize the defendant, and in all cases the witnesses, to appear at the court to which the change of venue was granted. [Cf. L. '54, p. 117, § 100; Cd. '81, § 1076; L. '91, p. 48, § 9; 2 H. C., § 1201.]

Time and place covered by recogni-
zance or bail bond in criminal case

where change of venue is taken.
L. R. A. 1916F, 380.

CHAPTER XI.

FORMS OF CRIMINAL ACTIONS.

§ 2022. Pleadings—Forms Abolished.

All the forms of pleading in criminal actions heretofore existing are abolished; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed herein. [L. '69, p. 240, § 180; Cd. '81, § 1002; 2 H. C., § 1202.]

Cited in 4 Wash. 106; 9 Wash. 97; 11 Wash. 119; 23 Wash. 549, 576; 44 Wash. 208.

Application of This Section: State v. Fillpot, 51 Wash. 223, 98 Pac. 659.

The ancient formalities and technicalities of the common law are abolished: State v. Day, 4 Wash. 104, 29 Pac. 984; State v. Wright, 9 Wash. 96, 37 Pac. 313; State v. Blanchard, 11 Wash. 116, 39 Pac. 377.

§ 2023. The Charge must be by Information or Indictment.

No person shall be held to answer in any court for an alleged crime or offense, unless upon information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of misdemeanor before a justice of the peace, or before a court-martial. [Cf. Cd. '81, § 764; L. '91, p. 48, § 10; 2 H. C., § 1203.]

§ 2024. All Prosecutions may be by Information.

All public offenses may be prosecuted in the superior courts by information. [L. '09, p. 186, § 1. Cf. L. '90, p. 100, § 1; L. '91, p. 214, § 1; 2 H. C., § 1204.]

See notes to Const., Art. I, § 25.

See infra, § 2050, manner of bringing information.

See infra, § 2053, duty of prosecuting attorney.

Cited in 1 Wash. 380; 3 Wash. 174; 13 Wash. 337; 20 Wash. 245; 30 Wash. 139; 32 Wash. 10; 50 Wash. 322; 58 Wash. 405.

NECESSITY OF INDICTMENT: See Remington's Digest, Ind. & Inf., §§ 1—4.

§ 1. **Constitutional and Statutory Provisions:** Rafferty, In re, 1 Wash. 382, 25

Pac. 465; Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029; State v. Nordstram, 7 Wash. 506, 35 Pac. 382; State v. Baldwin, 15 Wash. 15, 45 Pac. 650.

This law providing for prosecution by information is constitutional: State v. Humason, 5 Wash. 499, 32 Pac. 111.

A law changing the mode of procedure in prosecutions for crime from an indictment to an information does not contain any of the elements, or respond to any of the accepted definitions, of an *ex post facto* law, although the offense under prosecution may have been committed prior to such change in the law: *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029; *State v. Stowe*, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609; *State v. Hoyt*, 4 Wash. 818, 30 Pac. 1060.

§ 3. Offenses Which must be Prosecuted by Indictments—Infamous Crimes: *Fowler v. United States*, 1 W. T. 3; *McCarthy v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

§ 4. — Felonies and Misdemeanors: *State v. Gleason*, 15 Wash. 509, 46 Pac. 1043; *Barbee, In re*, 19 Wash. 306, 53 Pac. 155.

CHAPTER XII.

INDICTMENTS AND PROCEEDINGS BY INFORMATION.

§ 2025. Challenge to Panel of Grand Jurors.

Challenges to the panel of grand jurors shall be allowed to any person in custody or held to answer for an offense, when the clerk has not drawn from the jury-box the requisite number of ballots to constitute a grand jury, or when the drawing was not done in the presence of the proper officers; and such challenges shall be in writing and verified by affidavit, and proved to the satisfaction of the court. [Cf. L. '54, p. 110, § 45; Cd. '81, § 977; L. '91, p. 48, § 11; 2 H. C., § 1205.]

Cited in 82 Wash. 290.

§ 2026. Challenge to Individual Grand Juror.

Challenges to individual grand jurors may be made by such person for reason of want of qualifications to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice. [L. '54, p. 110, § 46; Cd. '81, § 978; 2 H. C., § 1206.]

Bias as ground of challenge to grand juror in absence of statutory provision. 4 Ann. Cas. 873.

Power of *amicus curiae* to object to competency of grand juror. Ann. Cas. 1915A, 196.

§ 2027. Venire When Panel Discharged.

If a challenge to the panel be allowed, the panel shall be discharged, and the court may order the sheriff to summon from the bystanders and the body of the county a sufficient number of persons to act as grand jurors. [Cf. L. '54, p. 110, § 47; Cd. '81, § 979; L. '91, p. 48, § 12; 2 H. C., § 1207.]

See *infra*, § 2041, resummoning from county and from bystanders.

Court should terminate proceedings at any stage of the case when it is discovered that the impaneling of the grand jurors was null and void: *Yelm Jim v. Territory*, 1 W. T. 63; *Clarke v. Territory*, 1 W. T. 68.

Order of court to summon from by-

standers to fill the panel is good, if the qualifications of those selected are such as the law requires: *Yelm Jim v. Territory*, *supra*; *Clark v. Territory*, *supra*. Temporary absence from the state does not disqualify one from acting as a juror: *Id.*

§ 2028. Discharge of Juror—Panel to be Filled.

If a challenge to an individual juror be allowed, he shall be discharged, and the panel filled. [L. '54, p. 110, § 48; Cd. '81, § 980; 2 H. C., § 1208.]

See *supra*, § 110, venire to fill vacancies and open venire.

§ 2029. Oath of Grand Jury—Form.

The following oath shall be administered to the grand jury:—

“You, as grand jurors for the body of the county of —, do solemnly swear (or affirm) that you will diligently inquire into and true presentment make of all such matters and things as shall come to your knowledge, according to your charge; the counsel of the state, your own counsel, and that of your fellows, you shall keep secret; you shall present no person through envy, hatred, or malice; neither will you leave any person unpresented through fear, favor, affection, or reward, or the hope thereof; but that you will present things truly as they come to your knowledge, according to the best of your understanding, and according to the laws of this state. So help you God.” [Cf. L. '54, p. 110, § 49; Cd. '81, § 981; L. '91, p. 48, § 13; 2 H. C., § 1209.]

§ 2030. Foreman—Powers of—Clerk of Grand Jury.

A foreman of the grand jury shall be appointed by the court, who may remove him and appoint another at any time, and such foreman shall have power to administer all oaths and affirmations to witnesses who shall appear before such grand jury, and the jury may appoint one of their number as clerk to keep a minute of their proceedings. [L. '54, p. 110, § 50; Cd. '81, § 982; 2 H. C., § 1210.]

Cited in 39 Wash. 695.

Presence and Use of Stenographers: *Mather v. King County*, 39 Wash. 693, 82 Pac. 121.

§ 2031. Grand Jury Charged by Court—Advice to.

The grand jury shall be charged by the court as to the nature of their duties, and may at any reasonable time ask the advice of the court as to any legal questions upon which they may desire information. [L. '54, p. 110, § 51; Cd. '81, § 983; 2 H. C., § 1211.]

§ 2032. Prosecuting Attorney to Attend, etc.

The prosecuting attorney shall attend on the grand jury for the purpose of examining witnesses and giving them such advice as they may ask. [Cf. L. '54, p. 110, § 52; Cd. '81, § 984; L. '91, p. 49, § 14; 2 H. C., § 1212.]

See *infra*, § 4136, prosecuting attorney to attend, duties, etc.

Cited in 21 Wash. 61; 39 Wash. 695;
52 Wash. 490.

Right of attorney general of state
to appear before grand jury. *Ann.*
Cas. 1912D, 945; *Ann. Cas.* 1915D,
161.

Appearance of private or substituted
prosecutor before grand jury as
affecting indictment. *Ann. Cas.*
1912D, 184; 33 *L. R. A. (N. S.)*
568.

§ 2033. Duties of Grand Jury.

The grand jury shall inquire into the cases of parties in custody or under bail, charged with commission of offenses against the laws of this state, and duly returned by a committing magistrate, or upon a complaint sworn to before an officer authorized to administer oaths and presented by the prosecuting attorney, or under the instructions of the court. [Cf. L. '54, p. 111, § 53; L. '65, p. 19, § 1; Cd. '81, § 985; L. '91, p. 49, § 15; 2 H. C., § 1213.]

See *infra*, § 2037.

FINDING AND FILING OF INDICTMENT: See Remington's Digest, Ind. & Inf., §§ 5—8.

§ 5. **Persons in Custody Under Information:** State v. Croney, 31 Wash. 122, 71 Pac. 783.

§ 6. **Finding of Grand Jury:** Watts

v. Territory, 1 W. T. 409; McAllister v. Territory, 1 W. T. 360.

§ 7. — **Competency of Jurors and Regularity of Selection and Impanelling:** Yelm Jim v. Territory, 1 W. T. 63.

§ 8. **Successive Indictments for Same Offense:** State v. Freidrich, 4 Wash. 204, 29 Pac. 1066, 30 Pac. 328, 31 Pac. 332.

§ 2034. Jurors to Communicate Personal Knowledge of Offenses.

If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow-jurors, who may thereupon investigate the same, if a majority so order. [Cd. '81, § 986; 2 H. C., § 1214.]

§ 2035. Complainant not to be Present, When.

No complainant who may institute a prosecution shall be competent to be present at the deliberations of a grand jury, or vote for the finding of an indictment. [L. '65, p. 19, § 1; Cd. '81, § 987; 2 H. C., § 1215.]

Complainant as member of grand jury as affecting validity of indictment. Ann. Cas. 1912B, 738;

Ann. Cas. 1916C, 424; Ann. Cas. 1917E, 619.

§ 2036. Malicious and Frivolous Prosecution—Costs.

Where a grand jury ignore a bill of indictment, they shall also find whether the prosecution is malicious and frivolous, and find whether the complainant or county shall pay the costs, which shall be returned with their proceedings into open court. [L. '65, p. 20, § 2; Cd. '81, § 988; 2 H. C., § 1216.]

§ 2037. Inquiry into Persons in Prison, etc.

The grand jury shall especially inquire as to the offense of any person confined in prison on a criminal charge; into the condition and mismanagement of the public prisons in the county; into the willful misconduct in office of public officers; and shall in their discretion examine the public records of the county. [L. '54, p. 111, § 53; Cd. '81, § 989; 2 H. C., § 1217.]

See supra, § 2033.

§ 2038. Duty to Hear Evidence.

The grand jury are not bound to hear evidence for the defendant; but it is their duty to weigh all the evidence submitted to them, and when they have reason to believe that other evidence within their reach will explain away the charge, they should order such evidence to be produced, and for that purpose may cause process to issue for the witnesses. [L. '54, p. 111, § 54; Cd. '81, § 990; 2 H. C., § 1218.]

§ 2039. Fact of Indictment Found not to be Disclosed, When.

No grand jury shall disclose the fact that an indictment for a felony has been found against any person not in custody or under

recognizance until such person has been arrested. [L. '54, p. 111, § 56; Cd. '81, § 991; 2 H. C., § 1219.]

See *infra*, § 2046, secrecy of indictment.

See *infra*, § 2378, penalty for violating secrecy.

Disclosure of proceedings by grand juror as contempt of court. 15 *Ann. Cas.* 257; 17 L. R. A. (N. S.) 1049.

§ 2040. Secrecy of Proceedings, Charge as to.

No grand juror shall be allowed to state or to testify in any court in what manner he or any member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question, or what question was before them; and in charging the grand jury the court shall remind them of the provisions of this and the preceding sections. [L. '54, p. 111, § 57; Cd. '81, § 992; 2 H. C., § 1220.]

Cited in 8 Wash. 464.

§ 2041. Grand Jury may be Resummoned, When.

Whenever the grand jury shall have been dismissed, they may be summoned to attend again, if necessary; and if a full jury do not attend, the number may be completed from the bystanders. [L. '54, p. 111, § 58; Cd. '81, § 993; 2 H. C., § 1221.]

Power of court to reassemble grand jury after discharge. 17 *Ann. Cas.* 656; *Ann. Cas.* 1916C, 207.

CHAPTER XIII.

FINDING AND PRESENTMENT OF INDICTMENTS.

§ 2042. Twelve Jurors must Concur—Indorsement.

An indictment cannot be found without the concurrence of at least twelve grand jurors, and when so found, it must be indorsed "a true bill," and such indorsement, signed by the foreman of the jury. [Cf. L. '54, p. 111, §§ 55, 59; L. '69, p. 238, § 173; Cd. '81, § 994; 2 H. C., § 1223.]

Where the grand jury come into open court and present a bill duly indorsed and signed by their foreman, it is evidence of the most satisfactory kind that twelve of their number concurred in

finding the bill: *Watts v. Territory*, 1 W. T. 409.

Number of jurors necessary to constitute quorum. *Ann. Cas.* 1912C, 30; *Ann. Cas.* 1918A, 106; 28 L. R. A. 33.

§ 2043. Names of Witnesses Indorsed, Defendant Entitled to Copy.

When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or indorsed thereon, before it is presented to the court, and the clerk of the court must, within one day after demand made, furnish the defendant, or his counsel, a copy thereof without charge, or permit the defendant's counsel, or the clerk of such counsel to take a copy. [Cf. L. '54, p. 111, § 59; L. '69, p. 239, § 174; Cd. '81, § 995; 2 H. C., § 1223.]

Cited in 8 Wash. 233; 67 Wash. 22.

The mandate of the Constitution, Article I, § 22, is sufficiently complied with when the accused is given the complaint, and told to make a copy of it if he chooses: *State v. White*, 8 Wash. 230, 35 Pac. 1100.

The accused is not a "witness" within this section and section 2099, requiring

the names of witnesses examined before the grand jury to be indorsed on the indictment, where the accused, learning of the investigation, was permitted to make a voluntary statement before the grand jury, but the indictment was not based thereon, and no vote was taken after the statement was made: *State v. Kulbe*, 67 Wash. 21, 120 Pac. 510.

§ 2044. Indictment at Instance of Private Prosecutor—Costs.

When an indictment is found at the instance of a private prosecutor, the following must be added to the indorsement required by the preceding section: "Found at the instance of" (here state the name of the person); and in such case, if the prosecution fails, the court trying the cause may award costs against the private prosecutor, if satisfied, from all circumstances, that the prosecution was malicious or without probable cause. [Cd. '81, § 996; 2 H. C., § 1224.]

See *infra*, § 2226, costs against complainant on frivolous or malicious accusation.

This section was intended to cover all criminal cases triable by jury, but the jury has no authority, on acquitting the defendant, to find that the complaint was malicious or without probable cause; and the judgment on such verdict, that complaining witness pay costs of trial and stand committed until costs are paid is void: *Permstick, In re*, 3 Wash. 672, 29 Pac. 350, 28 Am. St. Rep. 80.

Two prominent elements of this section are: (1) that the court, upon failure of prosecution, is to be satisfied from all the circumstances that the action of the complainant was malicious or without probable cause; (2) that the imprisonment until costs are paid is not a part of the judgment there permitted: *Id.*

§ 2045. Custody and Inspection of.

An indictment, when found by the grand jury, must be presented by their foreman, in their presence, to the court and filed by the clerk, and remain in his office as a public record; but if the defendant has not been held to answer the charge, neither the indictment, nor any order or process in relation thereto, must be inspected by any person other than the judge of the court, or an officer thereof, in the discharge of a duty concerning the same, until after the arrest of the defendant. [L. '69, p. 239, § 175; Cd. '81, § 997; 2 H. C., § 1225.]

§ 2046. Secrecy as to Indictment.

No grand juror or officer of the court must disclose any fact concerning such indictment while it is not subject to public inspection; and a violation of this section or the foregoing section is punishable as a contempt. [L. '69, p. 239, § 176; Cd. '81, § 998; 2 H. C., § 1226.]

See *supra*, § 2039, grand jury not to disclose.

See *infra*, § 2378, penalty for violating secrecy.

§ 2047. Indictment Found "Not a True Bill," Filing, etc.

When a person has been held to answer a criminal charge, and the indictment in relation thereto is not found a "true bill," it must be indorsed "not a true bill," which indorsement must be signed by the foreman, and presented to the court and filed with the clerk, and remain a public record; but in the case of an indictment not found "a true bill," against a person not so held, the same, together with

the minutes of the evidence in relation thereto, must be destroyed by the grand jury. [L. '69, p. 239, § 177; Cd. '81, § 999; 2 H. C., § 1227.]

§ 2048. Effect of Finding "Not a True Bill."

When an indictment indorsed "not a true bill" has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury, or made the cause of an information, unless the court so order. [Cf. L. '69, p. 239, § 178; Cd. '81, § 1000; L. '91, p. 49, § 16; 2 H. C., § 1228.]

This section is not intended to confer any right upon the defendant, but simply to expedite the business of the court, subject to its discretion: *Lybarger v. State*, 2 Wash. 552, 27 Pac. 449, 1029.

§ 2049. Presentment Defined.

A presentment is an informal statement of facts, for the purpose of obtaining the advice of the court as to the law thereon. It is made by the foreman, in the presence of the grand jury, and with the concurrence of twelve of their number. A presentment is not to be filed in court, or preserved beyond the sitting of the grand jury. [Cf. L. '69, p. 239, § 179; Cd. '81, § 1001; L. '91, p. 49, § 17; 2 H. C., § 1229.]

§ 2050. Information—Filing, Indorsement, etc.

All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and indorse thereon the names of the witnesses known to him at the time of filing the same, and at such time before the trial of any case as the court may, by rule or otherwise, prescribe he shall indorse thereon the names of such other witnesses as shall then be known to him; and said court shall possess and may exercise the same powers and jurisdiction to hear, try, and determine all such prosecutions upon information, to issue writs and process, and do all other acts therein, as it possesses and may exercise in cases of like prosecutions upon indictments. [L. '90, p. 101, § 2; 2 H. C., § 1230.]

Cited in 3 Wash. 173; 7 Wash. 309, 465, 509; 14 Wash. 411; 30 Wash. 139; 33 Wash. 326, 327; 54 Wash. 167; 88 Wash. 213; 97 Wash. 404.

FILING AND FORMAL REQUISITES OF INFORMATION: See Remington's Digest, Ind. & Inf., §§ 13—18.

§ 13. Jurisdiction of Court in General: *State v. Nelson*, 13 Wash. 523, 43 Pac. 637; *State v. Melvern*, 32 Wash. 7, 72 Pac. 489.

§ 14. — Necessity of Averments Showing Jurisdiction: *State v. Anderson*, 5 Wash. 350, 31 Pac. 969; *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *State v. Munson*, 7 Wash. 239, 34 Pac. 932; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121.

§ 15. Authority to File: *Hammond v. State*, 3 Wash. 171, 28 Pac. 334; *State v. Riddell*, 33 Wash. 324, 74 Pac. 477.

§ 16. Preliminary Proceedings: *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115; *State v. De Paoli*, 24 Wash. 71, 63 Pac. 1102.

§ 17. Time of Filing: *State v. Lewis*, 35 Wash. 261, 77 Pac. 198; *State v. Seright*, 48 Wash. 307, 93 Pac. 521; *State v. Fletcher*, 50 Wash. 303, 97 Pac. 242; *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 233.

§ 18. Loss or Destruction: *State v. McFadden*, 42 Wash. 1, 84 Pac. 401.

Signature: See Remington's Digest, Ind. & Inf., § 22; *Hammond v. State*, 3 Wash. 171, 28 Pac. 334; *State v. Riddell*, 33 Wash. 324, 74 Pac. 477.

Indorsement of Witnesses on Information: See Remington's Digest, Crim. Law, §§ 197—200.

§ 197. Time for Making Indorsement: *State v. Lee Doon*, 7 Wash. 308, 34 Pac.

1103; *State v. Lewis*, 31 Wash. 515, 72 Pac. 121; *State v. Regan*, 8 Wash. 506, 36 Pac. 472; *State v. Holmes*, 12 Wash. 169, 40 Pac. 736, 41 Pac. 887; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Kelly*, 14 Wash. 702, 45 Pac. 38; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897; *State v. Le Pitre*, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922; *State v. Quinn*, 56 Wash. 295, 105 Pac. 818; *State v. Carpenter*, 56 Wash. 670, 106 Pac. 206; *State v. Gray*, 61 Wash. 549, 112 Pac. 641; *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

See, also, *State v. Lowery*, 104 Wash.

520, 177 Pac. 355; *State v. Harding*, 108 Wash. 606, 185 Pac. 579.

§ 198. — **Correction or Amendment of Indorsement:** *State v. Everitt*, 14 Wash. 574, 45 Pac. 150; *State v. McGonigle*, 14 Wash. 594, 45 Pac. 20; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247.

§ 199. — **Effect of Failure to Indorse Generally:** *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367; *State v. Regan*, 8 Wash. 506, 36 Pac. 472.

§ 200. — **Competency of Witness not Indorsed:** *State v. Phelps*, 22 Wash. 181, 60 Pac. 134; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *State v. Sexton*, 37 Wash. 110, 79 Pac. 634.

§ 2051. Verification of Information.

All informations shall be verified by the oath of the prosecuting attorney, complainant, or some other person. [L. '91, p. 49, § 18; 2 H. C., § 1231.]

Cited in 3 Wash. 174; 6 Wash. 643; 20 Wash. 514; 66 Wash. 627; 94 Wash. 144.

Verification or Accompanying Affidavit: See *Remington's Digest*, Ind. & Inf., §§ 23—25. **Sufficiency in General:** *Hammond v. State*, 3 Wash. 171, 28 Pac. 334; *State v. Devine*, 6 Wash. 587, 34 Pac. 154; *State v. Rosener*, 8 Wash. 42, 35 Pac. 357; *State v. Regan*, 8 Wash. 506, 36 Pac. 472; *State v. White*, 12 Wash. 417, 41 Pac. 182; *State v. Clark*, 58 Wash. 128, 107 Pac. 1347; *State v.*

Pepoon, 62 Wash. 635, 114 Pac. 449; *State v. Hewett*, 103 Wash. 52, 173 Pac. 726; *State v. Cronin*, 20 Wash. 512, 56 Pac. 26.

Waiver of verification of indictment or information. 31 L. R. A. (N. S.) 805.

Amendment of verification of indictment to cure defect for which motion in arrest of judgment has been made. 67 L. R. A. 182.

§ 2052. Commitment or Recognizance of Defendant Held to Answer.

Any person who may according to law be committed to jail, or become recognized, or held to bail with sureties for his appearance in court to answer to any indictment, may in like manner so be committed to jail, or become recognized and held to bail for his appearance to answer to any information or indictment, as the case may be. [L. '90, p. 101, § 5; 2 H. C., § 1587.]

See *supra*, § 1957, recognizance, when and how taken.

Cash in lieu of bail, see § 1957½, *supra*.

§ 2053. Duty of Prosecuting Attorney Relating to Preliminary Examinations.

It shall be the duty of the prosecuting attorney of the proper county to inquire into and make full examination of all the facts and circumstances connected with any case of preliminary examination, as provided by law, touching the commission of any offense, wherein the offender shall be committed to jail, or become recognized or held to bail; and if the prosecuting attorney shall determine, in any such case, that an information ought not to be filed, he shall make, subscribe, and file with the clerk of the court a statement in writing containing his reasons, in fact and in law, for not filing an information in such case, and such statement shall be filed at and during the session of court at which the

offender shall be held for his appearance: Provided, that in such case, such court may examine such statement, together with the evidence filed in the case, and if, upon such examination, the court shall not be satisfied with such statement, the prosecuting attorney shall be directed by the court to file the proper information, and bring the case to trial. [L. '90, p. 102, § 6; 2 H. C., § 1232.]

Cited in 43 Wash. 20.

CHAPTER XIV.

REQUISITES OF INDICTMENTS AND INFORMATION.

§ 2054. First Pleading.

The first pleading on the part of the state is the indictment or information. [Cf. L. '69, p. 240, § 181; Cd. '81, § 1003; L. '91, p. 49, § 19; 2 H. C., § 1233.]

Cited in 23 Wash. 549.

§ 2055. Contents of Indictment or Information.

The indictment or information must contain,—

1. The title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties;

2. A statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. [Cf. L. '69, p. 240, § 182; Cd. '81, § 1004; L. '91, p. 49, § 20; 2 H. C., § 1234.]

Cited in 9 Wash. 10, 97; 11 Wash. 418; 12 Wash. 353; 15 Wash. 7; 20 Wash. 249; 23 Wash. 549; 34 Wash. 600; 38 Wash. 272; 43 Wash. 121; 48 Wash. 263; 56 Wash. 303; 65 Wash. 598, 607; 75 Wash. 15; 89 Wash. 12; 94 Wash. 315; 102 Wash. 565.

FORMAL REQUISITES OF INDICTMENT: See Remington's Digest, Ind. & Inf., §§ 9—12.

§ 9. **Form and Contents in General:** Bradshaw v. Territory, 3 W. T. 265, 14 Pac. 594.

§ 10. **Commencement—Venue:** Schilling v. Territory, 2 W. T. 283, 5 Pac. 926.

§ 11. **Charge or Body of Indictment:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872.

§ 12. **Conclusion:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; Blanton v. State, 1 Wash. 265, 24 Pac. 439.

An information for horse-stealing, describing the horses as two certain mares of the value of \$200, the property of E., is sufficiently certain and specific to meet the requirements of this section: State v. Shuck, 38 Wash. 270, 80 Pac. 444.

An information charging, in the language of the statute, the accused with

willfully and unlawfully accepting the earnings of one P. W. then and there being a common prostitute, sufficiently charges the offense of accepting the earnings of a prostitute, within the requirements of this section: State v. Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

An information for larceny, which could be readily understood as charging the defendant with unlawfully obtaining a check for \$1,000 from B. by means of false and fraudulent representations and that he received the money thereon with intent to deprive and defraud the owner thereof, is sufficiently definite and certain within this section: State v. Garland, 65 Wash. 666, 118 Pac. 907.

An information for homicide sufficiently describes the manner of killing, under this section, if it states the facts constituting the offense in ordinary language, so that it may be understood by a person of common understanding: State v. Quinn, 56 Wash. 295, 105 Pac. 818.

Power of court to amend indictment as to description of offense. 7 A. L. R. 1535.

Effect of omission of word "did" in indictment. 7 Ann. Cas. 46.

§ 2056. Form of Indictment.

The indictment may be substantially in the following form:—

The State of Washington, v. A — B —.	}	Superior Court of the State of Washington, for the County of —.
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A B is accused by the grand jury of the —, by this indictment, of the crime of (here insert the name of the crime, if it have one, such as treason, murder, arson, manslaughter, or the like; or if it be a crime having no general name, such as libel, assault and battery, and the like, insert a brief description of it as given by law), committed as follows:—

The said A B, on the — day of —, 18—, in the county of —, aforesaid (here set forth the act charged as a crime).

Dated at —, in the county aforesaid, the — day of —, A. D., 18—.

(Signed) C D, Prosecuting Attorney.

(Indorsed) A true bill.

(Signed) E F, Foreman of the Grand Jury.

[Cf. L. '69, p. 240, § 183; Cd. '81, § 1005; L. '91, p. 50, § 21; 2 H. C., § 1235.]

Cited in 9 Wash. 98.

Validity and construction of statute

prescribing form of indictment.
Ann. Cas. 1918C, 551, 569, 574.

§ 2057. Indictment or Information must be Direct and Certain.

The indictment or information must be direct and certain, as it regards:—

1. The party charged;

2. The crime charged; and

3. The particular circumstances of the crime charged, when they are necessary to constitute a complete crime. [Cf. L. '54, p. 112, § 61; L. '69, p. 241, § 184; Cd. '81, § 1006; L. '91, p. 50, § 22; 2 H. C., § 1236.]

Cited in 4 Wash. 107; 15 Wash. 444; 21 Wash. 356; 22 Wash. 5; 27 Wash. 461, 464; 34 Wash. 600; 56 Wash. 623; 65 Wash. 598; 74 Wash. 518; 75 Wash. 16; 84 Wash. 441; 85 Wash. 354; 90 Wash. 23; 99 Wash. 212; 102 Wash. 565; 105 Wash. 126.

Requirement That Indictment be Direct and Certain: See notes to section 2065, *infra*.

See, also, State v. Roberts, 22 Wash. 1, 60 Pac. 65; State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Eaid, 55 Wash. 302, 104 Pac. 275, 33 L. R. A. (N. S.) 946; State v. Smith, 85 Wash. 352, 148 Pac. 25; State v. Bryant, 90 Wash. 20, 155 Pac. 420; State v. Kelly, 102 Wash. 265, 172 Pac. 1175.

§ 2058. True Name Inserted, When.

When a defendant is designated in the indictment or information by a fictitious or erroneous name, and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted or informed against by the name mentioned in the indictment or information. [Cf. L. '69, p. 241, § 185; Cd. '81, § 1007; L. '91, p. 50, § 23; 2 H. C., § 1237.]

Power of court to correct misnomer in indictment or change name. 1 A. L. R. 1531, 1543.

§ 2059. One Crime to be Charged, and in One Form Only.

The indictment or information must charge but one crime, and in one form only, except that where the crime may be committed by use of different means, the indictment or information may allege the means in the alternative. [Cf. L. '69, p. 241, § 186; Cd. '81, § 1008; L. '91, p. 50, § 24; 2 H. C., § 1238.]

Cited in 7 Wash. 463; 15 Wash. 444; 20 Wash. 164; 27 Wash. 464; 32 Wash. 302; 42 Wash. 674; 51 Wash. 226; 56 Wash. 86, 471, 623, 626; 61 Wash. 534; 74 Wash. 518; 84 Wash. 439; 85 Wash. 345; 89 Wash. 13; 99 Wash. 212.

Joinder of Parties: See Remington's Digest, Ind. & Inf., § 71; State v. Nelson, 39 Wash. 221, 81 Pac. 721.

Duplicity: See Remington's Digest, Ind. & Inf., §§ 72—77. **Continuing Offenses and Offenses on Different Days:** State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Leonard, 56 Wash. 83, 105 Pac. 163, 21 Ann. Cas. 69.

§ 73. — Series of Acts Constituting One or Same Offense: State v. Ilomaki, 40 Wash. 629, 82 Pac. 873; State v. Wapenstein, 67 Wash. 502, 121 Pac. 989; State v. Wingard, 92 Wash. 219, 158 Pac. 725; State v. Gipson, 92 Wash. 646, 159 Pac. 792.

An indictment for obtaining money by false pretenses in forging and presenting thirteen false claims is not duplicitous: State v. Callaghan, 107 Wash. 486, 182 Pac. 594.

§ 74. — Several Modes or Means of Committing Same Offense: State v. Hol-edger, 15 Wash. 443, 46 Pac. 652; State v. Newton, 29 Wash. 373, 70 Pac. 31; State v. Pettit, 74 Wash. 510, 133 Pac. 1014.

§ 75. — Single Act Constituting Two or More Offenses: State v. John Port Townsend, 7 Wash. 462, 35 Pac. 367;

State v. Regan, 8 Wash. 506, 36 Pac. 472; State v. Isensee, 12 Wash. 254, 40 Pac. 985; State v. McCormick, 20 Wash. 94, 54 Pac. 764; State v. Michel, 20 Wash. 162, 54 Pac. 995; State v. Klein, 38 Wash. 475, 80 Pac. 770; State v. Nelson, 39 Wash. 221, 81 Pac. 721; State v. McCormick, 56 Wash. 469, 105 Pac. 1037; State v. Klein, 94 Wash. 212, 162 Pac. 52; State v. Roberts, 100 Wash. 493, 171 Pac. 225.

§ 76. — Different Offenses Parts of Same Transaction: State v. Elswood, 15 Wash. 453, 46 Pac. 727; State v. Priest, 32 Wash. 74, 72 Pac. 1024; State v. Adams, 41 Wash. 552, 83 Pac. 1108; State v. Williams, 43 Wash. 505, 86 Pac. 847; State v. Laws, 61 Wash. 533, 112 Pac. 488; State v. Brummett, 98 Wash. 182, 167 Pac. 120.

§ 77. — Offenses of Same Nature Against or Relative to Different Persons, Property or Things: Territory v. Heywood, 2 W. T. 180, 2 Pac. 189; State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Butts, 42 Wash. 455, 85 Pac. 33; State v. Columbus, 74 Wash. 290, 133 Pac. 455; State v. Makovsky, 67 Wash. 7, 120 Pac. 513; Seattle v. Molin, 99 Wash. 210, 169 Pac. 318; State v. Dodd, 84 Wash. 436, 147 Pac. 9.

Election: See Remington's Digest, Ind. & Inf., § 78; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Osborne, 39 Wash. 548, 81 Pac. 1096; State v. Marion, 68 Wash. 675, 124 Pac. 125.

§ 2060. Statement as to Time When Offense Committed.

The precise time at which the crime was committed need not be stated in the indictment or information; but it may be alleged to have been committed at any time before the finding of the indictment or the filing of the information, and within the time in which an action may be commenced therefor, except where the time is a material ingredient in the crime. [Cf. L. '69, p. 241, § 187; Cd. '81, § 1009; L. '91, p. 51, § 25; 2 H. C., § 1239.]

Cited in 13 Wash. 338; 30 Wash. 16; 35 Wash. 154; 39 Wash. 551; 56 Wash. 385; 73 Wash. 433; 87 Wash. 474.

Time of Offense: See Remington's Digest, Ind. & Inf., §§ 40—43. **Necessity of Averments as to Time:** State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523; State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

§ 41. — Sufficiency of Averments: State v. Miller, 3 Wash. 131, 28 Pac. 375; State v. Smith, 19 Wash. 376, 53 Pac. 338; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Myrberg, 56 Wash. 384, 105 Pac. 622.

§ 42. — Certainty: State v. Bergfeldt, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979; State v. Nelson, 39 Wash. 221, 81 Pac. 721.

§ 43. — Statutes Dispensing With Averments as to Time: *State v. Williams*, 13 Wash. 335, 43 Pac. 15.

Failure to prove that a crime was committed on the particular day alleged in the information is not a fatal variance, since, under this section, it is sufficient if the commission is proved to have been within the time in which an action may be commenced therefor: *State v. Anderson*, 30 Wash. 14, 70 Pac. 104; *State v. Osborne*, 39 Wash. 548, 81 Pac. 1096.

Power of court to correct date of offense in indictment. 7 **A. L. R.** 1531, 1543.

Validity of indictment or information fixing commission of crime on future or impossible date. 6 **Ann. Cas.** 854; **Ann. Cas.** 1913B, 1043.

Sufficiency of allegation in indictment of commission of crime on blank date. 19 **Ann. Cas.** 930.

§ 2061. Statement as to Person Injured or Intended to be.

When the crime involves the commission of or an attempt to commit a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material. [L. '69, p. 241, § 188; Cd. '81, § 1010; 2 H. C., § 1240.]

Cited in 35 Wash. 154; 67 Wash. 397.

Designation of Persons Other Than Accused: See *Remington's Digest*, Ind. & Inf., § 97; *State v. Oleson*, 35 Wash. 149, 76 Pac. 686; *State v. Johnson*, 36 Wash. 294, 78 Pac. 903; *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622; *State v. Ewing*, 67 Wash. 395, 121 Pac. 834.

It is not necessary in charging one with the crime of employing a female in a place where intoxicating liquors are sold to allege in the information the name of the female so employed: *State v. Conzidine*, 16 Wash. 358, 47 Pac. 755.

Under an information against a bank officer for receiving, after the insolvency of the bank, a deposit from the B. G. Co., a corporation, it is a fatal variance to prove a deposit by B. & S., a copartnership, consisting of the incorpora-

tion of the B. G. Co., which was not in existence at the time alleged, and the fact that the corporation was the successor of the copartnership does not bring the two names within the principle of *idem sonans*: *State v. Oleson*, 35 Wash. 149, 76 Pac. 686.

The fact that the bank was insolvent at a particular time, and that a deposit of \$113 was made at that time, does not identify the act of such deposit with certainty, without the name of the depositor, within the provision of this section: *State v. Oleson*, 35 Wash. 149, 76 Pac. 686.

Necessity in indictment of naming person to whom forged instrument was passed. 31 **L. R. A. (N. S.)** 1046.

§ 2062. Animal—Description—Sufficiency.

When the crime involves the taking of or injury to an animal, the indictment or information is sufficiently certain in that respect if it describes the animal by the common name of its class. [Cf. L. '69, p. 241, § 189; Cd. '81, § 1011; L. '91, p. 51, § 26; 2 H. C., § 1241.]

§ 2063. Construction of Words and Phrases.

The words used in an indictment or information must be construed in their usual acceptation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning. [Cf. L. '69, p. 241, § 190; Cd. '81, § 1012; L. '91, p. 51, § 27; 2 H. C., § 1242.]

Cited in 23 Wash. 549.

Meaning of "about" as used in indictment or information with ref-

erence to quantity. **Ann. Cas.** 1918D, 706.

Meaning of word "tenor" as used in indictment. **Ann. Cas.** 1914B, 661.

§ 2064. Words of the Statute Need not be Strictly Pursued.

Words used in a statute to define a crime need not be strictly pursued in the indictment or information, but other words, conveying

the same meaning, may be used. [Cf. L. '69, p. 241, § 191; Cd. '81, § 1013; L. '91, p. 51, § 28; 2 H. C., § 1243.]

Cited in 8 Wash. 464; 11 Wash. 518; 12 Wash. 463; 21 Wash. 272; 22 Wash. 276; 31 Wash. 247; 55 Wash. 305; 65 Wash. 598.

See notes to § 2065, *infra*.

"To kill and murder" is necessarily an equivalent allegation to the phrase "to inflict bodily injury," and comes within the meaning of this section: *State v. Young*, 22 Wash. 273, 60 Pac. 650.

Under this section, allowing words con-

veying the same meaning as the statutory words to be used, the word "malicious" is supplied by the words "of his premeditated malice": *State v. Ackles*, 8 Wash. 462, 36 Pac. 597.

Sufficiency of Substituted Words: See *Remington's Digest, Ind. & Inf.*, § 62; *State v. Bohn*, 19 Wash. 36, 52 Pac. 325; *State v. Clayborne*, 14 Wash. 622, 45 Pac. 303; *State v. Robey*, 74 Wash. 562, 134 Pac. 174.

§ 2065. Requisites of Indictments, etc.

The indictment or information is sufficient if it can be understood therefrom,—

1. That it is entitled in a court having authority to receive;
2. That it was found by a grand jury of the county in which the court was held;
3. That the defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;
4. That the crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable therein;
5. That the crime was committed at some time previous to the finding of the indictment, or filing of the information, and within the time limited by law for the commencement of an action therefor;
6. That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended;
7. [That] the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case. [L. '69, p. 242, § 192; Cd. '81, § 1014; L. '91, p. 51, § 29; 2 H. C., § 1244.]

Cited in 4 Wash. 107; 9 Wash. 99, 403; 10 Wash. 98; 11 Wash. 419; 13 Wash. 338; 23 Wash. 550; 29 Wash. 373; 31 Wash. 247, 310; 33 Wash. 346; 51 Wash. 226, 228; 55 Wash. 305; 56 Wash. 626; 75 Wash. 16; 99 Wash. 212; 102 Wash. 565; 103 Wash. 195; 105 Wash. 175.

Formal Requisites of Information—Caption or Title and Conclusion: See *Remington's Digest, Ind. & Inf.*, §§ 20, 21; *State v. Devine*, 6 Wash. 587, 34 Pac. 154; *State v. Gile*, 8 Wash. 12, 35 Pac. 417.

REQUISITES AND SUFFICIENCY OF ACCUSATION: See *Remington's Digest, Ind. & Inf.*, §§ 26—70.

§ 26. **Applicability of Rules of Pleading in General:** *State v. Wright*, 9 Wash. 96, 37 Pac. 313.

§ 27. **Subject Matter of Allegations—Designation of Offense of Grade or Degree Thereof:** *Leschi v. Territory*, 1 W. T. 13; *State v. Power*, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721; *State v. Lewis*, 80 Wash. 532, 141 Pac. 1025.

An information for obtaining money under false pretenses is sufficient where it shows that the money was secured by falsely representing that a tract of forty acres in S. county was subject to homestead entry and that accused could locate the prosecuting witnesses thereon, in view of this and the next section: *State v. Millroy*, 103 Wash. 193, 174 Pac. 10.

§ 28. — **Elements and Incidents of Offense in General:** *Terry v. State*, 1 Wash. 277, 24 Pac. 447; *Armstrong v.*

Van de Vanter, 21 Wash. 682, 59 Pac. 510; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989.

§ 29. — **Matters Judicially Noticed:** Schilling v. Territory, 2 W. T. 283, 5 Pac. 926.

§ 30. — **Matters of Presumption or Implication:** State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Ryan, 34 Wash. 597, 76 Pac. 90; State v. Douette, 31 Wash. 6, 71 Pac. 556; State v. Druxinman, 34 Wash. 257, 75 Pac. 814.

§ 31. — **Matters of Fact or Conclusions:** State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Heath, 57 Wash. 246, 106 Pac. 756.

§ 32. — **Matters of Defense in General:** State v. Halbert, 14 Wash. 306, 44 Pac. 538; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; State v. Lewis, 31 Wash. 515, 72 Pac. 121.

See, also, State v. Cook, 113 Wash. 391, 194 Pac. 401.

§ 33. **Directness and Positiveness:** State v. Krug, 12 Wash. 288, 41 Pac. 126; State v. Guse, 21 Wash. 269, 57 Pac. 831; State v. Dodd, 84 Wash. 436, 147 Pac. 9.

§ 34. **Certainty and Particularity:** State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Costello, 29 Wash. 366, 69 Pac. 1099; State v. Stewart, 32 Wash. 103, 72 Pac. 1026; State v. Bogardus, 36 Wash. 297, 78 Pac. 942; State v. Nelson, 39 Wash. 221, 81 Pac. 721.

See, also, State v. Cook, 113 Wash. 391, 194 Pac. 401.

§ 35. **Disjunctive or Alternative Allegations:** State v. Brookhouse, 10 Wash. 87, 38 Pac. 862; State v. Lewis, 42 Wash. 672, 85 Pac. 668; State v. Pettit, 74 Wash. 510, 133 Pac. 1014; State v. Meyerkamp, 82 Wash. 607, 144 Pac. 942.

§ 36. **Synonymous Words:** State v. Ackles, 8 Wash. 462, 36 Pac. 597; State v. Stuth, 11 Wash. 423, 39 Pac. 665; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

§ 37. **Designation and Description of Accused:** Whitcher v. State, 2 Wash. 286, 26 Pac. 268; State v. Maldonado, 21 Wash. 653, 59 Pac. 489.

§ 38. **Accessories Before the Fact:** State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; State v. Golden, 11 Wash. 422, 39 Pac. 646.

§ 39. **Place of Offense:** Schilling v. Territory, 2 W. T. 283, 5 Pac. 926; State v. Johnson, 4 Wash. 593, 30 Pac. 672; State v. Meyers, 9 Wash. 8, 36 Pac. 1051; State v. Mayberry, 9 Wash. 193, 37 Pac. 384; State v. Williams, 13 Wash. 335, 43 Pac. 15; State v. Baldwin, 15

Wash. 15, 45 Pac. 650; State v. McLain, 43 Wash. 124, 86 Pac. 390.

See, also, State v. Burgess, 111 Wash. 537, 191 Pac. 635.

§ 44. **Intent:** Linbeck v. State, 1 Wash. 336, 25 Pac. 452; State v. Wilson, 9 Wash. 218, 37 Pac. 424; State v. Dolan, 17 Wash. 499, 50 Pac. 472.

§ 45. — **Sufficiency of Averments of Intent:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; State v. Michel, 20 Wash. 162, 54 Pac. 995; State v. Champoux, 33 Wash. 339, 74 Pac. 557; State v. Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

See, also, State v. Shuey, 107 Wash. 437, 181 Pac. 890.

§ 46. **Knowledge or Notice:** McClaine v. Territory, 1 Wash. 345, 25 Pac. 453; State v. Holedger, 15 Wash. 443, 46 Pac. 652; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; State v. Paoli, 24 Wash. 71, 63 Pac. 1102; State v. Ulsemer, 24 Wash. 657, 64 Pac. 800; State v. Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; State v. Zenner, 35 Wash. 249, 77 Pac. 191; State v. Barker, 43 Wash. 69, 86 Pac. 387.

§ 47. **Felonious or Otherwise Unlawful Nature of Act—Necessity of Charging Unlawfulness or Wrongfulness in General:** State v. Johnny Tommy, 19 Wash. 27, 53 Pac. 157.

§ 48. — **Necessity of Use of Word "Felonious":** Watts v. Territory, 1 W. T. 409; State v. Day, 4 Wash. 104, 29 Pac. 984.

Under sections 2064, 2065, it is not necessary to use the word "feloniously" in an information charging the crime of grand larceny: State v. Smith, 31 Wash. 245, 71 Pac. 767.

§ 49. **Act or Omission Constituting Offense—In General:** State v. Carey, 4 Wash. 424, 30 Pac. 729.

§ 50. — **Specific Facts:** State v. Smith, 3 Wash. 14, 27 Pac. 1028; State v. See, 4 Wash. 344, 30 Pac. 327, 746; State v. McLain, 43 Wash. 124, 86 Pac. 388; State v. Messner, 43 Wash. 206, 86 Pac. 636.

§ 51. — **Circumstances Making Act or Omission Criminal:** State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Roberts, 22 Wash. 1, 60 Pac. 65; State v. Brown, 6 Wash. 609, 34 Pac. 133; State v. Bogardus, 36 Wash. 297, 78 Pac. 942.

§ 52. **Designation of Person Injured or Others:** Foster v. Territory, 1 Wash. 411, 25 Pac. 459; State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Bodekar, 11 Wash. 417, 39 Pac. 645; State v. Con-

sidine, 16 Wash. 358, 47 Pac. 755; State v. Crane, 88 Wash. 210, 152 Pac. 989.

§ 53. Description of Real Property: State v. Biles, 6 Wash. 186, 33 Pac. 347; State v. Dolson, 22 Wash. 259, 60 Pac. 653.

§ 54. Description of Personal Property: State v. Brookhouse, 10 Wash. 87, 38 Pac. 862; State v. Shuck, 38 Wash. 270, 80 Pac. 444.

§ 55. Quantity or Value of Personal Property: McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; State v. Hanshew, 3 Wash. 12, 27 Pac. 1029; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Palmer, 20 Wash. 207, 54 Pac. 1121; State v. Brew, 4 Wash. 95, 29 Pac. 762, 31 Am. St. Rep. 904; State v. Blanchard, 11 Wash. 116, 39 Pac. 377; State v. Johnson, 19 Wash. 410, 53 Pac. 667; State v. Ryan, 34 Wash. 597, 76 Pac. 90; State v. Young, 13 Wash. 584, 43 Pac. 881.

§ 56. Ownership, Possession or Custody of Property: State v. Johnson, 4 Wash. 593, 30 Pac. 672; State v. Dengel, 24 Wash. 49, 63 Pac. 1104; State v. Morgan, 31 Wash. 226, 71 Pac. 723; State v. Randall, 36 Wash. 438, 78 Pac. 998.

See, also, State v. Cook, 113 Wash. 391, 194 Pac. 401.

§ 57. — Sufficiency of Averments: State v. Kasper, 5 Wash. 174, 31 Pac. 636; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Coss, 12 Wash. 673, 42 Pac. 127; State v. Riddell, 33 Wash. 324, 74 Pac. 477.

§ 58. Description of or Setting Forth Written or Printed Matter: White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Wright, 9 Wash. 96, 37 Pac. 313; State v. Ryan, 34 Wash. 597, 76 Pac. 90.

§ 59. Statutory Offenses—Elements and Incidents of Offense in General: State v. Brown, 7 Wash. 10, 34 Pac. 132; State v. Henderson, 15 Wash. 593, 47 Pac. 19.

§ 60. Sufficiency of Averments in Language of Statute: Foster v. Territory, 1 Wash. 411, 25 Pac. 459; Watts v. Territory, 1 W. T. 409; State v. Day, 4 Wash. 104, 29 Pac. 984; State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Reis, 9 Wash. 329, 37 Pac. 452; State v. Turner, 10 Wash. 94, 38 Pac. 864; State v. Phelps, 22 Wash. 181, 60 Pac. 134; State v. Levan, 23 Wash. 547, 63 Pac. 202; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Ryan, 34 Wash. 597, 76 Pac. 90; State v. Bogardus, 36 Wash. 297, 78 Pac. 942; State v. Smith, 40 Wash. 615, 82 Pac. 918, 5 Ann. Cas. 686; State v. Lewis, 42 Wash. 672, 85 Pac. 668; State v. Burns, 54 Wash. 113, 102 Pac. 886; State v. Jahns, 61 Wash. 636, 112 Pac. 747; State v. Sullivan, 97 Wash.

639, 166 Pac. 1123; State v. Austin, 103 Wash. 63, 173 Pac. 725; State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Womack, 4 Wash. 19, 29 Pac. 929; State v. Regan, 8 Wash. 506, 36 Pac. 472; State v. Wright, 9 Wash. 96, 37 Pac. 313; State v. Whiteman, 9 Wash. 402, 37 Pac. 659; State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Bokien, 44 Wash. 403, 44 Pac. 889; State v. Whitworth, 30 Wash. 47, 70 Pac. 254; State v. Smith, 31 Wash. 245, 71 Pac. 767; State v. Druxinman, 34 Wash. 257, 75 Pac. 814; State v. Nelson, 39 Wash. 221, 81 Pac. 721; State v. Garland, 65 Wash. 666, 118 Pac. 907; State v. Davis, 43 Wash. 116, 86 Pac. 201; State v. Hall, 54 Wash. 142, 102 Pac. 888; State v. Jakubowski, 77 Wash. 78, 137 Pac. 448; State v. Williams, 73 Wash. 678, 132 Pac. 415.

See, also, State v. Bachtold, 106 Wash. 550, 180 Pac. 896; State v. Craig, 106 Wash. 630, 180 Pac. 896; State v. Randall, 107 Wash. 695, 182 Pac. 575.

§ 61. — Necessity of Using Exact Words: Leschi v. Territory, 1 W. T. 13; State v. Knowlton, 11 Wash. 512, 39 Pac. 966.

§ 62. — Sufficiency of Substituted Words: State v. Ackles, 8 Wash. 462, 36 Pac. 597; State v. Clayborne, 14 Wash. 622, 45 Pac. 303; State v. Bohn, 19 Wash. 36, 52 Pac. 325; State v. Young, 22 Wash. 273, 60 Pac. 650; State v. Robey, 74 Wash. 562, 134 Pac. 174.

§ 63. — Particular Offenses: Schilling v. Territory, 2 W. T. 283, 5 Pac. 926; State v. Wilson, 9 Wash. 16, 36 Pac. 967; Foster v. Territory, 1 Wash. 416, 25 Pac. 459; State v. Reis, 9 Wash. 329, 37 Pac. 452; State v. Turner, 10 Wash. 94, 38 Pac. 864; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Bogardus, 36 Wash. 297, 78 Pac. 942; State v. Romans, 21 Wash. 284, 57 Pac. 819; State v. Phelps, 22 Wash. 181, 60 Pac. 134; State v. Ryan, 34 Wash. 597, 76 Pac. 90; State v. Smith, 40 Wash. 615, 82 Pac. 918, 5 Ann. Cas. 686.

§ 64. — Validity as Charge of Offense at Common Law: Bradshaw v. Territory, 3 W. T. 265, 14 Pac. 594; State v. Place, 5 Wash. 773, 32 Pac. 736.

§ 65. Attempts: State v. Womack, 4 Wash. 19, 29 Pac. 939; State v. Garbe, 34 Wash. 395, 75 Pac. 993; State v. Baker, 69 Wash. 589, 125 Pac. 1016; State v. Richards, 8 Wash. 160, 152 Pac. 720.

§ 66. Solicitation: State v. Butler, 8 Wash. 194, 35 Pac. 1093, 40 Am. St. Rep. 900, 25 L. R. A. 434.

§ 68. — Matter of Description: McClaine v. Territory, 1 Wash. 345, 25 Pac. 453; State v. Meyers, 9 Wash. 8, 36 Pac. 1051; State v. Kyle, 14 Wash. 550, 45 Pac. 147.

§ 69. **Bill of Particulars:** State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Lewis, 31 Wash. 515, 72 Pac. 121; State v. Bogardus, 36 Wash. 297, 78 Pac. 942.

§ 70. **Variance from Preliminary Complaint or Warrant:** State v. Myers, 8 Wash. 177, 35 Pac. 580.

AMENDMENT: See Remington's Digest, Ind. & Inf., § 88; State v. Van Cleve, 5 Wash. 642, 32 Pac. 461; State v. Lyts, 25 Wash. 347, 65 Pac. 530; State v. Garland, 65 Wash. 666, 118 Pac. 907;

State v. Phillips, 65 Wash. 324, 118 Pac. 43; State v. Hamshaw, 61 Wash. 390, 112 Pac. 379; State v. Bryant, 90 Wash. 20, 155 Pac. 420; Seattle v. Savage, 103 Wash. 71, 174 Pac. 1183; State v. Koerner, 103 Wash. 516, 175 Pac. 175.

Necessity of averment in indictment negating exception in statute upon which prosecution is based. 6 Ann. Cas. 726; 13 Ann. Cas. 364; Ann. Cas. 1913B, 135.

Power of court to amend indictment. 7 A. L. R. 1516.

§ 2066. Former Defects or Imperfections, How Regarded.

No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections:—

1. For want of an allegation of the time or place of any material fact, when the time and place have been once stated;

2. For the omission of any of the following allegations, namely: "With force and arms," "contrary to the form of the statute or the statutes," or "against the peace and dignity of the state";

3. For the omission to allege that the grand jury was impaneled, sworn, or charged;

4. For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor

5. For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. [Cf. L. '69, p. 242, § 193; Cd. '81, § 1015; L. '91, p. 52, § 30; 2 H. C., § 1245.]

Cited in 9 Wash. 99; 29 Wash. 373; 31 Wash. 248; 42 Wash. 674; 49 Wash. 294; 65 Wash. 598; 94 Wash. 315; 103 Wash. 195; 105 Wash. 175.

Surplusage and Unnecessary Matter—In General: See Remington's Digest, Ind. & Inf., § 67; White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Ackles, 8 Wash. 462, 36 Pac. 597; State v. Bohn, 19 Wash. 36, 52 Pac. 325; State v. Fetterly, 33 Wash. 599, 74 Pac. 810; State v. Garbe, 34 Wash. 395, 75 Pac. 993; State v. Ferrato, 72 Wash. 112, 129 Pac. 898.

WAIVER OF DEFECTS AND OBJECTIONS, AND AIDER BY VERDICT: See Remington's Digest, Ind. & Inf., §§ 107—113. **Defects and Objections Which may be Cured or Waived:** Territory v. Heywood, 2 W. T. 180, 2 Pac. 189; State v. Snider, 32 Wash. 299, 73 Pac. 355; State v. Strange, 50 Wash. 321, 97 Pac. 233; State v. McBride, 72 Wash. 390, 130 Pac. 486.

§ 108. — **Objections Relative to Verification:** Hammond v. State, 3 Wash. 171, 28 Pac. 334; State v. Stone, 66 Wash. 625, 120 Pac. 76.

§ 109. **Aider by Verdict:** State v. Hanshew, 3 Wash. 12, 27 Pac. 1029; State v. Carey, 4 Wash. 424, 30 Pac. 729.

§ 110. — **Defects Cured:** State v. Hanshew, 3 Wash. 12, 27 Pac. 1029.

§ 111. — **Insufficiency of Accusation in General:** State v. Anderson, 30 Wash. 14, 70 Pac. 104; State v. Hall, 54 Wash. 142, 102 Pac. 888; State v. Ray, 62 Wash. 582, 114 Pac. 439; State v. Wingard, 92 Wash. 219, 158 Pac. 725.

See, also, State v. Anderson, 107 Wash. 336, 181 Pac. 696, 185 Pac. 624.

§ 112. — **Objections on the Ground of Variance:** State v. Brown, 6 Wash. 609, 34 Pac. 133.

§ 113. — **Verdict on Good and Bad Counts:** Leschi v. Territory, 1 W. T. 13.

§ 2067. Presumptions of Law, etc., Need not be Stated.

Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment or information. [Cf. L. '69, p. 242, § 194; Cd. '81, § 1016; L. '91, p. 52, § 31; 2 H. C., § 1246.]

See Remington's Digest, Ind. & Inf., §§ 29, 30; and notes to section 1065, *supra*.

§ 2068. Judgment, How Plead.

In pleading a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary to state in the indictment or information the facts conferring jurisdiction; but the judgment, determination, or proceeding may be stated to have been duly given or made. The facts conferring jurisdiction, however, must be established on the trial. [Cf. L. '54, p. 112, § 65; L. '69, p. 242, § 195; Cd. '81, § 1017; L. '91, p. 52, § 32; 2 H. C., § 1247.]

§ 2069. Private Statute, How Plead.

In pleading a private statute, or right derived therefrom, it is sufficient to refer, in the indictment or information, to the statute by its title and the day of its passage, and the court must thereupon take judicial notice thereof. [Cf. L. '54, p. 112, § 66; L. '69, p. 243, § 196; Cd. '81, § 1018; L. '91, p. 53, § 33; 2 H. C., § 1248.]

§ 2070. Pleading in Indictment, etc., for Libel.

An indictment or information for libel need not set forth any extrinsic facts, for the purpose of showing the application to the party libeled, of the defamatory matter on which the indictment or information is founded; but it is sufficient to state generally that the same was published concerning him; and the fact that it was so published must be established on the trial. [Cf. L. '69, p. 243, § 197; Cd. '81, §§ 1019, 1232; L. '91, p. 53, § 34; 2 H. C., § 1249.]

§ 2071. Pleading in Forgery Where Instrument Destroyed or Withheld.

When an instrument which is the subject of an indictment or information for forgery has been destroyed or withheld by the act or procurement of the defendant, and the fact of the destruction or withholding is alleged in the indictment or information, and established on the trial, the misdescription of the instrument is immaterial. [Cf. L. '54, p. 113, § 68; Cd. '81, § 1020; L. '91, p. 53, § 35; 2 H. C., § 1250.]

§ 2072. Pleadings in Indictment, etc., for Perjury.

In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before

whom the perjury was committed. [Cf. L. '54, p. 112, § 67; L. '69, p. 243, § 199; Cd. '81, § 1021; L. '91, p. 53, § 36; 2 H. C., § 1251.]

Cited in 31 Wash. 12; 55 Wash. 304.

Jurisdiction and Authority to Administer Oath: See Remington's Digest, Perjury, § 3; State v. Douette, 31 Wash. 6, 71 Pac. 556.

Sufficiency of averment in indictment for perjury as to jurisdiction or authority to administer oath. 32 L. R. A. (N. S.) 142.

§ 2073. Against Several—Conviction or Acquittal Against One or More.

Upon an indictment or information against several defendants, any one or more may be convicted or acquitted. [Cf. L. '69, p. 243, § 200; Cd. '81, § 1022; L. '91, p. 53, § 37; 2 H. C., § 1252.]

§ 2074. Pleading in Indictment, etc., for Larceny or Embezzlement.

In an indictment or information for larceny or embezzlement of money, bank notes, certificates of stock, or valuable securities, or for a conspiracy to cheat or defraud a person of any such property, it is sufficient to allege the larceny or embezzlement, or the conspiracy to cheat and defraud, to be of money, bank notes, certificates of stock, or valuable securities, without specifying the coin, number, denomination, or kind thereof. [Cf. Cd. '81, § 1023; L. '91, p. 53, § 38; 2 H. C., § 1253.]

Cited in 11 Wash. 117; 19 Wash. 54, 412; 20 Wash. 208; 27 Wash. 366.

Under this section an information for grand larceny describing the property taken as "a quantity of money of the value of seventy-seven dollars," is sufficient: State v. Hanshaw, 3 Wash. 12, 27 Pac. 1029; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Palmer, 20 Wash. 207, 54 Pac. 1121.

An information for larceny of a sum of money need not contain a special allegation of the value, etc., under this section: State v. Blanchard, 11 Wash. 116, 39 Pac. 377; State v. Ryan, 34 Wash. 597, 76 Pac. 90.

In an information charging robbery of money it is sufficient to describe the property taken as lawful money, without

any further designation thereof: State v. Johnson, 19 Wash. 410, 53 Pac. 667.

In an information charging the larceny of money a description of the property stolen as being two one hundred dollar bills and one fifty dollar bill, lawful money of the United States, is sufficient: State v. Burns, 19 Wash. 52, 52 Pac. 316.

In an information charging the stealing of money, it is not necessary to set out a particular description of the money, or specify the coin, number or denomination thereof: State v. Palmer, 20 Wash. 207, 54 Pac. 1121.

Form of allegation of ownership of property of a decedent's estate in an indictment or information for larceny. L. R. A. 1916E, 785.

§ 2075. Pleading in Indictment, etc., for Selling Obscene Literature.

An indictment or information for exhibiting, publishing, passing, selling, or offering to sell, or having in possession with such intent, any lewd or obscene book, pamphlet, picture, print, card, paper, or writing, need not set forth any portion of the language used or figures shown upon such book, pamphlet, picture, print, card, papers, or writing, but it is sufficient to state generally the facts of the lewdness or obscenity thereof. [Cf. Cd. '81, § 1024; L. '91, p. 54, § 39; 2 H. C., § 1254.]

§ 2076. Ownership of Property, How Pleaded—Variance.

In prosecutions under the provision of section 3169, where the owner of the property is unknown, such property shall, for the purpose of this code, be deemed and held to be owned by the state of Washington; and in all cases where the indictment or information alleges the state to be the

owner of such property, and the proof on the trial discloses the name of the actual owner, it shall not be deemed a variance, or failure of proof, unless the defendant is the actual owner. [Cd. '81, § 1025; L. '91, p. 54, § 40; 2 H. C., § 1255.]

Sections 2803 and 2814 of Remington & Ballinger's Code, also referred to in this section, are repealed, and the reference is omitted.

See *infra*, § 2156, variance as to ownership of property.

Cited in 46 Wash. 495.

Under this section it is not necessary to allege that the ownership is unknown in an information charging that a horse was the property of the state of Washington: *State v. Eddy*, 46 Wash. 494, 90 Pac. 641.

May an indictment involving the felonious taking of property lay ownership in one in possession of property as agent, bailee, etc. 21 L. E. A. (N. S.) 311.

CHAPTER XV.

PROCEEDINGS BEFORE ARRAIGNMENT.

§ 2077. Warrant of Arrest to Issue, When.

When an indictment is found or an information filed, the court may direct the clerk to issue a warrant for the arrest of the defendant, returnable forthwith; if no order is made, the clerk must issue a warrant within ten days after the indictment is returned into court, or the information filed. [Cf. L. '54, p. 113, § 70; Cd. '81, § 1026; L. '91, p. 54, § 41; 2 H. C., § 1256.]

ARREST ON CRIMINAL CHARGES:
See Remington's Digest, Arrest, §§ 6—8.

§ 6. Authority to Arrest Without Warrant: *State v. Symes*, 20 Wash. 484, 55 Pac. 626; *State v. Surry*, 23 Wash. 655, 63 Pac. 577.

See, also, *Mitchell v. Hughes*, 104 Wash. 231, 176 Pac. 26; *Coldeen v. Reid*, 107 Wash. 508, 182 Pac. 599.

§ 7. Authority Under Warrant: *State v. Yourex*, 30 Wash. 611, 71 Pac. 203.

§ 8. Property in Possession of Prisoner: *Wooding v. Puget Sound Nat. Bank*, 11 Wash. 527, 40 Pac. 223; *State ex rel. Murphy v. Brown*, 83 Wash. 100, 145 Pac. 69.

Affidavits for warrant of arrest based

on information and belief. 1 Ann. Cas. 653; 18 Ann. Cas. 817.

Necessity to prevent escape as condition of right to make arrest without warrant. 2 L. E. A. (N. S.) 730.

Constitutionality of statute authorizing arrest without warrant. 1 A. L. E. 585.

Arrest without warrant of woman soliciting or accosting men. L. E. A. 1917D, 697.

Misnomer in warrant of arrest as affecting apprehension of right person. 8 Ann. Cas. 35.

Time at which an arrest is made as affecting its legality. 9 A. L. E. 1350; 9 Ann. Cas. 623.

§ 2079. Bail to be Indorsed on Warrant.

The court must, at the time of directing the clerk to issue the warrant, fix the amount in which persons charged by indictment are to be held to bail, and the clerk must indorse the amount on the warrant. If no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the court, and such judge must thereon indorse the amount of bail to be required; or if there is no such judge in the county, the clerk may fix the amount of bail. [Cf. L. '54, p. 113, § 72; Cd. 81, § 1028; L. '91, p. 54, § 42; 2 H. C., § 1257.]

§ 2080. Service of Criminal Process.

All criminal process issuing out of the superior court shall be directed to the sheriff of the county in which it is to be served, and be by him.

executed according to law. Where there is no sheriff of a county, or he is disqualified from any cause from discharging any particular duty, it shall be lawful for the officer or person commanding or desiring the discharge of that duty to appoint some suitable person, a citizen of the county, to execute the same: Provided, that final process shall in no case be executed by any other person than the legally authorized officer, or in case he is disqualified, some suitable person appointed by the court, or judge thereof, out of which the process issues, who shall make such appointment in writing, and before such appointment shall take effect, the person so appointed shall give surety to the party interested for the faithful performance of his duties, which bonds of suretyship shall be in writing and approved by the court or judge making the appointment, and be placed on file with the papers in the case. [Cf. L. '54, p. 113, § 71; L. '60, p. 146, § 214; Cd. '81, § 1027; 2 H. C., § 1258.]

§ 2081. Warrant of Arrest by Telegraph.

Whenever any person or persons shall have been indicted or accused on oath of any public offense, or thereof convicted, and a warrant of arrest shall have been issued, the magistrate issuing such warrant, or any judge of the supreme court, or of any superior court, may indorse thereon an order signed by him and authorizing the service thereof by telegraph, and thereupon such warrant and order may be sent by telegraph to any marshal, sheriff, constable or policeman, and on the receipt of the telegraphic copy thereof by any such officer, he shall have the same authority and be under the same obligations to arrest, take into custody, and detain the said person or persons, as if the said original warrant of arrest, with the proper direction for the service thereof, duly indorsed thereon, had been placed in his hands, and the said telegraphic copy shall be entitled to full faith and credit, and have the same force and effect in all courts and places as the original; but prior to indictment and conviction, no such order shall be made by any officer, unless in his judgment there is probable cause to believe the said accused person or persons guilty of the offense charged: Provided, the making of such order, by any officer aforesaid, shall be prima facie evidence of the regularity thereof, and of all the proceedings prior thereto. The original warrant and order, or a copy thereof, certified by the officer making the order, shall be preserved in the telegraph office from which the same is sent, and in telegraphing the same the original or the said certified copy may be used. [L. '66, p. 75, § 16; Cd. '81, § 2357; 1 H. C., § 1557.]

Cited in 20 Wash. 488.

Under the statutes of this state, as at common law, an officer may, without a warrant, arrest a person against whom

he knows there is a charge of felony pending in another county, the rule not being changed by this section: *State v. Symes*, 20 Wash. 484, 55 Pac. 626.

§ 2082. Officer may Break Door, etc., to Make Arrest.

To make an arrest in criminal actions, the officer may break open any outer or inner door or windows of a dwelling-house or other building, or any other inclosure, if, after notice of his office and purpose, he

be refused admittance. [L. '54, p. 129, § 1179; Cd. '81, § 1170; 2 H. C., § 1379.]

Right of officer without warrant to
break doors and arrest on sus-

picion of felony. *Ann. Cas.* 1912B,
574.

§ 2083. Officer to Exhibit Warrant.

The officer making an arrest must inform the defendant that he acts under authority of a warrant, and must also show the warrant if required. [Cf. L. '54, p. 114, § 74; Cd. '81, § 1030; L. '91, p. 55, § 43; 2 H. C., § 1259.]

§ 2084. Force may be Used.

If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest. [L. '54, p. 114, § 75; Cd. '81, § 1031; 2 H. C., § 1260.]

Right of officer to kill misdemeanant in order to effectuate arrest. *4 Ann. Cas.* 760.

§ 2085. Pursuit of Prisoner, Assistance Commanded.

If a person arrested escape or be rescued, the person from whose custody he made his escape or was rescued may immediately pursue and retake him at any time and within any place in the state. To retake the person escaping or rescued, the person pursuing has the same power to command assistance as given in cases of arrest. [L. '54, p. 114, § 76; Cd. '81, § 1032; 2 H. C., § 1261.]

§ 2086. Taking and Entering Recognizance.

Recognizances in criminal proceedings may be taken in open court and entered on the order-book. [L. '54, p. 114, § 77; Cd. '81, § 1033; 2 H. C., § 1262.]

See *supra*, § 1957, recognizance, when and how taken.

§ 2087. Officer may Take Recognizances, etc.

Any officer authorized to execute a warrant in a criminal action may take the recognizance, and justify and improve the bail; he may administer an oath, and examine the bail as to its sufficiency. [L. '54, p. 114, § 78; Cd. '81, § 1034; 2 H. C., § 1263.]

§ 2088. Recognizance Certified and Recorded, Effect of.

Every recognizance taken by any peace officer must be certified by him forthwith to the clerk of the court to which the defendant is recognized. The clerk must thereupon record the recognizance in the order-book, and from the time of filing it has the same effect as if taken in open court. [L. '54, p. 114, § 79; Cd. '81, § 1035; 2 H. C., § 1264.]

§ 2089. Deposit of Money in Lieu of Bail.

The defendant may, in the place of giving bail, deposit with the clerk of the court to which he is held to answer the sum of money mentioned in the order; and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody. [L. '54, p. 114, § 80; Cd. '81, § 1036; 2 H. C., § 1265.]

Deposit of money in lieu of bail in justice court, see *supra*, § 1957½.

Cited in 23 Wash. 324; 107 Wash. 693.

This section applies only to proceedings in the superior court: Kellogg v. Witte, 107 Wash. 691, 182 Pac. 570.

Deposit of money in lieu of bail in criminal cases. 5 Ann. Cas. 153; Ann. Cas. 1913D, 194; Ann. Cas. 1918D, 536.

§ 2090. Forfeiture of Bail.

If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the default to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited. [L. '54, p. 114, § 81; Cd. '81, § 1037; 2 H. C., § 1266.]

Cited in 69 Wash. 615.

§ 2091. Rights of Defendant in Capital Cases.

As soon as may be after the finding of an indictment or the filing of an information for a capital crime, the party charged shall be served with a copy thereof by the sheriff or his deputy, at least twenty-four hours before trial, and shall, on demand upon the clerk by himself or counsel, have a list of the petit jurors returned delivered to him at least twenty-four hours before trial, and shall also have process to summon such witnesses as are necessary to his defense, at the expense of the county. [Cf. L. '54, p. 114, § 82; Cd. '81, § 1038; L. '91, p. 55, § 44; 2 H. C., § 1267.]

Cited in 7 Wash. 509; 42 Wash. 542; 56 Wash. 297.

This section does not entitle the accused to be tried by a jury selected solely from the names so returned, nor to demand that such list be exhausted be-

fore a special venire be issued, where part of such jurors are in attendance upon another department of the court: State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881.

§ 2092. Rights of Defendant Charged With a Felony.

Every person indicted or informed against for an offense for which he may be imprisoned in the penitentiary, if he be under recognizance or in custody to answer for such offense, he or his attorney shall be furnished with a copy of the indictment or information, and of all indorsements thereof, without paying any fees therefor. [Cf. L. '54, p. 115, § 83; Cd. '81, § 1039; L. '91, p. 55, § 45; 2 H. C., § 1268.]

Service of Copy of Indictment or Information: See Remington's Digest, Crim. Law, § 200-1; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Dilley, 44 Wash. 207, 87 Pac. 133; State v. Quinn,

56 Wash. 295, 105 Pac. 818; State v. Newcomb, 58 Wash. 414, 109 Pac. 355.

Service of List of Jurors: See Remington's Digest, Crim. Law, § 201; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881.

CHAPTER XVI.

ARRAIGNMENT, PLEADINGS AND PROCEEDINGS THEREON.

§ 2093. Arraignment of Defendant.

When the indictment or information has been filed the defendant, if he has been arrested, or as soon thereafter as he may be, shall be arraigned thereon before the court. [L. '91, p. 55, § 46; 2 H. C., § 1269.]

Cited in 4 Wash. 207; 5 Wash. 643; 36 Wash. 360; 44 Wash. 618.

Arraignment, Plea and Waiver: See Remington's Digest, Crim. Law, §§ 61,

62; *Elick v. Territory*, 1 W. T. 136; *State v. Brown*, 37 Wash. 106, 79 Pac. 638.

A court commissioner has no power to take the arraignment of a prisoner, accept a plea of guilty, and render judgment, under Constitution, Art. IV, § 23, conferring upon him the power of a judge at chambers; since a judge at chambers, under Laws of 1891, p. 91, does not have the power of a court, and §§ 2093, 2120,

2187, require arraignment, plea of guilty, and sentence to be in open court: *State v. Philip*, 44 Wash. 615, 87 Pac. 955.

Necessity of arraignment in criminal case. 12 *Ann. Cas.* 704; *Ann. Cas.* 1015C, 1073.

May defendant be arraigned after commencement of trial. 27 *L. R. A. (N. S.)* 1181.

Waiver of arraignment. *Ann. Cas.* 1917D, 829.

§ 2094. Defendant may Appear by Counsel, When.

If the indictment or information be for a misdemeanor punishable by fine only, the defendant may appear upon arraignment by counsel. [Cf. L. '54, p. 116, § 92; Cd. '81, § 1066; L. '91, p. 55, § 47; 2 H. C., § 1270.]

§ 2095. Right to have Counsel.

If the defendant appear without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel, by reason of poverty, counsel shall be assigned to him by the court. [Cf. L. '54, p. 116, § 89; L. '55, p. 11; L. '60, p. 149, § 232; Cd. '81, § 1063; 2 H. C., § 1271.]

Cited in 5 Wash. 330, 643.

Appointment of Counsel for Accused: See *Remington's Digest*, Crim. Law, § 208; *Presby v. Klickitat County*, 5 Wash. 329, 31 Pac. 876; *State v. Bush*, 41 Wash. 13, 82 Pac. 1024; *State v. Kelch*, 95 Wash. 277, 163 Pac. 757; *State v. Smith*, 95 Wash. 271, 163 Pac. 759.

Error, if any, in arraigning appellant and compelling him to enter his plea before he could procure counsel, and

without appointing counsel for him, is cured by the subsequent action of the court in allowing the plea of not guilty to be withdrawn and the validity of the information to be attacked by demurrer and motion to quash: *State v. Boyce*, 24 Wash. 514, 64 Pac. 719.

Right of accused to benefit of counsel before pleading to criminal charge. *Ann. Cas.* 1918D, 287.

§ 2096. Defendant to Declare His True Name.

When the defendant is arraigned, he shall be interrogated; if the name by which he is indicted be not his true name, he shall then declare his true name, or be proceeded against by the name in the indictment or information. [Cf. L. '54, p. 116, § 90; L. '69, p. 248, § 221; Cd. '81, § 1064; L. '91, p. 55, § 48; 2 H. C., § 1272.]

§ 2097. Entry of True Name.

If he alleges that another name is his true name it must be entered in the minutes of the court, and the subsequent proceedings on the indictment or information may be had against him by that name, referring also to the name by which he is indicted or informed against. [Cf. L. '54, p. 116, § 91; Cd. '81, § 1065; L. '91, p. 56, § 49; 2 H. C., § 1273.]

§ 2098. Pleading on Arraignment—Time for Answer.

In answer to the arraignment, the defendant may move to set aside the indictment or information, or he may demur or plead to it, and is en-

titled to one day after arraignment in which to answer thereto if he demand it. [Cf. Cd. '81, § 1045; L. '91, p. 56, § 50; 2 H. C., § 1274.]

Cited in 11 Wash. 119.

This section was not repealed by sections 2109 and 2115: State v. Harding, 20 Wash. 556, 56 Pac. 399, 929.

Time to Plead in General: See Remington's Digest, Crim. Law, § 63; State v.

Harding, 20 Wash. 556, 56 Pac. 399, 929; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Sexton, 37 Wash. 110, 79 Pac. 634; State v. Wilson, 69 Wash. 235, 124 Pac. 1125.

§ 2099. Grounds of Motion to Set Aside Indictment.

The motion to set aside the indictment can be made by the defendant on one or more of the following grounds, and must be sustained:—

1. When it is not indorsed "a true bill," and the indorsement signed by the foreman of the grand jury as prescribed by this code;

2. When the names of all the witnesses examined before the grand jury are not indorsed thereon;

3. When it has not been presented, and marked "filed," as prescribed by this code;

4. When any person, other than the grand jurors, was present before the grand jury when the question was taken upon the finding of the indictment, or when any person, other than the grand jurors, was present before the grand jury during the investigation of the charge, except as required or permitted by law;

5. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law. [Cd. '81, § 1046; 2 H. C., § 1275.]

Cited in 1 Wash. 271; 22 Wash. 554; 67 Wash. 22; 82 Wash. 290.

Power of court on own motion to set aside indictment and order re-submission. Ann. Cas. 1918A, 860.

Right to quash part of a count of an indictment, leaving the remainder of the count intact. 22 L. E. A. (N. S.) 469.

§ 2100. Grounds not Allowed, When.

The ground of the motion to set aside the indictment mentioned in the fifth subdivision of the last section is not allowed to a defendant who has been held to answer before indictment. [Cd. '81, § 1047; 2 H. C., § 1275, last pt.]

§ 2101. Grounds of Motion to Set Aside Information.

A motion to set aside an information can be made by the defendant on one or more of the following grounds, and must be sustained:—

1. When it is not signed by the prosecuting attorney;

2. When it is not verified;

3. When it has not been marked "filed" by the clerk;

4. When the names of the witnesses are not indorsed upon it as required by section 2050. [L. '91, p. 56, § 51; 2 H. C., § 1276.]

Cited in 32 Wash. 11; 94 Wash. 144—146.

MOTION TO QUASH OR DISMISS: See Remington's Digest, Ind. & Inf., §§ 79—83. **Mode of Making Objections in General:** State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Bogardus, 36 Wash. 297, 78 Pac. 942.

§ 80. Motion to Quash or Set Aside: State v. Croney, 31 Wash. 122, 71 Pac. 783.

§ 82. — Grounds: Blanton v. State, 1 Wash. 265, 24 Pac. 439; State v. So Ho Ge, 1 Wash. 275, 24 Pac. 442; State v. So Ho Me, 1 Wash. 276, 24 Pac. 443; State v. Heaton, 21 Wash. 59, 56 Pac.

843; State v. Douette, 31 Wash. 6, 71 Pac. 556; State v. Melvern, 32 Wash. 7, 72 Pac. 489.

A refusal of a motion under this section to have an information "set aside" because it was not verified, is error without prejudice, where the court properly permitted an amended and verified information to be filed: State v. Haffer, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917E, 229, L. R. A. 1917C, 610.

§ 83. — **Time for Making:** Territory v. Heywood, 2 W. T. 180, 2 Pac. 189; Blanton v. State, 1 Wash. 265, 24 Pac. 439; State v. Bodeckar, 11 Wash. 417, 39 Pac. 645; State v. Blanchard, 11 Wash. 116, 39 Pac. 377; State v. Rogan, 18 Wash. 43, 50 Pac. 582; State v. Anderson, 20 Wash. 193, 55 Pac. 39; State v. McBride, 72 Wash. 390, 130 Pac. 486; State v. Owen, 97 Wash. 466, 166 Pac. 793.

§ 2102. Must Demur or Plead on Denial of Motion.

If the motion to set aside the indictment [or information] be denied, the defendant must immediately answer the indictment or information, either by demurring or pleading thereto. [Cf. Cd. '81, § 1048; L. '91, p. 56, § 52; 2 H. C., § 1277.]

§ 2103. Effect of Order for Resubmission.

If the court direct that the case be resubmitted, the defendant, if already in custody, must so remain, unless he be admitted to bail; or if already admitted to bail, or money has been deposited instead thereof, the bail or money is answerable for the appearance of the defendant to answer a new indictment or information. [Cf. Cd. '81, § 1049; L. '91, p. 56, § 53; 2 H. C., § 1278.]

Cited in 11 Wash. 420.

§ 2104. Order No Bar to Another Prosecution.

An order to set aside the indictment or information as provided in this chapter shall be no bar to a future prosecution for the same offense. [Cf. Cd. '81, § 1050; L. '91, p. 56, § 54; 2 H. C., § 1279.]

§ 2105. Grounds of Demurrer.

The defendant may demur to the indictment or information when it appears upon its face either,—

1. That it does not substantially conform to the requirements of this code;
2. [That] more than one crime is charged;
3. That the facts charged do not constitute a crime;
4. That the indictment or information contains any matter which if true would constitute a defense or other legal bar to the action. [Cf. Cd. '81, § 1051; L. '91, p. 56, § 55; 2 H. C., § 1280.]

Cited in 42 Wash. 456; 56 Wash. 471; 72 Wash. 394.

Demurrer: See Remington's Digest, Ind. & Inf., §§ 86, 87. **Grounds:** State v. Gottfreedson, 24 Wash. 398, 64 Pac. 523; State v. Nelson, 36 Wash. 126, 78 Pac.

790, 104 Am. St. Rep. 945, 68 L. R. A. 283; State v. Bogardus, 36 Wash. 297, 78 Pac. 942. **Operation and Effect of Decision Sustaining Demurrer:** State v. Riley, 36 Wash. 441, 78 Pac. 1001.

§ 2106. Judgment on Demurrer Final, When.

If the demurrer is sustained because the judgment or information contains matter which is a legal defense or bar to the action, the judgment shall be final, and the defendant must be discharged. [Cf. Cd. '81, § 1052; L. '91, p. 57, § 56; 2 H. C., § 1281.]

Cited in 11 Wash. 420.

Upon appeal from a justice's court in a criminal case, the superior court has jurisdiction of the cause for trial de novo, and after sustaining a demurrer

to the complaint below, may direct a new complaint or information to be filed: State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716.

§ 2107. Effect of Failure to Plead After Demurrer Overruled.

If the demurrer is overruled, the defendant has a right to put in a plea. If he fails to do so, judgment may be rendered against him on the demurrer, and if necessary, a jury may be impaneled to inquire and ascertain the degree of the offense. [Cf. Cd. '81, § 1053; 2 H. C., § 1282.]

Cited in 16 Wash. 115; 20 Wash. 560.

This section was not impliedly repealed by another section of the same statute providing that no person indicted by a

grand jury shall be convicted except by confession or by a verdict of a jury: State v. Harding, 20 Wash. 556, 56 Pac. 399, 929.

§ 2108. The Three Pleas of Defendant.

There are but three pleas to the indictment or information: A plea of,—

1. Guilty;

2. Not guilty;

3. A former judgment of conviction or acquittal of the offense charged, which may be pleaded with or without the plea of not guilty. [Cf. Cd. '81, § 1054; L. '91, p. 57, § 57; 2 H. C., § 1283.]

See infra, § 2174, insanity, how pleaded.

Cited in 69 Wash. 63.

Validity and effect of conditional pleas of guilty. Ann. Cas. 1914A, 451.

Right to plead over after plea of former conviction or acquittal. 9 Ann. Cas. 130.

§ 2109. Pleas, How Entered—Form of.

The plea may be entered on the record substantially in the following form:—

1. A plea of guilty: The defendant pleads that he is guilty of the offense charged in the indictment (or information, as the case may be);

2. A plea of not guilty: The defendant pleads that he is not guilty of the offense charged in the indictment (or information, as the case may be);

3. A plea of former conviction or acquittal: The defendant pleads that he has formerly been convicted (or acquitted, as the case may be) of the offense charged in the indictment (or information, as the case may be), by the judgment of the court of (naming it), rendered on the — day of —, A. D. 18— (naming the time). [Cf. Cd. '81, § 1055; L. '91, p. 57, § 58; 2 H. C., § 1284.]

Cited in 31 Wash. 86; 84 Wash. 114.

Time to Plead in General: See Remington's Digest, Crim. Law, § 63; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Sexton, 37 Wash. 110, 79 Pac. 634.

Pleas: See Remington's Digest, Crim. Law, §§ 65—67. **Requisites and Sufficiency:** Elick v. Territory, 1 W. T. 136; State v. Darwin, 63 Wash. 303, 115 Pac. 309, 33 L. R. A. (N. S.) 1026.

§ 66. **Several Pleas:** State v. Quinn, 56 Wash. 295, 105 Pac. 818; State v. Elliott, 69 Wash. 62, 124 Pac. 212.

§ 67. **Plea of Guilty—Voluntary Character of Plea:** State v. Allen, 41 Wash. 63, 82 Pac. 1036; State v. Wilmot, 95 Wash. 326, 163 Pac. 742.

Plea of Former Acquittal or Conviction—Requisites and Sufficiency: See Remington's Digest, Crim. Law, § 70; State v. Lewis, 31 Wash. 75, 71 Pac. 778.

§ 2110. Plea of Guilty must be Put in by Defendant.

The plea of guilty can only be put in by the defendant himself in open court. [Cd. '81, § 1056; 2 H. C., § 1285.]

See *supra*, § 2094, appearance by counsel in misdemeanors.

Cited in 44 Wash. 618.

§ 2111. Substitution of Plea.

At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted. [Cd. '81, § 1057; 2 H. C., § 1286.]

Cited in 53 Wash. 270; 101 Wash. 204, 205; 102 Wash. 604; 109 Wash. 163.

Withdrawal: See Remington's Digest, Crim. Law, § 68; *State v. Cimini*, 53 Wash. 268, 101 Pac. 891; *State v. Wilmot*, 95 Wash. 326, 163 Pac. 742; *State v. Scott*, 101 Wash. 199, 172 Pac. 234.

An application to withdraw a plea of guilty is addressed to the sound discretion of the court; but in view of sections 2111, 2181, it can only be entertained after judgment as an application

to vacate the judgment; and if for irregularity or fraud, the judgment is entitled to every reasonable intendment in its support, and will be set aside only upon a clear showing and adjudication of a prima facie defense on the merits: *State v. Anderson*, 109 Wash. 161, 186 Pac. 266.

Right of accused to withdraw plea of guilty. 8 Ann. Cas. 237; 16 Ann. Cas. 973; Ann. Cas. 1912D, 243.

§ 2112. Plea of not Guilty, Effect of.

The plea of not guilty is a denial of every material allegation in the indictment or information; and all matters of fact may be given in evidence under it, except a former conviction or acquittal. [Cf. Cd. '81, § 1058; L. '91, p. 57, § 59; 2 H. C., § 1287.]

§ 2113. Conviction or Acquittal Operates as a Bar, When.

A conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense [notwithstanding a defect in form or substance in the indictment or information on which the conviction or acquittal took place]. [Cf. Cd. '81, §§ 768, 1059; L. '91, p. 57, § 60; 2 H. C., §§ 1288, 1365.]

Impliedly repealed in part. The decision in 84 Wash. 113 must be confined to the bracketted words, or there will be no statutory authority for a bar by a verdict on the merits, except in prosecutions in another state or county (§§ 2271, 2272) or for a different degree (§§ 2166, 2366).

Compare *infra*, §§ 2271, 2272, 2316, former acquittal or conviction when a bar.

See Const. U. S., amendment 5; Const. Wash., Art. I, § 9, jeopardy.

Cited in 54 Wash. 117; 75 Wash. 15; 84 Wash. 115, 116, 117.

This section was impliedly repealed by § 2316, *infra*: *State v. George*, 84 Wash. 113, 146 Pac. 378.

§ 2114. Judgment on Demurrer No Bar—Exception.

The judgment for the defendant on a demurrer to the indictment or information, except where it is otherwise provided, or for an objection taken at the trial to its form or substance, or for variance between the indictment or information and the proof, shall not bar another prosecution for the same offense. [Cf. Cd. '81, § 1060; L. '91, p. 58, § 61; 2 H. C., § 1289.]

See *supra*, § 2106, judgment on demurrer, when final.

§ 2115. Refusal to Plead—Plea of not Guilty to be Entered.

If the defendant fail or refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered by the

court. [Cf. L. '54, p. 116, § 88; Cd. '81, § 1061; L. '91, p. 58, § 62; 2 H. C., § 1290.]

Cited in 16 Wash. 115; 20 Wash. 560.

Refusal or Failure to Plead: See Remington's Digest, Crim. Law, § 64; Palmer

v. United States, 1 W. T. 5; State v. Straub, 16 Wash. 111, 47 Pac. 227.

§ 2116. On Charge of Murder Jury must be Impaneled.

If, on the arraignment of any person, he shall plead guilty, if the offense charged be not murder, the court shall, in its discretion, hear testimony, and determine the amount and kind of punishment to be inflicted; but if the defendant plead guilty to a charge of murder, a jury shall be impaneled to hear testimony, and determine the degree of murder and the punishment therefor. [L. '54, p. 115, § 87; Cd. '81, § 1062; 2 H. C., § 1291.]

Cited in 35 Wash. 569.

§ 2118. Conviction Necessary Before Punishment.

No person charged with any offense against the law shall be punished for such offense unless he shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case and of the person. [L. '54, p. 76, § 6; Cd. '81, § 770; 2 H. C., § 1367.]

§ 2126. Compromise of Misdemeanor, When.

When a defendant is prosecuted in a criminal action for a misdemeanor, for which the person injured by the act constituting the offense has a remedy by a civil action, the offense may be compromised as provided in the next section, except when it was committed,—

1. By or upon an officer while in the execution of the duties of his office;
2. Riotously; or
3. With an intent to commit a felony. [L. '54, p. 115, § 84; Cd. '81, § 1040; 2 H. C., § 1292.]

§ 2127. Compromising Criminal Actions, When and How.

In such case, if the party injured appear in the court in which the cause is pending at any time before the final judgment therein, and acknowledge in writing, that he has received satisfaction for the injury, the court may, in its discretion on payment of the costs incurred, order all proceedings to be discontinued and the defendant to be discharged. The reasons for making the order must be set forth therein and entered in the minutes. Such order is a bar to another prosecution for the same offense. [Cf. L. '54, p. 115, § 84; Cd. '81, §§ 1041, 1042; L. '91, p. 58, § 63; 2 H. C., § 1293.]

See *infra*, § 2866, compounding or concealing crime.

§ 2128. Offenses not to be Compromised Except as Herein Provided.

No offense can be compromised, nor can any proceedings for the prosecution or punishment thereof be stayed upon a compromise, except as provided in this chapter. [Cf. Cd. '81, § 1043; L. '91, p. 58, § 64; 2 H. C., § 1294.]

§ 2129. Restoration of Stolen Property—Duty of Officer.

All property obtained by larceny, robbery, or burglary, shall be restored to the owner; and no sale, whether in good faith on the part

of the purchaser or not, shall divest the owner of his rights to such property; and it shall be the duty of the officer who shall arrest any such person charged as principal or accessory in any robbery or larceny, to secure the property alleged to have been stolen, and he shall be answerable for the same, and shall annex a schedule thereof to his return of the warrant. [L. '54, p. 84, § 51; Cd. '81, § 851; 2 H. C., § 1380.]

§ 2130. Recompense for Securing and Keeping Stolen Property.

Upon any conviction of burglary, robbery, or larceny, the court may order a suitable recompense to the prosecutor, and also to the officer who has secured and kept the stolen property, not exceeding their actual expenses, with a reasonable allowance for their time and trouble, to be paid by the county treasurer. [L. '54, p. 84, § 52; Cd. '81, § 852; 2 H. C., § 1381.]

CHAPTER XVII.

TRIALS AND VERDICTS IN CRIMINAL ACTIONS.

§ 2134. Trial Docket.

The clerk shall, in preparing the docket of criminal cases, enumerate the indictments and informations pending according to the date of their filing, specifying opposite to the title of each action whether it be for a felony or misdemeanor, and whether the defendant be in custody or on bail; and shall, in like manner, enter therein all indictments and informations on which issues of fact are joined, all cases brought to the court on change of venue from other counties, and all cases pending upon appeal from inferior courts. [Cf. L. '54, p. 115, § 86; Cd. '81, § 1044; L. '91, p. 58, § 65; 2 H. C., § 1295.]

§ 2135. Continuance, When Granted.

A continuance may be granted in any case on the ground of the absence of evidence, on the motion of the defendant, supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and place of residence of the witness or witnesses, and the substance of the evidence expected to be obtained; and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the continuance shall not be granted. [L. '77, p. 206, § 7; Cd. '81, § 1077; 2 H. C., § 1296.]

Cited in 29 Wash. 448; 107 Wash. 572.

Continuance: See Remington's Digest, Crim. Law, §§ 191—193-1. **Discretion:** Blanton v. State, 1 Wash. 265, 24 Pac. 139; State v. Grune, 72 Wash. 448, 130 Pac. 751; State v. Hooker, 99 Wash. 661, 170 Pac. 374; State v. Musselman, 101 Wash. 330, 172 Pac. 346.

Under the express provision of this section, a continuance on account of the absence of a witness, is properly denied where the prosecuting attorney admitted that the witness would testify, as

claimed, the same as upon a former trial and such testimony was read to the jury: State v. Conner, 167 Wash. 571, 182 Pac. 602.

§ 192. **Grounds and Application for Continuance—Indorsement of Names of Witnesses on Indictment and Addition of New Names:** State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Kelly, 14 Wash. 702, 45 Pac. 38; State v. Everett, 14 Wash. 574, 45 Pac. 150; State v. Hol-edger, 15 Wash. 443, 46 Pac. 652; State v. Carpenter, 56 Wash. 670, 106 Pac.

206; *State v. McCaskey*, 97 Wash. 401, 166 Pac. 1163.

See, also, *State v. Vane*, 105 Wash. 421, 178 Pac. 456.

§ 192-1. — **Diligence:** *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

§ 193. **Application for Continuance—In General:** *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Millroy*, 133 Wash. 193, 174 Pac. 10.

A motion for a continuance is properly denied where the affidavit therefor did not give the names of any of the absent witnesses or what they would testify to, and where it also failed to show that in a case of a continuance any testimony could have been procured that was not

produced at the trial: *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

See, also, *State v. Argentieri*, 105 Wash. 7, 177 Pac. 690; *State v. Grant*, 105 Wash. 189, 177 Pac. 784.

§ 193-1. — **Presence of Accused at Hearing:** *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 88.

Time for Sessions and Adjournments: See Remington's Digest, Crim. Law, § 211; *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036.

Avoiding continuance in criminal case by admitting proposed testimony of absent witness. *Ann. Cas.* 1913C, 488; 16 L. R. A. 239.

§ 2136. Subpoena for State Witnesses—Continuance for State.

The clerk shall, at the time of issuing a warrant for the defendant, issue a subpoena for all the witnesses whose names are indorsed on the indictment, and any others required; but in no case shall a continuance be granted to the state on account of the absence of any witness whose name is not indorsed on the indictment. [Cd. '81, § 1068.]

The present force of this section is doubtful.

§ 2137. Issues to be Tried by Jury—Practice as in Civil Cases.

Except as otherwise specially provided, issues of fact joined upon an indictment or information shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining, and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases. [Cf. L. '54, p. 118, § 101; Cd. '81, § 1078; L. '91, p. 58, § 66; 2 H. C., § 1297.]

Cited in 8 Wash. 306; 17 Wash. 550; 22 Wash. 133; 83 Wash. 517.

This section and section 323, supra, do not confer the right to try a criminal case by a jury of less than twelve persons: *State v. Ellis*, 22 Wash. 129, 60 Pac. 136.

Separation and Exclusion of Witnesses: See Remington's Digest, Crim. Law, § 223; *State v. Lee Doon*, 7 Wash. 308, 34 Pac. 1103; *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. Homaki*, 40 Wash. 629, 82 Pac. 873; *State v. Dalton*, 43 Wash. 278, 86 Pac. 590.

Election Between Acts: See Remington's Digest, Crim. Law, § 226; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778; *State v. Leonard*, 56 Wash. 83, 105 Pac. 163, 21 Ann. Cas. 69; *State v. Biggs*, 57 Wash. 514, 107 Pac. 374; *State v. Ray*, 62 Wash. 582, 114 Pac. 439; *State v. Workman*, 66 Wash. 292, 119 Pac. 751; *State v. Hornaday*, 67 Wash. 660, 122 Pac. 322; *State v. Moss*, 73 Wash. 430, 131 Pac. 1132; *State v. Roberts*, 100 Wash. 493, 171 Pac. 225.

Order of Proof: See Remington's Digest, Crim. Law, §§ 227—231.

§ 227. **Admission of Evidence Dependent on Preliminary Proof:** *Yelm Jim v. Territory*, 1 W. T. 63; *Leonard v. Territory*, 2 W. T. 381, 7 Pac. 872; *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; *State v. Druxinman*, 34 Wash. 257, 75 Pac. 814; *State v. Gohl*, 46 Wash. 408, 90 Pac. 259; *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989; *State v. Macleod*, 78 Wash. 175, 138 Pac. 648; *State v. Greiner*, 63 Wash. 46, 114 Pac. 897.

§ 228. **Scope of Evidence in Chief:** *State v. Kasper*, 5 Wash. 174, 31 Pac. 636.

§ 229. **Scope of Evidence in Rebuttal:** *Leonard v. Territory*, 2 W. T. 381, 7 Pac. 872; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *State v. Burton*, 27 Wash. 528, 67 Pac. 1097; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036; *State v. Carpenter*, 32 Wash. 254, 73 Pac. 357; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490; *State v. McPhail*, 39 Wash. 199, 81 Pac. 683; *State v. Belknap*, 44 Wash. 605, 87 Pac. 934; *State v. Con-*

stantine, 48 Wash. 213, 93 Pac. 317; State v. Mallahan, 66 Wash. 21, 118 Pac. 898; Seattle v. Smythe, 97 Wash. 351, 166 Pac. 1150, L. R. A. 1918A, 228.

See, also, State v. Walker, 104 Wash. 472, 176 Pac. 315.

§ 230. **Admission in Rebuttal of Evidence Proper in Chief:** State v. Nelson, 13 Wash. 523, 43 Pac. 637; State v. Druxinman, 34 Wash. 257, 75 Pac. 814; State v. Copeland, 66 Wash. 243, 119 Pac. 607; State v. Stone, 66 Wash. 625, 120 Pac. 76; State v. Overland, 68 Wash. 566, 123 Pac. 1011.

§ 231. **Reopening Case for Further Evidence:** State v. Sexton, 37 Wash. 110, 79 Pac. 634; State v. Constatine, 43 Wash. 102, 86 Pac. 384, 117 Am. St. Rep. 1043; State v. Pilegge, 61 Wash. 264, 112 Pac. 263; State v. Brown, 62 Wash. 293, 113 Pac. 782; State v. Mallahan, 66 Wash. 21, 118 Pac. 898; State v. Hornaday, 67 Wash. 660, 122 Pac. 322; State v. Jones, 80 Wash. 588, 141 Pac. 700.

OBJECTIONS TO EVIDENCE: See Remington's Digest, Crim. Law, §§ 232—234.

§ 232. **Right to Object—Estoppel or Waiver:** State v. Yourex, 30 Wash. 611, 71 Pac. 203; State v. Garland, 65 Wash. 666, 118 Pac. 907; State v. Stone, 66 Wash. 625, 120 Pac. 76.

§ 233. **Time for Objection:** State v. Melvern, 32 Wash. 7, 72 Pac. 489.

§ 234. **Sufficiency and Scope of Objection:** State v. Douette, 31 Wash. 6, 71 Pac. 556; State v. Shaw, 75 Wash. 326, 135 Pac. 20; State v. Miller, 78 Wash. 268, 138 Pac. 896; State v. Gunn, 85 Wash. 121, 147 Pac. 401; State v. Roberts, 95 Wash. 308, 163 Pac. 778.

ARGUMENTS AND CONDUCT OF COUNSEL: See Remington's Digest, Crim. Law, §§ 235—244.

§ 235. **Control by Court in General:** Leschi v. Territory, 1 W. T. 13.

§ 236. **Rights and Duties of Prosecuting Attorney:** State v. Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; State v. Montgomery, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119, 21 Ann. Cas. 331; State v. Pryor, 67 Wash. 216, 121 Pac. 56.

§ 236-1. **Scope and Effect of Opening Statement—For Prosecution:** State v. Pepoon, 62 Wash. 635, 114 Pac. 449; State v. Boone, 65 Wash. 331, 118 Pac. 46.

See, also, State v. Storrs, 112 Wash. 675, 192 Pac. 894, 197 Pac. 17.

§ 236-2. — **For Defense:** State v. King, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322.

See, also, State v. Grant, 105 Wash. 189, 177 Pac. 784.

§ 236-3. **Presentation of Evidence—For Prosecution:** State v. Montgomery, 56 Wash. 443, 105 Pac. 1035, 134 Am. St. Rep. 1119, 21 Ann. Cas. 331; State v. Cottrell, 56 Wash. 543, 106 Pac. 179; State v. Pryor, 67 Wash. 216, 121 Pac. 56.

§ 236-4. **Scope and Effect of Summing Up—For Prosecution:** State v. Harris, 74 Wash. 60, 132 Pac. 735.

§ 237. **Limiting Scope or Time of Argument:** State v. Patchen, 37 Wash. 24, 79 Pac. 479; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881; Seattle v. Erickson, 55 Wash. 675, 104 Pac. 1128, 25 L. R. A. (N. S.) 1027; State v. Hewett, 103 Wash. 52, 173 Pac. 726.

§ 238. **Statements as to Facts, Comments and Arguments—In General:** State v. Armstrong, 37 Wash. 51, 79 Pac. 490; State v. Wong Tung Hee, 41 Wash. 623, 84 Pac. 596; State v. George, 58 Wash. 681, 109 Pac. 114; State v. Peebles, 71 Wash. 451, 129 Pac. 108; State v. Jakubowski, 77 Wash. 78, 137 Pac. 448; State v. Conroy, 82 Wash. 417, 144 Pac. 538; State v. Jackson, 83 Wash. 514, 145 Pac. 470; State v. Engstrom, 86 Wash. 499, 150 Pac. 1173; State v. Wright, 97 Wash. 304, 166 Pac. 645.

§ 239. — **Reading Proceedings in Prosecution:** State v. Costello, 29 Wash. 366, 69 Pac. 1099; State v. Churchill, 52 Wash. 210, 100 Pac. 309.

§ 240. — **Comments on Evidence or Witnesses:** Freidrich v. Territory, 2 Wash. 358, 26 Pac. 976; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Smails, 63 Wash. 172, 115 Pac. 82; State v. Cavelero, 89 Wash. 364, 154 Pac. 435.

§ 241. — **Comments on Failure of Accused to Testify:** State v. Ulsemer, 24 Wash. 657, 64 Pac. 800; State v. Smokalem, 37 Wash. 91, 79 Pac. 603; State v. Raub, 103 Wash. 214, 173 Pac. 1094.

§ 242. — **Comments on Appearance of Accused:** State v. Bokien, 14 Wash. 403, 44 Pac. 889.

§ 243. — **Comments on Commission of Other Offenses by Accused:** State v. Regan, 8 Wash. 506, 36 Pac. 472.

§§ 244, 245. **Withdrawal or Correction of Objectionable Matter:** State v. Manville, 8 Wash. 523, 36 Pac. 470; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Hawkins, 27 Wash. 375, 67 Pac. 814; State v. Ackerman, 90 Wash. 198, 155 Pac. 743.

See, also, State v. Storrs, 112 Wash. 675, 192 Pac. 894, 197 Pac. 17.

§ 2137-1. Alternate Jurors—Drawing—Qualifications—Attendance.

Whenever, in the opinion of a judge of a superior court about to try a defendant against whom has been filed an indictment or information for a felony, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn the court may direct the calling of one or two additional jurors, in its discretion, to be known as "alternate jurors." Such jurors must be drawn from the same source, and in the same manner, and of the same qualifications as the jurors already sworn, to be subject to the same examination and challenge: Provided, that the prosecution shall be entitled to one, and the defendant to two peremptory challenges to such alternate jurors. Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected, and must attend at all times upon the trial of the cause in company with the other jurors; and for a failure so to do are liable to be punished for contempt. They shall obey the orders of and be bound by the admonition of the court upon each adjournment of the court; but if the regular jurors are ordered to be kept in the custody of the sheriff during the trial of the case, such alternate jurors shall also be kept in confinement with the other jurors; and except, as hereinafter provided, shall be discharged upon the final submission of the case to the jury. If, before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternative, who shall then take his place in the jury box and be subject to the same rules and regulations as though he had been elected as one of the original jurors. [L. '17, p. 185, § 1.]

§ 2138. Peremptory Challenges, Number Allowed Defendant.

In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges. [L. '54, p. 118, § 102; Cd. '81, § 1079; 2 H. C., § 1298.]

Cited in 83 Wash. 2.

Construing all the statutory provisions together on the subject of challenges to jurors, defendant must, in prosecution for homicide, exercise two peremptory challenges to one by the state, until the twelve and six peremptory challenges respectively are exhausted: State v. Eddon, 8 Wash. 292, 36 Pac. 139.

Under this section, "capital offenses" refers only to those punishable by death; and the death penalty having been abolished, the right to twelve peremptory

challenges is suspended, and the fact that the crime was committed prior to the abolishment of the death penalty is immaterial, where the accused was not insisting on the application of the capital penalty: State v. Johnston, 83 Wash. 1, 144 Pac. 944.

Time of exercise of right of peremptory challenge. 19 Ann. Cas. 766.

Right of accused to full panel when making peremptory challenges. L. R. A. 1916A, 828.

§ 2139. Peremptory Challenges Allowed State.

The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors. [L. '54, p. 118, § 103; Cd. '81, § 1080; 2 H. C., § 1299.]

§ 2140. Challenges to Panel, When Allowed.

Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law for the drawing and return of the jury, and shall be in writing, sworn to, and proved to the satisfaction of the court. [L. '54, p. 118, § 104; Cd. '81, § 1081; 2 H. C., § 1300.]

Cited in 6 Wash. 566; 29 Wash. 446; 61 Wash. 408.

Challenge to Panel or Array, and Motion to Quash Venire—Grounds: See Remington's Digest, Jury, § 55; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Straub, 16 Wash. 111, 47 Pac. 227; State v. Leroy, 61 Wash. 405, 112 Pac. 635.

Under this section, it will be presumed, where the record shows that the court heard testimony in passing upon the challenge which was not brought up on appeal, that it was sufficient to sustain the court's conclusion: State v. Vance, 29 Wash. 435, 70 Pac. 34.

Under this section, the requirement that a jury be drawn for "the ensuing month" is not so material as to invalidate a panel part of whom were drawn for the month of December, but not summoned until January: State v. Leroy, 61 Wash. 405, 112 Pac. 635.

Bias or misconduct of officer summoning jurors as ground for challenge to panel. *Ann. Cas.* 1916A, 393.

Right to interpose challenge to array of jurors in absence of statute. *Ann. Cas.* 1912A, 1137.

§ 2141. Challenges for Cause.

Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant. [L. '54, p. 119, § 105; Cd. '81, § 1082; 2 H. C., § 1301.]

See supra, §§ 326—331, challenges for cause.

Cited in 3 Wash. 103, 104; 8 Wash. 14.

Challenges to the Polls for Cause: See Remington's Digest, Jury, §§ 56—59. **Grounds:** Horst v. Silverman, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Miller, 78 Wash. 268, 138 Pac. 896.

§ 57. — **Making and Sufficiency:** McAllister v. Territory, 1 W. T. 360; State v. Biles, 6 Wash. 186, 33 Pac. 347.

§ 58. — **Examination of Juror:** Northern Pac. R. R. Co. v. Holmes, 3 W. T. 202, 14 Pac. 688; White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Bokien, 14 Wash. 403, 44 Pac. 889; State v. Holedger, 15 Wash. 443, 46 Pac. 652; Horst v. Silverman, 20 Wash. 233, 55

Pac. 52, 72 Am. St. Rep. 97; State v. Royse, 24 Wash. 440, 64 Pac. 742; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Croncy, 31 Wash. 122, 71 Pac. 783; Abby v. Wood, 45 Wash. 379, 86 Pac. 558; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 15 Ann. Cas. 584, 14 L. R. A. (N. S.) 346; Hoyt v. Independent Asphalt Paving Co., 52 Wash. 672, 101 Pac. 367; State v. Elliott, 68 Wash. 603, 123 Pac. 1089.

§ 58-1. — **Evidence:** State v. Phillips, 65 Wash. 324, 118 Pac. 43; State v. Cohen, 72 Wash. 109, 129 Pac. 891.

§ 59. — **Trial and Determination:** White v. Territory, 3 W. T. 397, 19 Pac. 37; State v. Coella, 3 Wash. 99, 28 Pac. 28; Piper v. Spokane, 22 Wash. 147, 60 Pac. 138.

§ 2142. Conscientious Scruples of Juror as to Capital Punishment.

No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death shall be compelled or allowed to serve as a juror on the trial of any indictment or information for such an offense. [Cf. L. '54, p. 119, § 106; Cd. '81, § 1083; L. '91, p. 59, § 67; 2 H. C., § 1302.]

§ 2143. Oath to Jury, Form of.

The jury shall be sworn or affirmed well and truly to try the issue between the state and defendant, according to the evidence; and in capital cases, to well and truly try, and true deliverance make between the state and the prisoner at the bar, whom they shall have in charge, according to the evidence. [Cf. L. '54, p. 119, § 107; Cd. '81, § 1084; L. '91, p. 59, § 68; 2 H. C., § 1303.]

Cited in 16 Wash. 426; 18 Wash. 144.

Oath: See Remington's Digest, Jury, § 63; Leschi v. Territory, 1 W. T. 13; Hartigan v. Territory, 1 W. T. 447; Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. Gin Pon, 16 Wash.

425, 47 Pac. 961; State v. Johnny Tommy, 19 Wash. 270, 53 Pac. 157.

Objections and Exceptions: See Remington's Digest, Jury, § 64; State ex rel. King v. Trimbell, 12 Wash. 440, 41 Pac. 183; State v. Vance, 29 Wash. 435, 70 Pac. 34.

§ 2144. Jury may be Waived Except in Capital Cases.

The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases. [L. '54 p. 119, § 108; Cd. '81, § 1085; 2 H. C., § 1304.]

See Const., Art. I, §§ 21, 22.

Waiver of jury trial in criminal cases. 1 Ann. Cas. 597; 9 Ann. Cas. 1183.

Failure to demand jury by defendant in criminal case as waiver of jury trial. 9 Ann. Cas. 263.

§ 2145. Personal Presence of Defendant During Trial.

No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial. [L. '54, p. 119, § 109; Cd. '81, § 1086; 2 H. C., § 1305.]

See next section.

Cited in 66 Wash. 384, 385; 76 Wash. 308; 82 Wash. 367.

Presence of Accused: See Remington's Digest, Crim. Law, §§ 202, 203; Linbeck v. State, 1 Wash. 336, 25 Pac. 452; State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; State ex rel. Gabe v. Main, 66 Wash. 381, 119 Pac. 844; State v. Beaudin, 76 Wash. 306, 136 Pac. 137; State v. Shutzler, 82 Wash. 365, 144 Pac. 284; State v. Haffer, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917E, 229, L. R. A.

1917C, 610. **On View by Jury:** State v. Lee Doon, 7 Wash. 308, 34 Pac. 1103.

Presence of Others Under Indictment: See Remington's Digest, Crim. Law, § 214; State v. Hyde, 22 Wash. 551, 61 Pac. 719; State v. Mann, 39 Wash. 144, 81 Pac. 561.

Waiver by accused of right to be present at trial on felony charge. Ann. Cas. 1913C, 1146; Ann. Cas. 1918E, 375.

§ 2146. Trial in Defendant's Absence, When.

No person prosecuted for an offense punishable by a fine only shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution and payment of the fine and costs that may be assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered into after judgment. [L. '54, p. 119, § 110; Cd. '81, § 1087; 2 H. C., § 1306.]

See notes to last section.

§ 2147. Competency of Witnesses—Exceptions.

Witnesses competent to testify in civil cases shall be competent in criminal prosecutions, but regular physicians or surgeons, clergymen or priests, shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character; Indians shall be competent as witnesses hereinbefore provided, or in any prosecutions in which an Indian may be a defendant. [L. '54, p. 117, § 95; L. '73, p. 233, § 231; Cd. '81, § 1069.]

See *supra*, § 1210, competency in civil cases.

See *infra*, § 2290, convict as witness.

Cited in 105 Wash. 477, 478, 483.

§ 2148. Compelling Attendance of Witnesses—Defendant as Witness—Failure to Testify.

Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the state, or of the defendant, in a criminal prosecution, may be compelled to attend and testify in open court, if they have been subpoenaed, without their fees being first paid or tendered, unless otherwise provided by law; the court may, upon the motion of the prosecuting attorney, recognize witnesses, with or without sureties, to attend and testify at any hearing or trial in any criminal prosecution in any court of this state, or before the grand jury, and in default of such recognizance the court may direct that such witness shall be detained in the custody of the sheriff until the hearing or trial of the prosecution in which such testimony may be required: Provided, however, that each witness so detained by order of court pursuant to the provisions of this section, shall be paid, in addition to witness fees for actual attendance in court, the sum of one dollar per day for time actually detained in custody, and shall be furnished food and lodging while so detained, and any person accused of any crime in this state, by indictment, information, or otherwise, may, in the examination or trial of the cause, offer himself, or herself, as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses: Provided, that nothing in this code shall be construed to compel such accused person to offer himself or herself as a witness in such case: And provided further, that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf. [L. '15, p. 260, § 1. Cf. L. '54, p. 116, § 93; L. '71, p. 105, § 2; Cd. '81, § 1067; L. '91, p. 59, § 69; 2 H. C., § 1307.]

Cited in 7 Wash. 339; 8 Wash. 181, 185; 13 Wash. 486; 32 Wash. 26, 65; 35 Wash. 334; 71 Wash. 458; 84 Wash. 603; 87 Wash. 472, 616.

Failure of Accused to Testify: See *Remington's Digest, Crim. Law*, § 291; *Thompson v. Territory*, 1 W. T. 547; *Leonard v. Territory*, 2 W. T. 381, 7 Pac. 872; *Linbeck v. State*, 1 Wash. 366, 25 Pac. 452; *State v. Myers*, 8 Wash. 177, 35

Pac. 580; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. Mitchell*, 32 Wash. 64, 72 Pac. 707; *State v. Detherage*, 35 Wash. 326, 77 Pac. 504; *State v. Hanes*, 84 Wash. 601, 147 Pac. 193; *State v. Gustafson*, 87 Wash. 613, 152 Pac. 335.

Waiver of constitutional privilege of accused by testifying in his own behalf. 2 *Ann. Cas.* 247; 11 *Ann. Cas.* 522.

§ 2149. Immunity of Witnesses in Cases of Bribery, Grafting, etc.

Any person offending against any provisions of the common law or statutes of the state of Washington or any ordinances of any municipality thereof, relating to bribery, grafting or corrupt solicitation, shall be a competent witness against any other person so offending, and may be compelled to attend and testify upon any trial, hearing, proceeding or investigation in the same manner as any other person. But the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying. A person so testifying shall not thereafter be liable to indictment, information, prosecution, or punishment for such offense. [L. '07, p. 99, § 1.]

See *infra*, § 2291.

§ 2150. Not Applicable to Proceedings Before Committing Magistrate or Justice.

The provisions of section 2149 shall not be applicable to any prosecution or proceeding before a committing magistrate or justice of the peace. [L. '07, p. 99, § 2.]

§ 2151. Confession as Evidence.

The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony. [L. '54, p. 117, § 96; Cd. '81, § 1070; 2 H. C., § 1308.]

Cited in 3 Wash. 110; 7 Wash. 240; 12 Wash. 676; 13 Wash. 6; 18 Wash. 396; 21 Wash. 68; 25 Wash. 349; 36 Wash. 488; 56 Wash. 512; 68 Wash. 245, 469; 89 Wash. 583.

Admissions: See Remington's Digest, Crim. Law, §§ 132, 133. **Proof and Effect:** State v. Webster, 21 Wash. 63, 57 Pac. 361.

§ 133. Admissions Made in Legal Proceedings: State v. Hopkins, 13 Wash. 5, 42 Pac. 627; State v. Lyts, 25 Wash. 347, 65 Pac. 530.

CONFESSIONS: See Remington's Digest, Crim. Law, §§ 165—171.

§ 165. Admissibility in General: State v. Munson, 7 Wash. 239, 34 Pac. 932; State v. Coss, 12 Wash. 673, 42 Pac. 127; State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. Poole, 42 Wash. 192, 84 Pac. 727; State v. Harris, 74 Wash. 60, 132 Pac. 735; State v. Wilson, 68 Wash. 464, 123 Pac. 795; State v. Kelch, 95 Wash. 277, 163 Pac. 757; State v. Johnson, 103 Wash. 59, 173 Pac. 723.

Admissions made by a defendant in a civil action, when not given under compulsion, relative to property in question in a criminal proceeding against him for embezzlement may, under this section, be put in evidence in such proceeding: State v. Hopkins, 13 Wash. 5, 42 Pac. 627.

§ 166. Caution: State v. Washing, 36 Wash. 485, 78 Pac. 1019.

§ 167. Voluntary Character in General: State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Coella, 8 Wash. 512, 36 Pac. 474; State v. Newton, 29 Wash. 373, 70 Pac. 31; State v. Carpenter, 32 Wash. 254, 73 Pac. 357; State v. Washing, 36 Wash. 485, 78 Pac. 1019; State v. Royce, 38 Wash. 111, 80 Pac. 268, 3 Ann. Cas. 351; State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. Brownlow, 89 Wash. 582, 154 Pac. 1099; State v. Seablom, 103 Wash. 53, 173 Pac. 721.

§ 168. Threats and Fear: State v. McCullum, 18 Wash. 394, 51 Pac. 1044; State v. Miller, 61 Wash. 125, 111 Pac. 1053, Ann. Cas. 1912B, 1053; State v. Miller, 68 Wash. 239, 122 Pac. 1066.

§ 169. Codefendants: State v. Coss, 12 Wash. 673, 42 Pac. 127; State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. McCullum, 18 Wash. 394, 51 Pac. 1044; State v. Beebe, 66 Wash. 463, 120 Pac. 122.

§ 169-1. Determination of Question of Admissibility: State v. Barker, 56 Wash. 510, 106 Pac. 133; State v. Wilson, 68 Wash. 464, 124 Pac. 795.

§ 170. Corroboration — Corpus Delicti: State v. Marselle, 43 Wash. 273, 86 Pac. 586.

§ 171. **Use in Different Proceedings:** *State v. Hopkins*, 13 Wash. 5, 42 Pac. 627.

Conviction as sustainable on extrajudicial confession without corroborative evidence: 10 Ann. Cas. 913; Ann. Cas. 1912B, 1249.

Admissibility of confession of defendant against self and codefendant. 4 Ann. Cas. 918; 18 Ann. Cas. 274.

Proof of corpus delicti for purpose of corroborating confession. 68 L. R. A. 50, 64, 68, 71, 73; L. R. A. 1916B, 748, 848; 1 Ann. Cas. 823.

§ 2152. Rules of Evidence Same as in Civil Actions.

The rules of evidence in civil actions, so far as practicable, shall be applied to criminal prosecutions. [L. '54, p. 117, § 97; Cd. '81, § 1071; 2 H. C., § 1309.]

See *supra*, § 339, and notes, evidence in civil cases.

Cited in 15 Wash. 18; 83 Wash. 517; 105 Wash. 477, 478, 481, 483.

Judicial Notice: See Remington's Digest, Crim. Law, § 73; *Schilling v. Territory*, 2 W. T. 283, 5 Pac. 926; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Bergfeldt*, 41 Wash. 234, 83 Pac. 177, 6 Ann. Cas. 979.

Presumptions: See Remington's Digest, Crim. Law, §§ 74—79; *Shapoonmash v. United States*, 1 W. T. 189; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969; *State v. Wilson*, 9 Wash. 218, 37 Pac. 424.

§ 76. — **Innocence:** *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382.

§ 77. — **Sanity:** *State v. Smith*, 26 Wash. 354, 67 Pac. 70; *State v. Champoux*, 33 Wash. 339, 74 Pac. 557.

§ 78. — **Intent:** *State v. Payne*, 10 Wash. 545, 39 Pac. 157; *State v. White*, 10 Wash. 611, 39 Pac. 442.

§ 79. — **Knowledge of Fact:** *Territory v. Heywood*, 2 W. T. 180, 2 Pac. 189.

BURDEN OF PROOF: See Remington's Digest, Crim. Law, §§ 79½—83. **Statutory Provisions:** *State v. Kyle*, 14 Wash. 550, 45 Pac. 147; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Lawson*, 40 Wash. 455, 82 Pac. 750; *O'Neill, In re*, 41 Wash. 174, 83 Pac. 104, 6 Ann. Cas. 869, 3 L. R. A. (N. S.) 558.

§ 80. — **Extent of Burden on Prosecution:** *State v. Anderson*, 5 Wash. 350, 31 Pac. 969; *State v. Conahan*, 10 Wash. 268, 38 Pac. 996.

§ 81. — **Matters Excepted in Statute Defining Offense:** *State v. Poole*, 42 Wash. 192, 84 Pac. 727.

§ 82. — **Matters of Defense and Rebuttal in General:** *State v. Payne*, 6 Wash. 563, 34 Pac. 317.

§ 83. — **Insanity:** *McAllister v. Territory*, 1 W. T. 360; *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

FACTS IN ISSUE AND RELEVANT TO ISSUES: See Remington's Digest, Crim. Law, §§ 84—100.

§ 84. **Relevancy in General:** *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Symes*, 20 Wash. 484, 55 Pac. 626; *State v. Clem*, 49 Wash. 73, 94 Pac. 1079; *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

§ 85. **Identity of Things:** *State v. Murphy*, 15 Wash. 98, 45 Pac. 729.

§ 86. **Motive or Absence of Motive:** *State v. Ackles*, 8 Wash. 462, 36 Pac. 597; *State v. Mann*, 39 Wash. 144, 81 Pac. 561; *State v. Harry John*, 103 Wash. 189, 173 Pac. 943.

§ 87. **Consciousness of Guilt:** *State v. Thompson*, 14 Wash. 285, 44 Pac. 533.

§ 88. — **Flight or Escape:** *State v. Stentz*, 33 Wash. 444, 74 Pac. 588; *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

§ 89. **Threats and Expressions of Ill Will:** *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

§ 90. **Preparations and Preceding Circumstances:** *State v. Farris*, 26 Wash. 205, 66 Pac. 412.

§ 91. **Habits and Custom:** *Smith v. United States*, 1 W. T. 262; *State v. Coella*, 8 Wash. 512, 36 Pac. 474; *State v. Ulsemer*, 4 Wash. 657, 64 Pac. 800.

§ 92. **Nature of Criminal Act and Attendant Circumstances:** *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115; *State v. Riddell*, 33 Wash. 324, 74 Pac. 477.

§ 93. **Means of Committing Offense and Articles Connected Therewith:** *State v. Cushing*, 17 Wash. 544, 50 Pac. 512; *State v. Burns*, 19 Wash. 52, 52 Pac. 316; *State v. Lattin*, 19 Wash. 57, 52 Pac. 314; *State v. Arnold*, 97 Wash. 611, 166 Pac. 777; *State v. Dotson*, 97 Wash. 607, 166 Pac. 769; *State v. Surry*, 23 Wash. 655, 63 Pac. 557; *State v. Costello*, 29 Wash. 366, 69 Pac. 1099.

§ 94. **Subsequent Incriminating or Exculpatory Circumstances:** *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810; *State v. Nelson*, 39 Wash. 221, 1 Pac. 721; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721; *State v. Johnson*, 36 Wash. 294, 78 Pac. 903; *State v. Leroy*, 61 Wash. 405,

112 Pac. 635; *State v. Brown*, 62 Wash. 293, 113 Pac. 782.

§ 95. **Subsequent Condition of Person Injured:** *State v. Weisenberger*, 42 Wash. 426, 85 Pac. 20.

§ 96. **Insanity:** *McAllister v. Territory*, 1 W. T. 360; *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *State v. Glindemann*, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810; *State v. Constantine*, 48 Wash. 218, 93 Pac. 317; *State v. Shaw*, 75 Wash. 326, 135 Pac. 20; *State v. Spangler*, 92 Wash. 636, 159 Pac. 810; *State v. Albutt*, 99 Wash. 253, 169 Pac. 584.

See, also, *State v. White*, 113 Wash. 416, 194 Pac. 390.

§ 97. **Intoxication:** *State v. Dolan*, 17 Wash. 499, 50 Pac. 472.

§ 98. **Excuse or Justification:** *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588.

§ 98-1. **Alibi:** *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898.

§ 99. **Incriminating Others:** *State v. Myers*, 12 Wash. 77, 40 Pac. 626.

§ 100. **Corroborating Circumstances:** *State v. Gile*, 8 Wash. 12, 35 Pac. 417; *State v. Cushing*, 17 Wash. 544, 50 Pac. 512; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810.

RES GESTAE: See *Remington's Digest*, *Crim. Law*, §§ 101—106.

§ 101. **Relation to Offense in General:** *Blanton v. State*, 1 Wash. 265, 24 Pac. 439; *State v. Wilson*, 9 Wash. 16, 36 Pac. 967; *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Pettit*, 77 Wash. 67, 137 Pac. 335.

See, also, *State v. Vane*, 105 Wash. 421, 178 Pac. 456.

§ 102. — **Acts and Statements of Accused:** *State v. Webster*, 21 Wash. 63, 57 Pac. 361; *State v. Falsetta*, 43 Wash. 159, 86 Pac. 168, 10 Ann. Cas. 177.

See, also, *State v. Morris*, 109 Wash. 490, 187 Pac. 360; *State v. Gottstein*, 111 Wash. 600, 191 Pac. 766.

§ 103. — **Other Offenses Part of Same Transaction:** *Blanton v. State*, 1 Wash. 265, 24 Pac. 439; *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Burton*, 27 Wash. 528, 67 Pac. 1097; *State v. McDowell*, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414.

See, also, *State v. Lathrop*, 112 Wash. 560, 192 Pac. 950.

§§ 104, 105. — **Acts and Statements of Person Injured:** *State v. Eddon*, 8 Wash. 292, 36 Pac. 139; *State v. Moody*, 18 Wash. 165, 51 Pac. 356; *State v. Webster*, 21 Wash. 63, 57 Pac. 361; *State v.*

Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; *State v. Smith*, 26 Wash. 354, 67 Pac. 70; *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036.

§ 106. — **Acts and Statements of Third Persons:** *State v. Robinson*, 12 Wash. 491, 41 Pac. 884; *State v. Baker*, 69 Wash. 589, 125 Pac. 1016.

OTHER OFFENSES AND CHARACTER OF ACCUSED: See *Remington's Digest*, *Crim. Law*, §§ 107—117. **Other Offenses as Evidence of Offense Charged in General:** *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Thompson*, 14 Wash. 285, 44 Pac. 533; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *State v. Carpenter*, 32 Wash. 254, 13 Pac. 357; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 814; *State v. Wood*, 33 Wash. 290, 75 Pac. 380; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721; *State v. Strodemier*, 40 Wash. 608, 82 Pac. 915; *State v. Marselle*, 43 Wash. 273, 86 Pac. 586; *State v. Macleod*, 78 Wash. 175, 138 Pac. 648; *State v. Moore*, 84 Wash. 263, 146 Pac. 627.

See, also, *State v. Kaukos*, 109 Wash. 20, 186 Pac. 269.

§ 108. **Evidence Relevant to Offense Charged also Proving Other Crimes:** *State v. Craemer*, 12 Wash. 217, 40 Pac. 944; *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Norris*, 27 Wash. 453, 67 Pac. 983; *State v. Patchen*, 37 Wash. 24, 79 Pac. 479; *State v. Strodemier*, 40 Wash. 608, 82 Pac. 915; *State v. Dalton*, 43 Wash. 278, 86 Pac. 590; *State v. Dana*, 59 Wash. 30, 109 Pac. 191; *State v. Thuna*, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768, 140 Am. St. Rep. 902; *State v. Leroy*, 61 Wash. 405, 112 Pac. 635; *State v. Conroy*, 82 Wash. 417, 144 Pac. 538.

See, also, *State v. Beaton*, 106 Wash. 423, 180 Pac. 146.

§ 109. **Evidence of Former Conviction to Affect Credibility:** *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *State v. Rowan*, 84 Wash. 158, 146 Pac. 374.

§ 110. **Acts Showing Intent or Malice or Motive:** *State v. Place*, 5 Wash. 773, 32 Pac. 736; *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588; *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989; *State v. Gunn*, 85 Wash. 121, 147 Pac. 401.

See, also, *False pretenses*—Other offenses: *State v. Anderson*, 107 Wash. 336, 181 Pac. 696, 185 Pac. 624.

— **Bootlegging**—Other sales to show intent—Admissibility: *State v. Hessel*, 112 Wash. 53, 191 Pac. 637.

— **Intent:** *State v. Morris*, 109 Wash. 490, 187 Pac. 350.

§ 111. **Acts Part of Series Showing System or Habit:** *State v. Bokien*, 14 Wash. 403, 44 Pac. 889; *State v. Pittam*,

32 Wash. 137, 72 Pac. 1042; State v. Craddick, 61 Wash. 425, 112 Pac. 491; State v. Hazzard, 75 Wash. 5, 134 Pac. 514; State v. Shea, 78 Wash. 342, 139 Pac. 203; State v. Tilden, 79 Wash. 472, 140 Pac. 680; State v. Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

§ 112. **Proof and Effect of Other Offenses:** State v. Eder, 36 Wash. 482, 78 Pac. 1023; State v. Smith, 103 Wash. 7, 174 Pac. 9.

§ 113. **Character or Reputation of Accused—Good Character as Evidence for Defense:** State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883; State v. Surry, 23 Wash. 655, 63 Pac. 577; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 15 Ann. Cas. 584, 14 L. R. A. (N. S.) 346; State v. Clem, 49 Wash. 273, 94 Pac. 1079; State v. Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633; State v. Turfey, 100 Wash. 5, 170 Pac. 335.

§ 114. — **Rebuttal of Evidence of Good Character:** State v. Carpenter, 32 Wash. 254, 73 Pac. 357.

§ 115. — **General Reputation:** Smith v. United States, 1 W. T. 262; State v. Regan, 8 Wash. 506, 36 Pac. 472; State v. Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 890, 29 L. R. A. 154; State v. Hoxey, 54 Wash. 309, 103 Pac. 12, 22 L. R. A. (N. S.) 670; State v. O'Brien, 66 Wash. 219, 119 Pac. 609.

§ 116. — **Particular Acts:** State v. Coates, 22 Wash. 601, 61 Pac. 726; State v. Shaw, 75 Wash. 326, 136 Pac. 20; State v. Schuman, 89 Wash. 9, 153 Pac. 1084, Ann. Cas. 1918A, 633.

§ 117. — **Weight and Effect of Evidence:** Klehn v. Territory, 1 Wash. 584, 21 Pac. 31.

MATERIALITY AND COMPETENCY IN GENERAL: See Remington's Digest, Crim. Law, §§ 118—126. **Remoteness of Evidence:** State v. Farris, 26 Wash. 205, 66 Pac. 412.

§ 119. **Experiments:** State v. Melvern, 32 Wash. 7, 72 Pac. 489.

§ 120. **Testimony as to Intent or Motive:** State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Weisenberger, 42 Wash. 426, 85 Pac. 20; State v. Hatupin, 99 Wash. 468, 169 Pac. 966.

§ 121. **Excuse for Failure to Call Witness:** State v. Coella, 8 Wash. 512, 36 Pac. 474.

§ 122. **Compelling Accused to Criminate Himself:** State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; State v. O'Hara, 17 Wash. 525, 50 Pac. 477, 933.

§ 123. **Evidence Wrongfully Obtained in General:** State v. Griffin, 43 Wash. 591, 86 Pac. 951, 11 Ann. Cas. 95.

§ 124. **Articles Taken from Accused:** State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883; State v. Royce, 38 Wash. 111, 80 Pac. 268, 3 Ann. Cas. 351.

§ 125. **Pending Civil or Criminal Proceedings Against Accused:** State v. Hopkins, 13 Wash. 5, 42 Pac. 627; State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716.

§ 126. **Admissibility of Whole Conversation Where Adverse Party has Shown Part:** White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; State v. Regan, 8 Wash. 506, 36 Pac. 472.

BEST AND SECONDARY EVIDENCE: See Remington's Digest, Crim. Law, §§ 127—130.

§ 127. **Admissibility of Secondary Evidence:** State v. Munson, 7 Wash. 239, 34 Pac. 932; State v. Garland, 65 Wash. 666, 118 Pac. 907.

§ 128. — **Where Writing is Lost:** State v. Erving, 19 Wash. 435, 53 Pac. 717; State v. Champoux, 33 Wash. 339, 74 Pac. 557.

§ 129. **Preliminaries to Admission of Secondary Evidence:** State v. Hopkins, 13 Wash. 5, 42 Pac. 627; State v. McCauley, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; State v. Morden, 87 Wash. 465, 151 Pac. 832.

§ 130. — **Effect of Secondary Evidence Where Opposite Party Withholds Document:** State v. Baldwin, 15 Wash. 15, 45 Pac. 650.

ADMISSIONS, DECLARATIONS AND HEARSAY: See Remington's Digest, Crim. Law, §§ 131—139. **Admissions by Accused—In General:** State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Sullivan, 97 Wash. 639, 166 Pac. 1123.

§ 131-1. — **Acquiescence or Silence:** State v. Baruth, 47 Wash. 283, 91 Pac. 977.

§ 132. — **Proof and Effect:** State v. Webster, 21 Wash. 63, 57 Pac. 361.

§ 133. **Admissions Made in Legal Proceedings:** State v. Hopkins, 13 Wash. 5, 42 Pac. 627; State v. Lyts, 25 Wash. 347, 65 Pac. 530; State v. Bringgold, 40 Wash. 12, 82 Pac. 132, 5 Ann. Cas. 716; State v. Poole, 42 Wash. 192, 84 Pac. 727.

§ 134. **Declarations by Accused—In General:** State v. McFadden, 41 Wash. 1, 84 Pac. 401; State v. Ross, 85 Wash. 218, 147 Pac. 1149; State v. Billingsley, 99 Wash. 445, 169 Pac. 845.

§ 135. — **Self-serving Declarations:** State v. Gates, 28 Wash. 689, 69 Pac. 385;

State v. Lewis, 31 Wash. 75, 71 Pac. 778.

See, also, State v. Morris, 109 Wash. 490, 187 Pac. 350; State v. Gottstein, 111 Wash. 600, 191 Pac. 766.

§ 136. **Declarations by Person Injured:** Thompson v. Territory, 1 W. T. 547; State v. Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; State v. Halbert, 14 Wash. 306, 44 Pac. 538; State v. Lattin, 19 Wash. 57, 52 Pac. 314; State v. Baruth, 47 Wash. 283, 91 Pac. 977; State v. Beaudin, 76 Wash. 306, 136 Pac. 137.

§ 137. **Declarations by Third Persons—In General:** State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Humason, 5 Wash. 499, 32 Pac. 111; State v. Halbert, 14 Wash. 306, 44 Pac. 538; State v. Craig, 52 Wash. 66, 100 Pac. 167; State v. Quinn, 56 Wash. 295, 105 Pac. 818.

§ 138. — **Letters Written to Accused:** State v. Royce, 38 Wash. 111, 80 Pac. 268, 3 Ann. Cas. 351; State v. Roberts, 95 Wash. 308, 163 Pac. 778.

§ 139. **Hearsay in General:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Coella, 8 Wash. 512, 36 Pac. 474; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Hunter, 18 Wash. 670, 52 Pac. 247; State v. Ripley, 32 Wash. 182, 72 Pac. 1036; State v. Champoux, 33 Wash. 339, 74 Pac. 557; State v. Royce, 38 Wash. 111, 80 Pac. 268, 3 Ann. Cas. 351; State v. Weisenberger, 42 Wash. 326, 85 Pac. 20; State v. McLain, 43 Wash. 124, 86 Pac. 390.

See, also, State v. Lowery, 104 Wash. 520, 177 Pac. 355.

ACTS AND DECLARATIONS OF CONSPIRATORS AND CODEFENDANTS: See Remington's Digest, Crim. Law, §§ 140—141.

§ 140. **Furtherance of Execution of Common Purpose:** State v. Payne, 10 Wash. 545, 39 Pac. 157; State v. Dilley, 44 Wash. 207, 87 Pac. 133; State v. Williams, 62 Wash. 286, 113 Pac. 780; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989; State v. Pettit, 74 Wash. 510, 133 Pac. 1014; State v. Pettit, 77 Wash. 67, 137 Pac. 335; State v. Miller, 68 Wash. 239, 122 Pac. 1066.

§ 140½. **After Accomplishment of Object:** State v. Coss, 12 Wash. 673, 42 Pac. 127; State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. Dalton, 65 Wash. 663, 118 Pac. 829; State v. Mallahan, 66 Wash. 21, 118 Pac. 898.

See, also, State v. Lowery, 104 Wash. 520, 177 Pac. 355.

§ 141. **Proof and Effect of Acts or Declarations:** State v. McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989.

DOCUMENTARY EVIDENCE: See Remington's Digest, Crim. Law, §§ 142—146. **Official Acts or Proceedings, and Records:** State v. Symes, 20 Wash. 484, 55 Pac. 626; State v. Champoux, 33 Wash. 339, 74 Pac. 557.

§ 143. **Certified Copies:** State v. Yourex, 30 Wash. 611, 71 Pac. 203.

See, also, State v. Harding, 108 Wash. 606, 185 Pac. 579; State v. Morris, 109 Wash. 490, 187 Pac. 350; State v. Storrs, 112 Wash. 675, 192 Pac. 984; 197 Pac. 17.

§ 144. **Private Writings and Publications—Letters and Telegrams:** State v. Wilson, 10 Wash. 402, 39 Pac. 106; State v. Nelson, 39 Wash. 221, 81 Pac. 721; State v. Dilley, 44 Wash. 207, 87 Pac. 133; State v. Tilden, 79 Wash. 472, 140 Pac. 680.

§ 145. — **Maps, Plats and Diagrams:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; State v. Hunter, 18 Wash. 670, 52 Pac. 247.

§ 146. — **Photographs:** Crane v. Dexter Horton & Co., 5 Wash. 479, 32 Pac. 223; State v. Fateh-Mohamed, 76 Wash. 462, 136 Pac. 676.

OPINION EVIDENCE: See Remington's Digest, Crim. Law, §§ 147—159.

Conclusions and Matters of Opinion of Facts: State v. Munson, 7 Wash. 239, 34 Pac. 932; State v. Coella, 8 Wash. 512, 36 Pac. 474; State v. Gates, 28 Wash. 689, 69 Pac. 385; State v. Anderson, 30 Wash. 14, 70 Pac. 104; State v. Stockhammer, 34 Wash. 262, 75 Pac. 810; State v. Wingard, 92 Wash. 219, 158 Pac. 725.

§ 148. **Competency of Nonexperts, in General:** State v. Melvern, 32 Wash. 7, 72 Pac. 489.

§ 149. **Witnesses in General—Inferences or Impressions from Collective Facts:** State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Coella, 8 Wash. 512, 36 Pac. 474; State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Smail, 63 Wash. 172, 115 Pac. 82.

§ 150. — **Special Knowledge as to Subject Matter:** State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Miller, 80 Wash. 75, 141 Pac. 293, 1139.

§ 151. — **Personal Identity and Characteristics:** State v. Murphy, 15 Wash. 98, 45 Pac. 729; State v. Rutledge, 37 Wash. 523, 79 Pac. 1123; State v. Morrow, 63 Wash. 297, 115 Pac. 161, Ann. Cas. 1912D, 570; State v. Elliott, 68 Wash. 603, 123 Pac. 1089; State v. Miller, 78 Wash. 268, 138 Pac. 896.

§ 152. — **Age:** State v. Falsetta, 43 Wash. 159, 86 Pac. 168, 10 Ann. Cas. 177.

§ 153. — **Mental Condition or Capacity:** Blanton v. State, 1 Wash. 265, 24 Pac. 439; State v. Brooks, 4 Wash. 328,

30 Pac. 147; State v. Craig, 52 Wash. 66, 100 Pac. 167; State v. Constantine, 48 Wash. 218, 93 Pac. 317; State v. Spangler, 92 Wash. 636, 159 Pac. 810.

See, also, State v. White, 113 Wash. 416, 194 Pac. 390.

§ 154. — **Nature, Condition and Relation of Objects:** State v. Cushing, 17 Wash. 544, 50 Pac. 572.

§ 155. **Subjects of Expert Testimony—Matters Involving Special Knowledge in General:** State v. Gates, 28 Wash. 689, 69 Pac. 385.

§ 155-1. **Bodily Condition:** State v. Beaudin, 76 Wash. 306, 136 Pac. 137.

§ 155-2. — **Mental Condition:** State v. Robinson, 12 Wash. 491, 41 Pac. 884.

§ 155-3. — **Cause and Effect:** State v. Bridgham, 51 Wash. 18, 97 Pac. 1096.

§ 156. **Competency of Experts—Medical Experts:** State v. Boyce, 24 Wash. 514, 64 Pac. 719.

§ 157. — **Determination of Question of Competency:** State v. Melvern, 32 Wash. 7, 72 Pac. 489.

§ 158. **Examination of Experts—Hypothetical Questions:** State v. Underwood, 35 Wash. 558, 79 Pac. 863; State v. Wilson, 68 Wash. 464, 123 Pac. 795.

See, also, State v. Swartz, 108 Wash. 21, 182 Pac. 953; State v. Lathrop, 112 Wash. 560, 192 Pac. 950.

§ 159. **Comparison of Handwriting:** State v. Fillpot, 51 Wash. 223, 98 Pac. 659.

See, also, State v. McGuff, 104 Wash. 501, 177 Pac. 316.

TESTIMONY OF ACCOMPLICES AND CODEFENDANTS: See Remington's Digest, Crim. Law, §§ 160—164. **Accessories Before and After the Fact:** Edwards v. Territory, 1 W. T. 195.

§ 161. **Admissibility and Effect of Testimony of Accomplices:** State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. Ray, 62 Wash. 582, 114 Pac. 439; State v. Stapp, 65 Wash. 438, 118 Pac. 337; State v. Mallahan, 66 Wash. 21, 118 Pac. 898; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989.

See, also, State v. Vane, 105 Wash. 421, 178 Pac. 456.

§ 162. **Corroboration of Accomplice—Necessity:** Edwards v. State, 2 Wash. 291, 26 Pac. 258; Rose v. State, 2 Wash. 310, 26 Pac. 264; State v. Concannon, 25 Wash. 327, 65 Pac. 534; State v. Stapp, 65 Wash. 438, 118 Pac. 337; State v. Dalton, 65 Wash. 663, 118 Pac. 829; State v. Mallahan, 66 Wash. 21, 118 Pac. 898; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989; State v. Engstrom, 86 Wash. 499, 150 Pac. 1173.

§ 163. — **Sufficiency:** Edwards v. State, 2 Wash. 291, 26 Pac. 258; Rose v. State, 2 Wash. 310, 26 Pac. 264; State v. Concannon, 25 Wash. 327, 65 Pac. 534; State v. Pearson, 37 Wash. 405, 79 Pac. 985.

§ 164. **Testimony of Codefendants—Admissibility:** Edwards v. State, 2 Wash. 291, 26 Pac. 258.

EVIDENCE AT FORMER TRIAL: See Remington's Digest, Crim. Law, §§ 172, 173. **In General:** State v. Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; State v. Cushing, 17 Wash. 544, 50 Pac. 512. **Death of Witness as Ground for Admission of Former Testimony:** State v. Cushing, 17 Wash. 544, 50 Pac. 512.

WEIGHT AND SUFFICIENCY: See Remington's Digest, Crim. Law, §§ 175—185.

Weight and Conclusiveness in General: State v. Roller, 30 Wash. 692, 71 Pac. 718; State v. Fetterly, 33 Wash. 599, 74 Pac. 810; State v. Patchen, 37 Wash. 24, 79 Pac. 479; State v. Hill, 45 Wash. 694, 89 Pac. 160; State v. Rackich, 66 Wash. 390, 119 Pac. 843, Ann. Cas. 1913C, 312, 37 L. R. A. (N. S.) 760.

§ 176. **Circumstantial Evidence:** State v. Payne, 6 Wash. 563, 34 Pac. 317.

§ 177. **Flight or Attempted Escape:** State v. Detherage, 35 Wash. 326, 77 Pac. 504.

§ 179. **Reasonable Doubt:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; Klehn v. Territory, 1 Wash. 584, 21 Pac. 31; State v. Kasper, 5 Wash. 174, 31 Pac. 636; State v. Munson, 7 Wash. 239, 34 Pac. 932; State v. Berzaman, 10 Wash. 277, 38 Pac. 1037.

§ 180. **Sufficiency to Support Conviction in General:** Miller v. Territory, 3 W. T. 554, 19 Pac. 50; State v. Eubank, 33 Wash. 293, 74 Pac. 378; State v. Johnson, 36 Wash. 294, 78 Pac. 903.

§ 181. **Corpus Delicti:** Timmerman v. Territory, 3 W. T. 445, 17 Pac. 624; State v. Smith, 9 Wash. 341, 37 Pac. 491; State v. Gates, 28 Wash. 689, 69 Pac. 385.

§ 182. **Place of Commission of Offense and Venue:** State v. Whiteman, 9 Wash. 402, 37 Pac. 659; State v. Michel, 20 Wash. 162, 54 Pac. 995; State v. Fetterly, 33 Wash. 599, 74 Pac. 810; State v. Gilluly, 50 Wash. 1, 96 Pac. 512; State v. Fillpot, 51 Wash. 223, 98 Pac. 659; State v. Kincaid, 69 Wash. 273, 124 Pac. 684; State v. Chin Sam, 76 Wash. 612, 136 Pac. 1146; State v. Dooley, 82 Wash. 483, 144 Pac. 654; State v. Libby, 89 Wash. 27, 153 Pac. 1058, 155 Pac. 746; Spokane v. Knight, 96 Wash. 403, 165 Pac. 105.

§ 183. **Identity and Characteristics of Persons or Things:** State v. Meyers, 9 Wash. 8, 36 Pac. 1051; State v. Williams, 36 Wash. 143, 78 Pac. 780; State v. Smith, 40 Wash. 615, 82 Pac. 918, 5 Ann. Cas. 686; State v. Romano, 41 Wash. 241, 83 Pac. 1; State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922; State v. Williams, 62 Wash. 286, 113 Pac. 780; State v. Brown, 62 Wash. 293, 113 Pac. 782; State v. Miller, 80 Wash. 75, 141 Pac. 293, 1139; State v. Aurand, 76 Wash. 529, 136 Pac. 1139; State v. Wilmot, 95 Wash. 326, 163 Pac. 742.

§ 184. **Insanity:** McAllister v. Territory, 1 W. T. 360.

§ 185. **Alibi:** State v. Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897.

Experiments and Tests: See Remington's Digest, Crim. Law, § 212; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Barker, 56 Wash. 510, 106 Pac. 133; State v. Catsampas, 62 Wash. 70, 112 Pac. 1116; State v. Baker, 69 Wash. 589, 125 Pac. 1016.

See, also, State v. Burcham, 109 Wash. 625, 187 Pac. 352.

§ 2153. **Proof of Marriage in Adultery, Bigamy, etc.**

A recorded certificate of marriage, or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this chapter. [L. '95, p. 372, § 5.]

"Chapter" refers to L. '95, relating to incest, adultery and bigamy.

§ 2154. **Receiving Stolen Property—Averments and Proof Necessary.**

In any prosecution for the offense of buying, receiving, or aiding in the concealment of stolen property, moneys, or goods, known to have been stolen, or for bringing or aiding in bringing into this state any such property, money or goods, known to have been stolen, it shall not be necessary to aver, nor on the trial thereof to prove, that the person who stole such property has been convicted, nor that the larceny of such property, nor that any conspiracy or agreement between the defendant and any other person or persons concerning the stealing, buying, receiving, concealing, or bringing of such stolen property, was committed or entered into within the jurisdiction of the court trying the case. [Cf. L. '54, p. 84, § 50; Cd. '81, § 850; L. '90, p. 129, § 1; 2 H. C., § 69.]

§ 2156. **Variance as to Ownership of Property.**

In the prosecution of any offense committed upon or in relation to or in any way affecting any real estate, or any offense committed in stealing, embezzling, destroying, injuring, or fraudulently receiving or concealing any money, goods, or other personal estate, it shall be sufficient, and shall not be deemed variance, if it be proved on trial that, at the time when such offense was committed, either the actual or constructive possession, or the general or special property, in the whole or any part of such real or personal estate, was in the person or community alleged in the indictment or other accusation to be the owner thereof. [L. '54, p. 99, § 133; Cd. '81, § 963; 2 H. C., § 1377.]

See supra, § 2076, variance as to ownership of property, when.

Cited in 6 Wash. 189; 35 Wash. 134.

ISSUES, PROOF AND VARIANCE:
See Remington's Digest, Ind. & Inf., §§ 89—99.

Matters to be Proved—Surplusage and Unnecessary Allegations: State v. Stewart, 32 Wash. 103, 72 Pac. 1026; State v. Fetterly, 33 Wash. 599, 74 Pac. 810.

§ 90. **Evidence Admissible Under Pleadings:** White v. Territory, 1 Wash. 279, 24 Pac. 447.

§ 91. **Variance Between Allegations and Proof—In General:** State v. Brown, 6 Wash. 609, 34 Pac. 133.

§ 92. **— Principals and Accessories:** State v. Duncan, 7 Wash. 336, 35 Pac.

117, 38 Am. St. Rep. 888 (overruled); State v. Gifford, 19 Wash. 464, 53 Pac. 709 (overruling State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888); State v. Morgan, 21 Wash. 355, 58 Pac. 215.

§ 94. — **Place of Offense:** State v. Whiteman, 9 Wash. 402, 37 Pac. 659; State v. Cox, 39 Wash. 345, 81 Pac. 848; State v. Dolson, 22 Wash. 259, 60 Pac. 653.

§ 96. — **Mode or Means of Committing Offense:** State v. Payne, 10 Wash. 545, 39 Pac. 157; State v. Mendenhall, 24 Wash. 12, 63 Pac. 1109; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Anderson, 30 Wash. 14, 70 Pac. 104.

§ 98. — **Description, Quantity or Value of Property:** State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Phillips, 27 Wash. 364, 67 Pac. 608; State v. Rackich, 66 Wash. 390, 119 Pac. 843, Ann. Cas. 1913C, 312, 37 L. R. A. (N. S.) 760.

§ 99. — **Ownership, Possession or Custody of Property:** State v. Fair, 35 Wash. 127, 76 Pac. 731, 102 Am. St. Rep. 897; State v. Smith, 40 Wash. 615, 82 Pac. 918, 5 Ann. Cas. 686; State v. Wilson, 42 Wash. 56, 84 Pac. 409, 7 Ann. Cas. 418.

§ 2158. Court to Decide Questions of Law, Rules of Practice.

The court shall decide all questions of law which shall arise in the course of the trial, and the trial shall be conducted in the same manner as in civil actions. [Cf. L. '54, p. 119, § 111; Cd. '81, § 1088; L. '91, p. 60, § 70; 2 H. C., § 1310.]

See supra, § 339 and notes, practice in civil actions.

Cited in 83 Wash. 517.

Course and Conduct of Trial: See Remington's Digest, Crim. Law, §§ 215—220. **Remarks and Conduct of Judge—In General:** State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Wroth, 15 Wash. 621, 47 Pac. 106; State v. Phillips, 59 Wash. 252, 109 Pac. 1047; State v. Baker, 67 Wash. 595, 122 Pac. 335; State v. Jones, 80 Wash. 588, 142 Pac. 35.

§ 216. — **Comments on Evidence or Witnesses:** State v. Carter, 15 Wash. 121, 45 Pac. 745; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Hyde, 20 Wash. 234, 55 Pac. 49; State v. Surry, 23 Wash. 655, 63 Pac. 577; State v. Crofts, 22 Wash. 245, 60 Pac. 403; State v. Priest, 32 Wash. 74, 72 Pac. 1024; State v. Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; State v. De Pasquale, 39 Wash. 260, 81 Pac. 689; State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989; State v. Pettviel, 99 Wash. 434, 169 Pac. 977; State v. Jackson, 83 Wash. 514, 145 Pac. 470; State v. Russell, 90 Wash. 474, 156 Pac. 565; State v. Roberts, 91 Wash. 560, 158 Pac. 101; State v. Seablom, 103 Wash. 53, 173 Pac. 721; State v. Smith, 103 Wash. 267, 174 Pac. 9.

See, also, State v. Herwitz, 109 Wash. 153, 186 Pac. 290; State v. Storrs, 112 Wash. 675, 192 Pac. 984, 197 Pac. 17.

§ 217. — **Comment in Ruling on Evidence:** State v. Myers, 12 Wash. 77, 40 Pac. 626; State v. Coates, 22 Wash. 601, 61 Pac. 726; State v. Surry, 23 Wash. 655, 63 Pac. 557; State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Eubank,

33 Wash. 293, 74 Pac. 378; State v. Mann, 39 Wash. 144, 81 Pac. 561; State v. Schuman, 89 Wash. 9, 153 Pac. 1084; Ann. Cas. 1918A, 633; State v. Moneymaker, 100 Wash. 463, 171 Pac. 253; State v. Seablom, 103 Wash. 53, 173 Pac. 721.

§ 218. — **Proceedings for Contempt:** State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; State v. Dalton, 43 Wash. 278, 86 Pac. 590.

§ 219. — **Arrest of Witness:** State v. Roberts, 91 Wash. 560, 158 Pac. 101.

§ 220. **Presence and Conduct of Bystanders:** State v. Anderson, 20 Wash. 193, 55 Pac. 39; State v. McGilvery, 20 Wash. 240, 55 Pac. 115.

PROVINCE OF COURT AND JURY IN GENERAL: See Remington's Digest, Crim. Law, §§ 246—254.

§ 246. **Functions as Judges of Law and Facts in General:** Hartigan v. Territory, 1 W. T. 447; State v. Crossen, 77 Wash. 438, 137 Pac. 1030.

§ 247. **Questions of Law or of Fact—Preliminary or Introductory Questions of Fact:** Thompson v. Territory, 1 W. T. 547; State v. Cushing, 17 Wash. 544, 50 Pac. 712.

§ 248. — **Defenses in General:** State v. Barr, 11 Wash. 481, 39 Pac. 1080, 48 Am. St. Rep. 90, 29 L. R. A. 154; State v. Eubank, 33 Wash. 293, 74 Pac. 378.

§ 250. — **Weight and Effect of Evidence in General:** State v. Crawford, 31 Wash. 260, 71 Pac. 1031; State v. Eubank, 33 Wash. 293, 74 Pac. 378; State v. Schuman, 9 Wash. 89, 153 Pac. 1084, Ann. Cas. 1918A, 633; State v. Brooks, 89 Wash. 427, 154 Pac. 795.

See, also, *State v. Miller*, 105 Wash. 475, 178 Pac. 459; *State v. Swager*, 110 Wash. 431, 188 Pac. 504.

§ 251. — **Inferences from Evidence:** *State v. Walters*, 7 Wash. 246, 34 Pac. 936, 1098; *State v. Yourex*, 30 Wash. 611, 71 Pac. 203.

§ 252. — **Sufficiency of Evidence:** *State v. Elswood*, 15 Wash. 453, 46 Pac. 727.

§ 253. — **Grade or Degree of Offense:** *Leschi v. Territory*, 1 W. T. 13; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Murphy*, 101 Wash. 425, 172 Pac. 544.

§ 254. **Direction of Verdict:** *State v. Coella*, 8 Wash. 512, 36 Pac. 474; *State v. Wilson*, 10 Wash. 402, 39 Pac. 106; *State v. O'Hara*, 17 Wash. 525, 50 Pac. 477, 933; *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044; *State v. Hyde*, 22 Wash. 551, 61 Pac. 719; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810; *State v. Holmes*, 68 Wash. 7, 122 Pac. 345.

INSTRUCTIONS INVADING PROVINCE OF JURY: See *Remington's Digest*, *Crim. Law*, §§ 255—269.

§ 255. **Comments on Facts and Evidence in General:** *Freidrich v. Territory*, 2 Wash. 358, 26 Pac. 976; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; *State v. Carter*, 15 Wash. 121, 45 Pac. 745; *State v. Carey*, 15 Wash. 549, 46 Pac. 1050; *State v. Mitchell*, 32 Wash. 64, 72 Pac. 707; *State v. Vance*, 29 Wash. 435, 70 Pac. 34; *State v. Fenton*, 30 Wash. 325, 70 Pac. 741; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Detherage*, 35 Wash. 326, 77 Pac. 504; *State v. Wappenstein*, 67 Wash. 501, 121 Pac. 989; *State v. Shaw*, 75 Wash. 326, 135 Pac. 20; *State v. Miller*, 72 Wash. 174, 130 Pac. 356; *State v. Primmer*, 69 Wash. 400, 125 Pac. 158; *State v. Brownlow*, 89 Wash. 582, 154 Pac. 1099.

See, also, *State v. Palmer*, 104 Wash. 396, 176 Pac. 747; *State v. Siebenbaum*, 105 Wash. 157, 177 Pac. 669; *State v. Dale*, 110 Wash. 181, 188 Pac. 473; *State v. Warwick*, 105 Wash. 634, 178 Pac. 977.

§ 256. **Statement and Review of Evidence:** *State v. Gohl*, 46 Wash. 408, 90 Pac. 259.

§ 257. — **Reference to Interest of Accused:** *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055; *State v. Nordstrom*, 7 Wash. 506, 35 Pac. 382; *State v. White*, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; *State v. Carey*, 15 Wash. 549, 46 Pac. 1050; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

§ 258. — **Inferences from Evidence:** *State v. Gates*, 28 Wash. 689, 69 Pac.

385; *State v. Richards*, 97 Wash. 587, 167 Pac. 47.

§ 258-1. — **Hypothetical Statements:** *State v. Gohl*, 46 Wash. 408, 90 Pac. 259.

See, also, *State v. Skinner*, 111 Wash. 435, 191 Pac. 148.

§ 259. — **Assumptions as to Facts:** *State v. Howard*, 33 Wash. 250, 74 Pac. 382; *State v. Wheeler*, 93 Wash. 538, 161 Pac. 373.

See, also, *State v. McGuff*, 104 Wash. 501, 177 Pac. 316; *State v. Warwick*, 105 Wash. 634, 178 Pac. 977.

§ 260. — **Assuming Admitted or Established Facts:** *Edwards v. Territory*, 1 W. T. 195; *State v. Belknap*, 44 Wash. 605, 87 Pac. 934.

§ 261. — **Assuming Commission of Crime:** *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

§ 262. — **Assuming Defendant's Guilt:** *State v. John Port Townsend*, 7 Wash. 462, 35 Pac. 367; *State v. McBride*, 72 Wash. 390, 130 Pac. 486.

§ 263. — **Assuming Existence of Incriminating Evidence:** *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Riddell*, 33 Wash. 324, 74 Pac. 477; *State v. Stentz*, 33 Wash. 444, 74 Pac. 588; *State v. Manderville*, 37 Wash. 365, 74 Pac. 977.

§ 264. — **Opinion or Belief as to Facts:** *Freidrich v. Territory*, 2 Wash. 358, 26 Pac. 976.

§ 265. — **Weight and Effect of Evidence:** *State v. Stentz*, 33 Wash. 444, 74 Pac. 588; *State v. Williams*, 36 Wash. 143, 78 Pac. 780; *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Cherry Point Fish Co.*, 72 Wash. 420, 130 Pac. 499; *State v. Duncan*, 101 Wash. 542, 172 Pac. 915.

§ 266. — **Weight of Particular Facts:** *White v. Territory*, 3 W. T. 397, 19 Pac. 37; *State v. Ware*, 58 Wash. 526, 109 Pac. 359.

§ 267. — **Comments on Conduct or Character of Accused or Prosecutor:** *State v. Newton*, 29 Wash. 373, 70 Pac. 31.

§ 268. — **Determination of Questions of Law:** *Leschi v. Territory*, 1 W. T. 13; *State v. McPhail*, 39 Wash. 199, 81 Pac. 683; *State v. Smails*, 63 Wash. 172, 115 Pac. 82.

§ 269. — **Instructions as to Duties of Jury:** *State v. Brooks*, 4 Wash. 238, 30 Pac. 147; *State v. Harsted*, 66 Wash. 158, 119 Pac. 24; *State v. Serwe*, 91 Wash. 516, 158 Pac. 81.

NECESSITY, REQUISITES AND SUFFICIENCY OF INSTRUCTIONS: See *Remington's Digest*, *Crim. Law*, §§ 270—312.

§ 270. **Corpus Delicti:** State v. Burton, 27 Wash. 528, 67 Pac. 1097.

§ 272. **Elements and Incidents of Offense, and Defenses in General:** Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. Ackles, 8 Wash. 462, 36 Pac. 597; State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; State v. Greiner, 63 Wash. 46, 114 Pac. 897.

§ 273. **Intent and Malice:** State v. Dolan, 17 Wash. 499, 50 Pac. 472; State v. Surry, 23 Wash. 655, 63 Pac. 557.

§ 274. **Insanity:** State v. Hawkins, 23 Wash. 389, 63 Pac. 258; State v. Champoux, 33 Wash. 339, 74 Pac. 557; State v. Craig, 52 Wash. 66, 100 Pac. 167; State v. Harris, 74 Wash. 60, 132 Pac. 735.

§ 275. **Intoxication:** State v. Hawkins, 23 Wash. 289, 63 Pac. 258.

§ 276. **Alibi:** State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. King, 50 Wash. 312, 97 Pac. 247, 16 Ann. Cas. 322; State v. Arnold, 97 Wash. 611, 166 Pac. 777.

§ 277. **Character:** State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. Stentz, 33 Wash. 444, 74 Pac. 588; State v. Underwood, 35 Wash. 558, 79 Pac. 863.

§ 278. **Presumptions and Burden of Proof in General:** State v. Conahan, 10 Wash. 268, 38 Pac. 996; State v. Melvern, 32 Wash. 7, 72 Pac. 489.

§ 280. — **Flight:** State v. Stentz, 33 Wash. 444, 74 Pac. 588; State v. Pettit, 74 Wash. 510, 133 Pac. 1014; State v. Pettit, 77 Wash. 67, 137 Pac. 335.

§ 281. — **Presumption of Innocence:** State v. Courtemarch, 11 Wash. 446, 39 Pac. 955; State v. Krug, 12 Wash. 28, 41 Pac. 126; State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881; State v. Aurand, 76 Wash. 529, 136 Pac. 1139.

§ 282. — **Intent:** State v. Nichols, 15 Wash. 1, 45 Pac. 647; State v. Williams, 36 Wash. 143, 78 Pac. 780.

§ 283. — **Presumption as to Intending Natural Consequences of Act:** State v. Dolan, 17 Wash. 499, 50 Pac. 472; State v. Williams, 36 Wash. 143, 78 Pac. 780; State v. Romano, 41 Wash. 241, 83 Pac. 1; State v. Davis, 72 Wash. 261, 130 Pac. 95.

§ 284. — **Shifting Burden of Proof:** State v. Hoshor, 26 Wash. 643, 67 Pac. 386.

§ 285. **Declarations of Conspirators and Codefendants:** State v. Johnny Tommy, 19 Wash. 270, 53 Pac. 157.

§ 286. **Testimony of Accomplices:** State v. Coates, 22 Wash. 601, 61 Pac. 726; State v. Concannon, 25 Wash. 327, 65 Pac. 534; State v. Pearson, 37 Wash. 405, 79

Pac. 985; State v. Harras, 25 Wash. 416, 65 Pac. 774; State v. Jones, 53 Wash. 142, 101 Pac. 708; State v. Stapp, 65 Wash. 438, 118 Pac. 337.

§ 287. **Weight and Credibility of Evidence:** State v. Eddon, 8 Wash. 292, 36 Pac. 139; State v. Rutledge, 37 Wash. 523, 79 Pac. 1123; State v. Stapp, 65 Wash. 438, 118 Pac. 337.

§ 287-1. — **Confessions:** State v. Barker, 56 Wash. 510, 106 Pac. 133.

§ 288. **Circumstantial Evidence:** Timmerman v. Territory, 3 W. T. 445, 17 Pac. 624.

§ 289. **Credibility of Witnesses:** State v. Friedrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; State v. Kyle, 14 Wash. 550, 45 Pac. 147; State v. Hawkins, 23 Wash. 289, 63 Pac. 258; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Fenton, 30 Wash. 325, 70 Pac. 741; State v. Patchen, 37 Wash. 24, 79 Pac. 479; State v. McPhail, 39 Wash. 199, 81 Pac. 683; State v. Ilomaki, 40 Wash. 629, 82 Pac. 873; State v. Gaul, 88 Wash. 295, 152 Pac. 1029; State v. Sullivan, 97 Wash. 639, 166 Pac. 1123; State v. Seablom, 103 Wash. 53, 173 Pac. 721.

See, also, State v. Chittenden, 111 Wash. 213, 190 Pac. 232.

§ 290. **Credibility of Testimony or Statement of Accused:** State v. Ulsemer, 24 Wash. 657, 64 Pac. 80; State v. Melvern, 32 Wash. 7, 72 Pac. 489; State v. King, 50 Wash. 312, 97 Pac. 247; 16 Ann. Cas. 322.

§ 292. **Reasonable Doubt:** Smith v. United States, 1 W. T. 262; State v. Kasper, 5 Wash. 174, 31 Pac. 636; State v. Harras, 25 Wash. 416, 65 Pac. 744; State v. King, 49 Wash. 31, 94 Pac. 663; State v. Quinn, 56 Wash. 295, 105 Pac. 818; State v. Sullivan, 97 Wash. 639, 166 Pac. 1123; State v. Harsted, 66 Wash. 158, 119 Pac. 24; State v. Wappenstein, 67 Wash. 502, 121 Pac. 989; State v. Lance, 94 Wash. 484, 162 Pac. 574.

See, also, State v. Herwitz, 109 Wash. 153, 186 Pac. 290.

§ 293. — **Doubt Which Would Influence Reasonably Prudent Man:** State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Rosener, 8 Wash. 42, 35 Pac. 357; State v. Carpenter, 32 Wash. 254, 73 Pac. 357; State v. King, 12 Wash. 288, 41 Pac. 126; State v. Harras, 25 Wash. 416, 65 Pac. 744.

§ 294. — **Doubt on Any Fact:** State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; Leonard v. Territory, 2 W. T. 381, 7 Pac. 872; State v. Myers, 12 Wash. 77, 40 Pac. 626.

§ 295. **Law Applicable to Particular Issues or Theories:** State v. Carey, 15 Wash. 549, 46 Pac. 1050.

§ 296. **Principals and Accessories:** State v. Jones, 3 Wash. 175, 28 Pac. 254; State v. Peasley, 80 Wash. 99, 141 Pac. 316.

§ 297. **Grade or Degree of Offense:** State v. Courtemarch, 11 Wash. 446, 39 Pac. 955; State v. Dolan, 17 Wash. 499, 50 Pac. 472; State v. Young, 22 Wash. 273, 60 Pac. 650; State v. Dengel, 24 Wash. 49, 63 Pac. 1104; State v. Fenton, 30 Wash. 795, 70 Pac. 741; State v. Bailey, 31 Wash. 89, 71 Pac. 715; State v. McPhail, 39 Wash. 199, 81 Pac. 683; State v. Lindgrind, 33 Wash. 440, 74 Pac. 565; State v. Underwood, 35 Wash. 558, 79 Pac. 863; State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; State v. Beatty, 59 Wash. 235, 109 Pac. 1011; State v. Harsted, 66 Wash. 158, 119 Pac. 24; State v. Hart, 79 Wash. 225, 140 Pac. 321; State v. Reynolds, 94 Wash. 270, 162 Pac. 358.

See, also, State v. Dale, 110 Wash. 181, 188 Pac. 473.

§ 298. **Influence of Arguments of Counsel:** State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Lance, 94 Wash. 484, 162 Pac. 574.

§ 299. **Definition or Explanation of Terms:** State v. Coella, 3 Wash. 99, 28 Pac. 28; State v. Johnson, 19 Wash. 410, 53 Pac. 667; State v. Druxinman, 34 Wash. 257, 75 Pac. 814.

§ 300. **Written Instructions:** State v. Champoux, 33 Wash. 339, 74 Pac. 557; State v. Mayo, 42 Wash. 540, 85 Pac. 251, 7 Ann. Cas. 881.

§ 301. **Form and Language in General:** State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. Harras, 25 Wash. 416, 65 Pac. 744; State v. Robinson, 12 Wash. 491, 41 Pac. 884; State v. Williams, 13 Wash. 335, 43 Pac. 15; State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. Armstrong, 37 Wash. 51, 79 Pac. 490; Everett v. Simmons, 86 Wash. 276, 150 Pac. 414.

See, also, State v. Vane, 105 Wash. 421, 178 Pac. 456; State v. Chittenden, 111 Wash. 213, 190 Pac. 232.

§ 302. **Repetition:** State v. Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006; State v. Churchill, 52 Wash. 210, 100 Pac. 309.

See, also, State v. Sowders, 109 Wash. 10, 186 Pac. 260.

§ 303. **Inconsistent, Misleading or Contradictory Instructions:** McClaine v. Territory, 1 Wash. 345, 35 Pac. 453; State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Rosener, 8 Wash. 42, 35 Pac. 357; State v. Burton, 27 Wash. 528, 67 Pac. 1097.

§ 305. **Appearance and Demeanor of Accused:** State v. Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332.

§ 306. **Abstract Instructions in General:** Yelm Jim v. Territory, 1 W. T. 63;

State v. Cushing, 17 Wash. 544, 50 Pac. 512.

§ 307. **Application of Instructions to Case:** Smith v. United States, 1 W. T. 262; Miller v. Territory, 3 W. T. 554, 19 Pac. 50; State v. Jones, 3 Wash. 175, 28 Pac. 254; State v. Armstrong, 37 Wash. 51, 79 Pac. 490; State v. Pettit, 74 Wash. 510, 133 Pac. 1014.

See, also, State v. Cook, 113 Wash. 391, 194 Pac. 401.

§ 308. **Instructions Excluding or Ignoring Issues, Defenses or Evidence:** State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; State v. Barker, 56 Wash. 510, 106 Pac. 133; State v. Moss, 73 Wash. 430, 131 Pac. 1132.

§ 309. **Submission of Matters not Within Issues or not Sustained by Evidence:** Doctor Jack v. Territory, 2 W. T. 101, 3 Pac. 832; State v. White, 10 Wash. 611, 39 Pac. 160, 41 Pac. 442; State v. Surry, 23 Wash. 655, 63 Pac. 557.

§ 310. **Instructions Correcting Previous Erroneous Instructions and Omissions:** Doctor Jack v. Territory, 2 W. T. 101, 3 Pac. 832.

§ 311. **Construction and Effect of Charge as a Whole:** White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Regan, 8 Wash. 506, 36 Pac. 472; State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Carter, 15 Wash. 121, 45 Pac. 745; State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. Surry, 23 Wash. 655, 63 Pac. 557; State v. Riddell, 33 Wash. 324, 74 Pac. 477; State v. Manderville, 37 Wash. 865, 79 Pac. 977; State v. Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006.

See, also, State v. Sowders, 109 Wash. 10, 186 Pac. 260.

§ 312. **Error in Instructions Cured by Withdrawal or Giving Other Instructions:** McClaine v. Territory, 1 Wash. 345, 25 Pac. 453; State v. Carter, 15 Wash. 121, 45 Pac. 745; State v. Crawford, 31 Wash. 260, 71 Pac. 1031; State v. Peasley, 80 Wash. 99, 141 Pac. 316.

REQUESTS FOR INSTRUCTIONS: See Remington's Digest, Crim. Law, §§ 313—318.

Necessity in General: State v. Johnson, 19 Wash. 410, 53 Pac. 667; State v. Parsons, 44 Wash. 299, 87 Pac. 349, 120 Am. St. Rep. 1003, 12 Ann. Cas. 61, 7 L. R. A. (N. S.) 566; State v. Ross, 85 Wash. 218, 147 Pac. 1149; Low v. McDonald, 90 Wash. 122, 155 Pac. 748.

See, also, State v. Grant, 105 Wash. 189, 177 Pac. 784.

§ 314. **Instructions as to Special Issues and Defenses:** State v. Douette, 31 Wash. 6, 71 Pac. 556; State v. Armstrong, 37 Wash. 51, 79 Pac. 490; State v. Weisenburger, 42 Wash. 426, 85 Pac. 20; State

v. Messner, 43 Wash. 206, 86 Pac. 636; State v. Copeland, 66 Wash. 243, 119 Pac. 607; State v. Macleod, 78 Wash. 175, 138 Pac. 648; State v. McCanaghy, 84 Wash. 108, 146 Pac. 396; State v. Gaul, 88 Wash. 295, 152 Pac. 1029; State v. Hawkins, 89 Wash. 449, 154 Pac. 827; State v. Ward, 96 Wash. 550, 165 Pac. 794.

See, also, State v. Walker, 104 Wash. 472, 176 Pac. 315; State v. Lathrop, 112 Wash. 560, 192 Pac. 950.

§ 315. Presence of Jury During Argument for Requests: State v. Coella, 3 Wash. 99, 28 Pac. 28.

§ 316. Instructions Already Given: Smith v. United States, 1 W. T. 262; State v. Freidrich, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; State v. Murphy, 13 Wash. 229, 43 Pac. 44; State v. Webb, 20 Wash. 500, 55 Pac. 935; State v. Clark, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006; State v. Wilson, 42 Wash. 56, 84 Pac. 49, 7 Ann. Cas. 418; State v. Rutten, 13 Wash. 203, 43 Pac. 30; State v. Cushing, 17 Wash. 544, 50 Pac. 512; State v. McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State v. Carey, 15 Wash. 549, 46 Pac. 1050; State v. Klein, 19 Wash. 368, 53 Pac. 364; State

v. Vance, 29 Wash. 435, 70 Pac. 34; State v. Churchill, 52 Wash. 210, 100 Pac. 309.

See, also, State v. Palmer, 104 Wash. 396, 176 Pac. 547; State v. Vane, 105 Wash. 170, 177 Pac. 728; State v. Chittenden, 111 Wash. 213, 190 Pac. 232.

§ 317. Manner of Giving Instructions Asked: State v. Murphy, 13 Wash. 229, 43 Pac. 44; State v. Baldwin, 15 Wash. 15, 45 Pac. 650; State v. Klein, 19 Wash. 368, 53 Pac. 564; State v. McCann, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216; State v. Anderson, 30 Wash. 14, 70 Pac. 104.

§ 318. Modification by Court: State v. Baldwin, 15 Wash. 15, 45 Pac. 650; State v. Cushing, 17 Wash. 544, 50 Pac. 512.

OBJECTIONS TO INSTRUCTIONS OR REFUSAL THEREOF, AND EXCEPTIONS: See Remington's Digest, Crim. Law, §§ 319, 320.

Mode of Making Objection: State v. Coella, 8 Wash. 512, 36 Pac. 474.

§ 320. Sufficiency and Scope of Exceptions to Failure or Refusal to Instruct: State v. Robinson, 12 Wash. 491, 41 Pac. 884; State v. Gohl, 46 Wash. 408, 90 Pac. 259.

§ 2159. Custody of Jury.

Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county. [L. '54, p. 119, § 114; Cd. '81, § 1089; 2 H. C., § 1311.]

This section superseded, except in felony cases, by § 346, supra.

Cited in 2 Wash. 185, 563; 5 Wash. 775; 12 Wash. 54; 18 Wash. 46; 25 Wash. 407; 34 Wash. 263; 38 Wash. 273; 58 Wash. 131; 71 Wash. 676; 87 Wash. 475.

CUSTODY, CONDUCT AND DELIBERATIONS OF JURY: See Remington's Digest, Crim. Law, §§ 321—330.

Officer in Charge: Edwards v. Territory, 1 W. T. 195.

§ 322. Admonition to Jury: State v. Stockhammer, 34 Wash. 262, 75 Pac. 810.

§ 323. Presence During Proceedings: State v. Coella, 3 Wash. 99, 28 Pac. 28.

§ 324. Separation: Edwards v. Territory, 1 W. T. 195; Hartigan v. Territory, 1 W. T. 447; Anderson v. State, 2 Wash. 183, 26 Pac. 267; State v. Place, 5 Wash. 773, 32 Pac. 736; State v. Vorhies, 12 Wash. 53, 40 Pac. 620; State v. Holedger, 15 Wash. 443, 46 Pac. 652; State v. Rogan, 18 Wash. 43, 50 Pac. 582; State v. Barkuloo, 18 Wash. 141, 51 Pac. 350; State v. Mason, 19 Wash. 94, 52 Pac. 525; State v. Burns, 19 Wash. 52, 52 Pac. 316; State v. Johnny Tommy, 19

Wash. 270, 53 Pac. 157; State v. Harras, 22 Wash. 67, 60 Pac. 58; State v. Parker, 25 Wash. 405, 65 Pac. 776; State v. Stockhammer, 34 Wash. 232, 75 Pac. 810; State v. Clark, 58 Wash. 128, 107 Pac. 1047; State v. Newcomb, 58 Wash. 414, 109 Pac. 355; State v. Bennett, 71 Wash. 673, 129 Pac. 409; State v. Morden, 87 Wash. 465, 151 Pac. 832; State v. Harris, 99 Wash. 475, 169 Pac. 971.

§ 326. Misconduct of Others Affecting Jurors: State v. Boyce, 24 Wash. 514, 64 Pac. 719; State v. Zettler, 15 Wash. 625, 47 Pac. 35.

See, also, State v. White, 113 Wash. 416, 194 Pac. 390.

§ 327. Taking Papers or Articles to Jury-room: State v. Cushing, 14 Wash. 527, 45 Pac. 145, 53 Am. St. Rep. 883; State v. Yourex, 30 Wash. 611, 71 Pac. 203; Edwards v. Territory, 1 W. T. 195; Doctor Jack v. Territory, 2 W. T. 101, 3 Pac. 832; State v. Moody, 18 Wash. 165, 61 Pac. 356; State v. McCormick, 20 Wash. 94, 54 Pac. 764; State v. Webster, 21 Wash. 63, 57 Pac. 361; State v. Cham-

poux, 33 Wash. 339, 74 Pac. 557; State v. Simmons, 52 Wash. 132, 100 Pac. 269; State v. Baker, 67 Wash. 595, 122 Pac. 335.

See, also, State v. Burcham, 109 Wash. 625, 187 Pac. 352.

§ 329. **Instructions After Submission of Cause:** Linbeck v. State, 1 Wash. 336,

25 Pac. 452; State v. Yourex, 30 Wash. 611, 71 Pac. 203; State v. Miller, 78 Wash. 268, 138 Pac. 896.

See, also, State v. Hessel, 112 Wash. 53, 191 Pac. 637.

§ 330. **Manner of Arriving at Verdict:** State v. Holmes, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887.

§ 2160. Court may Order View of Place of Crime.

The court may order a view by any jury impaneled to try a criminal case. [L. '54, p. 120, § 115; Cd. '81, § 1090; 2 H. C., § 1312.]

See supra, § 344, and notes.

Cited in 18 Wash. 674.

View and Inspection: See Remington's Digest, Crim. Law, § 213; State v. Coella, 8 Wash. 512, 36 Pac. 474; State v. Hunter, 18 Wash. 670, 52 Pac. 247.

View by jury in criminal case in absence of accused as prejudicial

error. 41 Ann. Cas. 1159; Ann. Cas. 1915B, 568.

Occurrences during a view as warranting the jury's discharge without letting in pleas of former jeopardy upon subsequent trial. 4 L. R. A. 1266.

§ 2161. Separate Trial.

When two or more defendants are indicted or informed against jointly, any defendant requesting it may, in the discretion of the trial judge be tried separately. [L. '19, p. 42, § 1; Cf. L. '54, p. 120, § 116; Cd. '81, § 1091; L. '91, p. 60, § 71; 2 H. C., § 1313.]

See supra, § 2175, trial of question of insanity.

Cited in 19 Wash. 95; 48 Wash. 75; 66 Wash. 468, 589.

TRIAL—PRELIMINARY PROCEEDINGS: See Remington's Digest, Crim. Law, §§ 194, 195.

Trial of Indictments Together and Separate Trials: State v. Merchant, 48 Wash. 69, 92 Pac. 890; State v. Mason, 19 Wash. 947, 52 Pac. 525; State v. Bush, 41 Wash. 13, 82 Pac. 1024; State v. Moran, 66 Wash. 588, 120 Pac. 86.

Right of state to demand separate trial of persons jointly indicted. Ann. Cas. 1914C, 402.

At what time demand for separate trial may be made. Ann. Cas. 1915B, 802.

Order of trial of persons jointly indicted, after severance obtained, as within discretion of court. Ann. Cas. 1914C, 326.

§ 2162. Discharging One Defendant to Give Evidence—Effect of.

When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the state. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court, for the purpose of giving evidence for a co-defendant. The order of discharge is a bar to another prosecution for the same offense. [L. '54, p. 120, § 117; Cd. '81, § 1092; 2 H. C., § 1314.]

Cited in 2 Wash. 294.

§ 2163. Mistake in Charge, Defendant to be Held, When.

When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged if there appear to be good cause to detain him in custody; but the court must recognize him to answer the offense

shown, and if necessary, recognize the witnesses to appear and testify. [L. '54, p. 120, § 118; Cd. '81, § 1093; 2 H. C., § 1315.]

Cited in 10 Wash. 238; 14 Wash. 666. over the defendant, and it will be presumed, though not shown in the record, that sufficient cause existed to warrant the court's action: *State v. Hansen*, 10 Wash. 235, 38 Pac. 1023.

§ 2164. Venue may be Corrected and Action Certified to Proper County.

When it appears, at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment or information to be corrected, and direct that all papers and proceedings be certified to the superior court of the proper county, and recognize the defendant and witnesses to appear at such court, on a day specified in the order, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced. [L. '54, p. 120, § 119; Cd. '81, § 1094; L. '91, p. 60, § 72; 2 H. C., § 1316.]

See *supra*, § 2012, to be tried in county where crime committed.

Quantum of proof necessary to establish venue in criminal case. *Ann. Cas.* 1912B, 939.

§ 2165. Discharge of Jury Without Prejudice to Further Prosecution.

When a jury has been impaneled in either case contemplated in the last two preceding sections, such jury may be discharged without prejudice to the prosecution. [L. '54, p. 120, § 120; Cd. '81, § 1095; L. '91, p. 60, § 73; 2 H. C., § 1317.]

The references in the laws of 1891 are evidently erroneous.

§ 2166. When Conviction or Acquittal a Bar.

When the defendant has been convicted or acquitted upon an indictment or information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein. [L. '54, p. 120, § 121; Cd. '81, § 1096; L. '91, p. 60, § 74; 2 H. C., § 1318.]

See *supra*, § 2113, conviction or acquittal a bar, when.

See *infra*, § 2316, same subject.

Higher Grade of Offense: See Remington's Digest, Crim. Law, § 51; *State v. Murphy*, 13 Wash. 229, 43 Pac. 44 (over-ruled in *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611).

§ 2167. Jury may Find Any Degree of Offense.

Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense. [L. '54, p. 120, § 122; Cd. '81, § 1097; L. '91, p. 60, § 75; 2 H. C., § 1319.]

See *supra*, § 2158, and notes, court to determine law, etc.

See *infra*, § 2263, convictions for lesser degrees or attempts.

Cited in 11 Wash. 247; 12 Wash. 351; 17 Wash. 599; 21 Wash. 285; 22 Wash. 276; 32 Wash. 302; 39 Wash. 203; 43 Wash. 227; 59 Wash. 237; 76 Wash. 587; 111 Wash. 602. **CONVICTION OF OFFENSE INCLUDED IN CHARGE:** See Remington's Digest, Ind. & Inf., §§ 100—106. **Sufficiency of Charge of Lesser Offense:** *State v. Keen*, 10 Wash. 93, 38 Pac. 880;

State v. Klein, 19 Wash. 368, 53 Pac. 364.

§ 101. **Lesser Grade or Degree of Offense Charged:** Clarke v. Territory, 1 W. T. 68; State v. Dingle, 24 Wash. 49, 63 Pac. 1104; State v. Marselle, 43 Wash. 273, 86 Pac. 586.

See, also, State v. Spillman, 110 Wash. 662, 188 Pac. 919.

§ 102-2. — **Degrees of Larceny:** State v. Clem, 49 Wash. 273, 94 Pac. 1079.

§ 103. — **Degrees of Homicide:** White v. Territory, 3 W. T. 397, 19 Pac. 37; State v. Greer, 11 Wash. 244, 39 Pac. 874; State v. Cronin, 20 Wash. 512, 56 Pac. 26; Timmerman v. Territory, 3 W. T. 445, 17 Pac. 624; State v. Howard, 33 Wash. 250, 74 Pac. 382; State v. Underwood, 35 Wash. 558, 79 Pac. 863;

State v. Yandell, 34 Wash. 409, 75 Pac. 988.

See, also, State v. Sowders, 109 Wash. 10, 186 Pac. 260.

§ 104. **Attempt to Commit Offense Charged:** State v. Romans, 21 Wash. 284, 57 Pac. 819.

See, also, State v. Peterson, 109 Wash. 25, 186 Pac. 264.

§ 105. **Different Offense Included in Offense Charged:** State v. Weydeman, 3 Wash. 399, 28 Pac. 749; State v. Murphy, 13 Wash. 229, 43 Pac. 44; State v. Preston, 49 Wash. 298, 95 Pac. 82; State v. Gaasch, 56 Wash. 381, 105 Pac. 817.

§ 106. **Sufficiency or Failure of Proof of Offense Charged:** State v. Robinson, 12 Wash. 349, 41 Pac. 51, 902.

§ 2168. In Other Cases Degree of Guilt.

In all other cases, the defendant may be found guilty of an offense, the commission of which is necessarily included within that with which he is charged in the indictment or information. [Cf. L. '54, p. 120, § 123; Cd. '81, § 1098; L. '91, p. 61, § 76; 2 H. C., § 1320.]

See last section and notes.

Cited in 17 Wash. 511; 20 Wash. 164; 32 Wash. 303; 59 Wash. 237; 66 Wash. 245; 76 Wash. 587; 80 Wash. 534; 95 Wash. 328; 110 Wash. 666.

Assault With Intent to Kill or Murder: See Remington's Digest, Ind. & Inf., § 102; Watson v. State, 2 Wash. 504, 27 Pac. 226; State v. Ackles, 8 Wash. 462, 36 Pac. 597; State v. Largent, 9 Wash. 691, 38 Pac. 751; State v. Michel, 20 Wash. 162, 54 Pac. 995; State v. Snider, 32 Wash. 299, 73 Pac. 355; State v. Letica, 61 Wash. 629, 112 Pac. 748; State v. Crist, 62 Wash. 326, 113 Pac. 772.

See, also, State v. Beatty, 59 Wash. 235, 109 Pac. 1011.

In a prosecution for assault with intent to commit murder, it is error to refuse a requested instruction to the effect that the jury may, in case the evidence warrants it, find the defendant guilty of assault, or of assault and battery: State v. Dolan, 17 Wash. 499, 50 Pac. 472.

Under an information charging accused with an assault with intent to commit murder, a verdict of "guilty of assault with a deadly weapon with an intent to

do bodily harm," is erroneous, as such verdict convicts him of an offense other than the one alleged in the information: State v. Ackles, 8 Wash. 462, 36 Pac. 597; State v. Largent, 9 Wash. 691, 38 Pac. 751; State v. Manning, 9 Wash. 695, 38 Pac. 752.

Where defendant is charged with "assault with intent to kill," a verdict of guilty of a part of the crime charged must specify the particular offense of which the accused is found guilty: State v. Snider, 32 Wash. 299, 73 Pac. 355.

The jury may find a defendant guilty of any offense which is necessarily included in the charge in the indictment: Clarke v. Territory, 1 W. T. 68; Timmerman v. Territory, 3 W. T. 445, 17 Pac. 624.

Thus a conviction for manslaughter may be had under an indictment charging murder in the first degree: White v. Territory, 3 W. T. 397, 19 Pac. 37.

This section permits one accused of grand larceny to enter a plea of guilty to the offense of petit larceny: State v. Wilmot, 95 Wash. 326, 163 Pac. 742.

§ 2169. Verdict as to One or More Where Several are Charged.

On an indictment or information against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly. [Cf. L. '54, p. 120, § 124; Cd. '81, § 1099; L. '91, p. 61, § 77; 2 H. C., § 1321.]

§ 2170. Reconsideration Where Jury Mistakes the Law.

When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider the verdict; and if after such reconsideration they return the same verdict, it must be entered, but it shall be good cause for new trial. When there is a verdict of acquittal, the court cannot require the jury to reconsider it. [Cf. L. '54, p. 121, § 125; Cd. '81, § 1100; L. '91, p. 61, § 78; 2 H. C., § 1322.]

See *supra*, §§ 359, 361, polling jury and receiving verdict.

§ 2171. Rendition of Verdict.

When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court; and if all do not appear, the rest must be discharged without giving a verdict and the cause must be tried again. [Cf. L. '54, p. 121, § 127; Cd. '81, § 1102; L. '91, p. 61, § 80; 2 H. C., § 1324.]

See *infra*, § 2176, verdict on defense of insanity.

Cited in 18 Wash. 46.

VERDICT—PREPARATION AND RENDITION: See Remington's Digest, Crim. Law, §§ 331, 332; State v. Klein, 38 Wash. 475, 80 Pac. 770; Edwards v. Territory, 1 W. T. 195; State v. Straub,

16 Wash. 111, 47 Pac. 227; State ex rel. Gabe v. Main, 66 Wash. 381, 119 Pac. 844; State v. Millroy, 103 Wash. 193, 174 Pac. 10.

See, also, State v. Dericho, 107 Wash. 468, 182 Pac. 597.

§ 2172. Form of Verdict—Punishment Fixed by Court.

When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted. The verdict of the jury may be substantially in the following form:—

“We, the jury, in the case of the state of Washington, plaintiff, against —, defendant, find the defendant (guilty or not guilty, as the case may be). (Signed) A. B. Foreman.”

[Cf. L. '54, p. 121, § 128; L. '65, p. 101, § 1; Cd. '81, § 1103; 2 H. C., § 1335.]

See *infra*, § 2176, verdict on plea of insanity.

Cited in 3 Wash. 673; 14 Wash. 418; 20 Wash. 516; 56 Wash. 472; 58 Wash. 238.

REQUISITES OF VERDICT: See Remington's Digest, Crim. Law, §§ 333—339. **Form in General:** State v. Cronin, 20 Wash. 512, 56 Pac. 26; State v. McCormick, 56 Wash. 469, 105 Pac. 1037; State v. Moser, 94 Wash. 465, 162 Pac. 582.

§ 334. Designation of Parties: State v. Moran, 46 Wash. 596, 90 Pac. 1044.

§ 335. Sufficiency — General Verdict: Leschi v. Territory, 1 W. T. 13; Timmerman v. Territory, 3 W. T. 445, 17 Pac. 624.

§ 336. Conformity to Indictment and Issues: Clarke v. Territory, 1 W. T. 68; State v. Ackles, 8 Wash. 462, 36 Pac.

597; State v. Largent, 9 Wash. 691, 38 Pac. 751.

§ 337. Specification of Degree of Offense: Leschi v. Territory, 1 W. T. 13; Clarke v. Territory, 1 W. T. 68; State v. Snider, 32 Wash. 299, 73 Pac. 355.

§ 338. — Sufficiency of Specification of Degree of Offense: Leschi v. Territory, 1 W. T. 13; Timmerman v. Territory, 3 W. T. 445, 17 Pac. 624.

§ 338-1. Recommendation to Mercy: State v. Arata, 56 Wash. 185, 105 Pac. 227, 21 Ann. Cas. 242.

§ 339. Construction and Operation: State v. Weydeman, 3 Wash. 399, 28 Pac. 649; State v. Murphy, 13 Wash. 229, 43 Pac. 44; State v. Snider, 32 Wash. 299, 73 Pac. 355; State v. Haynes, 83 Wash. 660, 145 Pac. 634.

§ 2173. "Criminally Insane," Defined—Mental Irresponsibility.

Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this act. No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this act. [L. '07, p. 33, § 1.]

"Act," in this section, refers to §§ 2173-2176, and § 6969 et seq.

Cited in 63 Wash. 487.

Determination of Insanity: See Reming-

ton's Digest, Crim. Law, § 195-1; State v. Peterson, 90 Wash. 479, 156 Pac. 542.

§ 2174. Insanity—How Pleaded.

When it is desired to interpose the defense of insanity or mental irresponsibility on behalf of one charged with a crime, the defendant, his counsel or other person authorized by law to appear and act for him, shall at the time of pleading to the information or indictment file a plea in writing in addition to the plea or pleas required or permitted by other laws than this, setting up (1) his insanity or mental irresponsibility at the time of the commission of the crime charged, and (2) whether the insanity or mental irresponsibility still exists, or (3) whether the defendant has become sane or mentally responsible between the time of the commission of the crime and the time of the trial. The plea may be interposed at any time thereafter, before the submission of the cause to the jury, if it be proven that the insanity or mental irresponsibility of the defendant at the time of the crime was not before known to any person authorized to interpose a plea. [L. '07, p. 33, § 2.]

Cited in 56 Wash. 298, 299; 63 Wash. 486, 487; 69 Wash. 237, 238; 88 Wash. 320; 90 Wash. 480, 481.

Several Pleas: See Remington's Digest, Crim. Law, § 66; State v. Quinn, 56 Wash. 295, 105 Pac. 818; State v. Elliott, 69 Wash. 62, 124 Pac. 212.

Under this section, the plea is waived if not interposed before jury trial, and hence cannot be urged in the supreme court as ground for suspending judgment: State v. Wilson, 69 Wash. 235, 124 Pac. 1125.

The fact that the evidence is more compatible with mental irresponsibility amounting to temporary insanity has no bearing on the question of mitigation on

account of sudden anger and heat of blood, where the defense of insanity was not pleaded as required by this section, but was expressly disclaimed: State v. Gounagias, 88 Wash. 304, 153 Pac. 9, L. R. A. 1916C, 581.

Where the defense is insanity, the state has the right to open and close, since the main issue is his guilt or innocence, although the defendant has the burden of overcoming the presumption of sanity: State v. Harris, 74 Wash. 60, 132 Pac. 735.

Admissibility on issue of mental condition of proceedings to determine sanity of a prisoner awaiting trial. 7 A. L. R. 576.

§ 2175. Special Verdict on Acquittal, When Plea of Insanity Interposed.

If the plea of insanity or mental irresponsibility be interposed, and evidence upon that issue be given, the court shall instruct the jury when giving the charge, that in case a verdict of acquittal of the crime charged be returned, they shall also return special verdicts finding (1) whether the defendant committed the crime and if so, (2) whether they acquit him because of his insanity or mental irresponsibility at the time of its commission, (3) whether the insanity or mental irresponsibility continues and exists at the time of the trial, and (4) whether, if such condition of insanity or

mental irresponsibility does not exist at the time of the trial, there is such likelihood of a relapse or recurrence of the insane or mental irresponsible condition, that the defendant is not a safe person to be at large. Forms for the return of the special verdicts shall be submitted to the jury with the forms for the general verdicts. [L. '07, p. 33, § 3.]

Cited in 63 Wash. 487; 90 Wash. 481.

Acquittal on the ground of insanity is conclusive that defendant is insane, and the fact that defendant killed a man is conclusive that he is "manifestly dangerous," in the absence of clear evidence that his mental condition has undergone a radical change: *State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 Pac. 931, 9 L. R. A. (N. S.) 1191.

Under the constitution a person cannot

be put on trial while insane: *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207.

Insanity is a question for the jury: *State v. Churchill*, 52 Wash. 210, 100 Pac. 309.

Right of defendant to appeal from verdict of guilty but insane at time of commission of crime. *Ann. Cas.* 1912A, 462.

§ 2176. Verdict—Findings—Discharge or Commitment.

If the jury find by their special verdicts that the defendant committed the crime charged, that he is acquitted because of his insanity or mental irresponsibility at the time of its commission, and that before the trial he has become a sane or mentally responsible person, and is not liable to a relapse or recurrence of the insane or mentally irresponsible condition, and is a safe person to be at large, he shall be discharged. If the jury find that the defendant committed the crime charged, that he is acquitted because of his insanity or mental irresponsibility at the time of its commission, and that the insanity or mental irresponsibility still exists, or, if it does not exist, that he is so liable to a relapse or recurrence of the insane or mentally irresponsible condition as to be an unsafe person to be at large, the court shall enter judgment in accordance therewith, and shall order the defendant committed as a criminally insane person until such time as he shall be discharged as hereinafter provided. [L. '07, p. 34, § 4. Cf. L. '54, p. 121, § 126; Cd. '81, § 1101; L. '91, p. 61, § 79; 2 H. C., § 1323.]

See *infra*, §§ 6969–6973, confinement and discharge of the criminal insane. Compare § 2283, *infra*.

Cited in 63 Wash. 487.

Remedy of one convicted of crime while insane. 10 A. L. R. 213.

CHAPTER XVIII.

NEW TRIAL AND ARREST OF JUDGMENT.

§ 2181. When New Trial may be Granted.

An application for a new trial must be made before judgment, and may be granted for the following causes materially affecting a substantial right of the defendant:—

1. When the jury has received any evidence, paper, document, or book not allowed by the court;
2. Misconduct of the jury;
3. Newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence, and produced at the trial;
4. Accident or surprise;

5. Error of law occurring at the trial and excepted to by the defendant;
 6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone. [Cf. L. '54, p. 121, § 130; Cd. '81, § 1105; L. '91, p. 61, § 81; 2 H. C., § 1326.]

Cited in 25 Wash. 415; 42 Wash. 61; 47 Wash. 6; 59 Wash. 311; 101 Wash. 204, 205, 550; 109 Wash. 163.

MOTIONS FOR NEW TRIAL AND IN ARREST: See Remington's Digest, Crim. Law, §§ 342—361-1. **Statutory Provisions as to New Trial:** Thompson v. Territory, 1 W. T. 547.

§ 343. **Discretion of Court as to New Trial:** Smith v. United States, 1 W. T. 262; State v. Arnold, 97 Wash. 611, 166 Pac. 777.

§ 344. **Errors and Irregularities in Conduct of Trial:** State v. Coella, 3 Wash. 99, 28 Pac. 28.

§ 345. **Misconduct of Counsel for Prosecution:** State v. Carter, 8 Wash. 272, 36 Pac. 29.

§ 346. **Disqualification of Jurors:** State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Hall, 24 Wash. 255, 64 Pac. 153; State v. Parker, 25 Wash. 405, 65 Pac. 776; State v. Druxinman, 34 Wash. 257, 75 Pac. 814; State v. Welty, 65 Wash. 244, 118 Pac. 9.

See, also, State v. Spillman, 110 Wash. 662, 188 Pac. 915.

§ 347. **Misconduct of or Affecting Jurors—In General:** State v. Underwood, 35 Wash. 558, 79 Pac. 863; State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; State v. Moretti, 66 Wash. 537, 120 Pac. 102.

See, also, State v. Burcham, 109 Wash. 625, 187 Pac. 352.

§ 347-1. — **Receiving Evidence Out of Court:** State v. Miller, 61 Wash. 125, 111 Pac. 1053, Ann. Cas. 1912B, 1053; State v. Pepoon, 62 Wash. 635, 114 Pac. 449.

See, also, State v. Skinner, 111 Wash. 435, 191 Pac. 148.

§ 348. — **Use of Intoxicating Liquors:** State v. Strodemier, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012.

See, also, State v. Burcham, 109 Wash. 625, 187 Pac. 352.

§ 349. — **Separation:** State v. Shuck, 38 Wash. 270, 80 Pac. 444.

§ 350. — **Communication by or With Jurors:** State v. Hunter, 18 Wash. 670, 52 Pac. 247; State v. Lorenzy, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

§ 351. — **Misconduct of Officer:** State v. Smokalem, 37 Wash. 91, 79 Pac. 603; State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972.

§ 352. **Verdict Contrary to Evidence:** State v. Smith, 9 Wash. 341, 37 Pac. 491; State v. Symes, 17 Wash. 596, 50 Pac. 487; State v. Columbus, 74 Wash. 290, 133 Pac. 455.

§ 353. **Surprise or Mistake:** State v. John Port Townsend, 7 Wash. 462, 35 Pac. 367; State v. Hunter, 18 Wash. 670, 52 Pac. 247; State v. Miller, 80 Wash. 75, 141 Pac. 293, 1139; State v. Schrock, 92 Wash. 69, 158 Pac. 1005.

§ 354. **Newly Discovered Evidence—In General:** Leschi v. Territory, 1 W. T. 13; State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Webb, 20 Wash. 500, 55 Pac. 935; State v. Hyde, 22 Wash. 551, 61 Pac. 719.

§ 356. — **Diligence:** State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; State v. Vance, 29 Wash. 435, 70 Pac. 34; State v. O'Brien, 66 Wash. 219, 119 Pac. 609; State v. Blackwood, 103 Wash. 529, 175 Pac. 168.

See, also, State v. Argentieri, 105 Wash. 7, 177 Pac. 690.

§ 357. — **Materiality:** Fox v. Territory, 2 W. T. 297, 5 Pac. 603; State v. Hood, 103 Wash. 489, 175 Pac. 27.

§ 358. — **Cumulative Evidence:** State v. Stowe, 3 Wash. 206, 28 Pac. 337, 14 L. R. A. 609; State v. John Port Townsend, 7 Wash. 462, 35 Pac. 367; State v. Hunter, 18 Wash. 670, 52 Pac. 247; State v. Bridgham, 51 Wash. 18, 97 Pac. 1096; State v. Fateh-Mohamed, 76 Wash. 462, 136 Pac. 676; Everett v. Phillips, 90 Wash. 269, 155 Pac. 1059.

§ 358-1. — **Impeachment of Witness:** State v. Powell, 51 Wash. 372, 98 Pac. 741; State v. Beeman, 51 Wash. 557, 99 Pac. 756; State v. Smails, 63 Wash. 172, 115 Pac. 82.

See, also, State v. Swartz, 108 Wash. 21, 182 Pac. 953.

§ 359. — **Conflicting or Contradicted Evidence:** State v. Hyde, 22 Wash. 551, 61 Pac. 719; State v. Detherage, 35 Wash. 326, 77 Pac. 504.

§ 360. — **Sufficiency and Probable Effect:** Leschi v. Territory, 1 W. T. 13; State v. Kincaid, 69 Wash. 273, 124 Pac. 684.

§ 361-1. — **Time of Making:** State v. Smails, 63 Wash. 172, 115 Pac. 82; State v. Duncan, 101 Wash. 542, 172 Pac. 915.

Impeachment for Misconduct of Jurors: See Remington's Digest, Crim. Law, § 325;

State v. Murphy, 13 Wash. 229, 43 Pac. 44; State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; State v. Pepoon, 62 Wash. 635, 114 Pac. 449; State v. Hodoff, 88 Wash. 413, 153 Pac. 377.

See, also, State v. Lorenzy, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

Time when trial court may grant new trial on ground of newly discovered evidence. 9 Ann. Cas. 1037.

Incompetency of witness removed since trial as ground for new trial for newly discovered evidence. 17 Ann. Cas. 1165.

Insanity of accused at time of offense raised for the first time on motion for new trial. L. R. A. 1918B, 1146.

Improper conduct of court as presumptively affecting jury prejudi-

cally in criminal case. Ann. Cas. 1913C, 1257.

Improper denial of challenge to juror for cause as warranting reversal where injured party has exhausted his peremptory challenges. 9 Ann. Cas. 279; Ann. Cas. 1915D, 97.

Permitting separation of jury in capital case as ground for new trial. 24 L. R. A. (N. S.) 776; 1 Ann. Cas. 287; Ann. Cas. 1914A, 734; Ann. Cas. 1916A, 253.

Juror in criminal case reading newspaper account of trial as ground for new trial. 46 L. R. A. (N. S.) 741.

Treating jury as ground for new trial. 19 L. R. A. (N. S.) 733; 49 L. R. A. (N. S.) 889; Ann. Cas. 1912B, 750.

§ 2182. Application, How Made.

When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit. [L. '54, p. 122, § 131; Cd. '81, § 1106; 2 H. C., § 1327.]

Cited in 42 Wash. 61; 25 Wash. 415; 59 Wash. 311.

Application for New Trial: See Remington's Digest, Crim. Law, §§ 361—365.

§ 361. **Statement of Grounds:** Bradshaw v. Territory, 3 W. T. 265, 14 Pac. 594; State v. Largent, 9 Wash. 691, 38 Pac. 751; State v. Manning, 9 Wash. 695, 38 Pac. 752.

§ 362. — **Affidavits and Other Proofs in General:** Lybarger v. State, 2 Wash. 552, 27 Pac. 449, 1029; State v. Webb, 20 Wash. 500, 55 Pac. 935; State v. Wilson, 42 Wash. 56, 84 Pac. 409, 7 Ann. Cas. 418.

§ 363. — **Statements, Affidavits and Testimony of Jurors:** State v. Webb, 20 Wash. 500, 55 Pac. 935; State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; State v. Lorenzy, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

See, also, State v. Lyle, 105 Wash. 435, 178 Pac. 468.

§ 364. — **Affidavits as to Newly Discovered Evidence:** State v. Miller, 3 Wash. 131, 28 Pac. 375; State v. Parker, 25 Wash. 405, 65 Pac. 776; State v. Beeman, 51 Wash. 557, 99 Pac. 756.

§ 365. — **Presence of Accused at Hearing:** State v. Greer, 11 Wash. 244, 39 Pac. 874.

§ 2183. Judgment may be Arrested, When.

Judgment may be arrested on the motion of the defendant for the following causes:—

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court;

2. That the facts as stated in the indictment or information do not constitute a crime or misdemeanor. [Cf. L. '54, p. 122, § 132; Cd. '81, § 1107; L. '91, p. 62, § 82; 2 H. C., § 1328.]

Cited in 22 Wash. 554; 53 Wash. 269; 72 Wash. 393; 79 Wash. 263; 102 Wash. 605, 607.

Arrest of Judgment: See Remington's Digest, Crim. Law, §§ 366, 367. **Nature and Scope of Remedy by Arrest of Judgment:** State v. Hyde, 22 Wash. 551, 61 Pac. 719; State v. Massey, 95 Wash. 1,

163 Pac. 7. **Grounds:** Territory v. Lee, 3 W. T. 396, 17 Pac. 884; State v. Carey, 4 Wash. 424, 30 Pac. 729; State v. Feamster, 12 Wash. 461, 41 Pac. 52; State v. Cimini, 53 Wash. 268, 101 Pac. 891; State v. George, 79 Wash. 262, 140 Pac. 337; State v. Takano, 94 Wash. 119, 162 Pac. 35.

Motion in arrest on a plea of guilty lies when final judgment has not been entered: *State ex rel. Lundin v. Superior Court*, 102 Wash. 600, 174 Pac. 473.

Objections to evidence as ground for motion in arrest of judgment. *Ann. Cas.* 1913E, 72.

Motion in arrest of judgment as remedy of one convicted of crime while insane. 10 *A. L. R.* 216.

Raising objection of duplicity in indictment by motion in arrest of judgment. 49 *L. R. A. (N. S.)* 456.

Mistake as to name of juror in criminal case as ground for motion in arrest of judgment. 47 *L. R. A. (N. S.)* 714.

§ 2184. Judgment Arrested Without Motion, When.

The court may also, on its views of any of these defects, arrest the judgment without motion. [L. '54, p. 122, § 133; Cd. '81, § 1108; 2 H. C., § 1329.]

Cited in 102 Wash. 605, 607.

This has reference to the defects mentioned in the preceding section: *State*

ex rel. Lundin v. Superior Court, 102 Wash. 600, 174 Pac. 473.

§ 2185. Defendant may be Recommitted After Arrest of Judgment.

When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of an offense, properly charged, the court may order the defendant to be recommitted, or admitted to bail anew, to answer a new indictment [or information]. [L. '54, p. 122, § 134; Cd. '81, § 1109; 2 H. C., § 1330.]

Legal effect of order sustaining motion in arrest of judgment. *Ann. Cas.* 1912A, 975.

Effect of motion in arrest of judgment on loss of jurisdiction by delay in imposing sentence. 3 *A. L. R.* 1017.

§ 2186. Exceptions as in Civil Cases.

Exceptions may be taken by the defendant, as in civil cases, on any matter of law by which his substantial rights are prejudiced. [L. '54, p. 122, § 135; Cd. '81, § 1110; 2 H. C., § 1331.]

See *supra*, § 381 et seq., exceptions in civil cases, and notes.

CHAPTER XIX.

JUDGMENT AND THE ENFORCEMENT THEREOF.

§ 2187. Judgment on Verdict.

When the defendant is found guilty, the court shall render judgment accordingly and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise. [L. '54, p. 121, § 129; Cd. '81, § 1104; 2 H. C., § 1332.]

See *infra*, §§ 2190, 2198, pronouncing judgment.

See *infra*, § 2228 et seq., cost bills in criminal cases.

See *infra*, § 10243, conviction to be certified to state auditor.

Cited in 1 Wash. 414; 29 Wash. 60; 44 Wash. 618.

JUDGMENT, SENTENCE AND FINAL COMMITMENT: See *Remington's Digest*, *Crim. Law*, §§ 367½—377.

§ 367½. Constitutional and Statutory Provisions: *State v. Gilluly*, 50 Wash. 1, 96 Pac. 512.

§ 368. Jurisdiction: *State v. Dunlap*, 25 Wash. 292, 65 Pac. 544.

§ 369. Insanity After Conviction: *State v. Nordstrom*, 21 Wash. 403, 58 Pac. 248, 53 *L. R. A.* 584; *State v. Wilson*, 69 Wash. 235, 124 Pac. 1125.

§ 371. Requisites and Sufficiency of Sentence—In General: *Lytle v. Territory*,

1 W. T. 435; *Foster v. Territory*, 1 Wash. 411, 25 Pac. 459; *Davis v. Catron*, 22 Wash. 183, 60 Pac. 131; *Pellissier v. Reed*, 75 Wash. 201, 134 Pac. 813; *State v. Case*, 88 Wash. 664, 153 Pac. 1070.

§ 372. — **Conformity to Verdict:** *State v. McLain*, 43 Wash. 124, 86 Pac. 388.

§ 373. **Modification of Sentence and Conclusiveness:** *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332 (overruled); *State v. Symes*, 17 Wash. 596, 50 Pac. 487; *State ex rel. Brown v. Superior Court*, 79 Wash. 570, 140 Pac. 555; *Williams v. Brooks*, 95 Wash. 410, 163 Pac. 925; *State v. Scott*, 101 Wash. 199, 152 Pac. 234.

See, also, *State v. Dericho*, 107 Wash. 468, 182 Pac. 597.

§ 374. **Entry and Record of Judgment:** *Regan v. Territory*, 1 W. T. 31.

§ 375. **Amendment or Correction of Record:** *State v. Williams*, 43 Wash. 505, 86 Pac. 847.

§ 376. **Writ of Error Coram Nobis:** *State ex rel. Davis v. Superior Court*, 15 Wash. 339, 54 Pac. 772; *State v. Armstrong*, 41 Wash. 601, 84 Pac. 584; *Wilson v. State*, 46 Wash. 416, 90 Pac. 257.

§ 377. **Commitment:** *Way v. Woolery*, 6 Wash. 157, 32 Pac. 1082.

The defendant is liable for the jury fee, clerk's and sheriff's fees, although the compensation of such officers is provided for by salaries instead of fees: *State v. Armstrong*, 29 Wash. 57, 69 Pac. 392.

What is cruel and unusual punishment. *Ann. Cas.* 1918B, 396; 35 *L. R. A.* 561; *L. R. A.* 1915C, 558.

§ 2188. Judgment a Lien on Realty, When.

Judgments for fines in all criminal actions rendered are and may be made liens upon the real estate of the defendant in the same manner and with like effect as judgments in civil actions. [Cd. '81, § 1111; 2 H. C., § 1333.]

See *supra*, § 445 et seq., judgment liens in civil cases.

Cited in 82 Wash. 671.

§ 2189. Fines—Disposition—Penalty for Neglect to Pay Over.

All fines imposed on any person by the provisions of this code, where the same shall be collected, shall be paid to the county treasurer of the county where such conviction shall have been had, to go into the general county fund. The county treasurer shall give duplicate receipts therefor, one of which shall be filed with the county auditor; and all officers refusing or neglecting to pay over any fines within one month after they shall have been received shall, upon conviction thereof, be fined in four-fold the amount of such fines so received. [L. '54, § 128; Cd. '81, § 1113; 2 H. C., § 1335.]

See *supra*, § 966, disposition of fines and forfeitures generally.

See *infra*, § 2230, costs and other moneys collected in criminal cases belong to county.

Cited in 7 Wash. 447; 15 Wash. 416.

Under our system of county organization, the general rule is that counties are burdened with the entire cost of the administration of the criminal laws within their boundaries; and, in return, they receive and appropriate to their own

use all fines and costs collected in criminal cases: *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 Pac. 361.

It is not error to impose a fine without the imprisonment: *State v. Dunlap*, 25 Wash. 292, 65 Pac. 544.

§ 2190. Judgment Pronounced, When.

After verdict of guilty or finding of the court against the defendant, if the judgment be not arrested or a new trial granted, the court must pronounce judgment. [L. '54, p. 123, § 136; Cd. '81, § 1114; 2 H. C., § 1336.]

See *infra*, § 2198, defendant to be informed of verdict.

Cited in 102 Wash. 602.

Where the clerk of the court failed to enter an order in a criminal action, the court may make the record speak the truth by the filing of an order nunc pro tunc: *State v. Williams*, 43 Wash. 505, 86 Pac. 847.

Under this section, and Rem. Code § 2280, authorizing suspension of sentence upon the conviction of a minor, the superior court has no power to suspend sentence upon a plea of guilty by an adult: *State ex rel. Lundin v. Superior Court*, 102 Wash. 600, 174 Pac. 473.

§ 2194. Certain Criminals may be Sentenced to Reformatory.

All provisions of existing laws requiring the courts of this state to sentence male criminals between the ages of sixteen and thirty, convicted of any criminal offense, to the Washington penitentiary shall, from and after the turning over of the buildings of the Washington state reformatory to the board of managers as provided for in section 10294, of this code, apply to said Washington state reformatory, so far as to enable court to sentence the class of prisoners mentioned in section 10288 of this code to the Washington state reformatory. [L. '07, p. 389, § 12.]

See *infra*, § 10288, certain criminals to be sentenced to reformatory.

See *infra*, § 10298, indefinite sentences not void.

§ 2195. Indeterminate Sentence to Reformatory.

Every sentence to the Washington state reformatory of a person hereinafter convicted of a felony, shall be a general sentence to imprisonment in the Washington state reformatory, giving the location thereof, and the courts of this state imposing such sentence shall not fix or limit the duration thereof. The terms of such imprisonment of any prisoner so convicted and sentenced shall be terminated by the board of managers of the Washington state reformatory as authorized by this act, but such imprisonment shall not exceed the maximum provided by law for the crime for which the person was convicted nor be less than the minimum term provided by law for a felony; and a person sentenced to the Washington state reformatory shall, within thirty days after his sentence, unless the execution thereof be suspended, be conveyed to the Washington state reformatory by the state board of control in the manner prescribed in section 10920 of this code, and delivered into the custody of the superintendent of the Washington state reformatory, together with a certified copy of the sentence of the court, and there be safely kept until released by the board of managers of the Washington state reformatory, or until said prisoner be pardoned by the governor, and if the execution of the sentence be suspended, and the judgment be afterward affirmed, the defendant shall be conveyed to the Washington state reformatory within thirty days after the court directs the execution of the sentence. [L. '07, p. 390, § 13.]

See *infra*, § 2282, indeterminate sentence to reformatory.

See *infra*, § 10288, certain criminals to be sentenced to reformatory.

Indeterminate sentence as cruel and unusual punishment. **L. B. A. 1915C, 560.**

§ 2196. Presence of Defendant, When Necessary.

For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only he must be personally present, or some responsible person must undertake for him to secure the payment of the judgment and costs;

judgment may then be rendered in his absence. [L. '54, p. 123, § 137; Cd. '81, § 1115; 2 H. C., § 1337.]

See *supra*, § 2145, presence at trial.

Cited in 66 Wash. 384.

This section controls section 2145, providing that no person shall be tried unless personally present: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

Under this section it is not necessary that a defendant out on bail be present upon receipt of a verdict of acquittal: *State ex rel. Gabe v. Main*, 66 Wash. 381, 119 Pac. 844.

§ 2197. Warrant for Defendant, When.

If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county in this state, as a warrant of arrest in other cases. [L. '54, p. 123, § 138; Cd. '81, § 1116; 2 H. C., § 1338.]

§ 2198. Defendant to be Informed of Verdict.

When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him. [L. '54, p. 123, § 139; Cd. '81, § 1117; 2 H. C., § 1339.]

§ 2199. Bench-warrant, Forfeiture of Bail, etc.

If the defendant have been discharged on bail, or have deposited money instead thereof, and do not appear for judgment when his personal appearance is necessary, the court, in addition to the forfeiture of the recognizance, or of the money deposited, may direct the clerk to issue a bench-warrant for his arrest. [L. '54, p. 123, § 140; Cd. '81, § 1118; 2 H. C., § 1340.]

Cited in 82 Wash. 671.

§ 2200. Commitment Until Fine and Costs Paid.

When the defendant is adjudged to pay a fine and costs, the court shall order him to be committed to the custody of the sheriff until the fine and costs are paid or secured as provided by law. [L. '54, p. 123, § 141; Cd. '81, § 1119; 2 H. C., § 1341.]

See *infra*, § 2206, enforcement of judgment for fine and costs.

See *infra*, § 2209, fine and costs, how worked out.

Cited in 1 Wash. 329.

§ 2201. Execution as in Civil Actions for Fine and Costs.

Upon a judgment for fine and costs, and for all adjudged costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions. [L. '54, p. 123, § 142; Cd. '81, § 1120; 2 H. C., § 1342.]

See *supra*, § 510 et seq., execution in civil actions.

Cited in 23 Wash. 87; 82 Wash. 671.

§ 2202. Recognizance to Keep the Peace—Exception.

Every court before whom any person shall be convicted upon an indictment or information for an offense not punishable with death or imprisonment in the penitentiary may, in addition to the punishment pre-

scribed by law, require such person to recognize with sufficient sureties in a reasonable sum to keep the peace, or to be of good behavior, or both, for any term not exceeding one year, and to stand committed until he shall so recognize. [Cf. L. '54, p. 123, § 143; Cd. '81, § 1121; L. '91, p. 62, § 83; 2 H. C., § 1343.]

§ 2203. Proceedings upon Breach of Bond.

In case of the breach of the conditions of any such recognizance the same proceedings shall be had that are by law prescribed in relation to recognizances to keep the peace. [L. '54, p. 123, § 144; Cd. '81, § 1122; 2 H. C., § 1344.]

See *supra*, § 1936 et seq., provisions relating to recognizances to keep the peace.

§ 2204. Stay upon Judgment Sixty Days.

Every defendant against whom a judgment has been rendered for fine and costs may stay the execution for the fine assessed and costs for sixty days from the rendition of the judgment, by procuring one or more sufficient sureties, to enter into a recognizance in open court, acknowledging themselves to be bail for such fine and costs. [L. '54, p. 124, § 145; Cd. '81, § 1123; 2 H. C., § 1345.]

§ 2205. Qualification and Liability of Sureties.

Such sureties shall be approved by the clerk, and the entry of the recognizance shall be written immediately following the judgment, and signed by the bail, and shall have the same effect as a judgment; and if the fine or costs be not paid at the expiration of the sixty days, a joint execution shall issue against the defendant and the bail, and an execution against the body of the defendant, who shall be committed to jail, to be released as provided in this code in committal for default to pay or secure the fine and costs. [L. '54, p. 124, § 146; Cd. '81, § 1124; 2 H. C., § 1346.]

§ 2206. Judgment of Fine and Costs, How Enforced.

If any person ordered into custody until the fine and costs adjudged against him be paid shall not, within five days pay or cause the payment of the same to be made, the clerk of the court shall issue a warrant to the sheriff commanding him to imprison such defendant in the county jail until such fine and costs are paid, or until he has been imprisoned in such jail one day for every three dollars of such fine and costs; but execution may at any time issue against the property of the defendant as in other cases. [Cf. L. '54, p. 124, § 147; Cd. '81, § 1125; L. '83, p. 38, § 1; L. '91, p. 62, § 84; 2 H. C., § 1347.]

See notes to § 2200, commitment until fine paid.

See *infra*, § 2209, fine and costs, how worked out.

Cited in 1 Wash. 414; 23 Wash. 87; 82 Wash. 671.

§ 2207. Certified Transcript—Mittimus.

When any person shall be sentenced to be imprisoned in the penitentiary or county jail, the clerk of the court shall, as soon as may be, make out and deliver to the sheriff of the county, or his deputy, a transcript, from the minutes of the court, of such conviction and sentence, duly certi-

fied by such clerk, which shall be sufficient authority for such sheriff to execute the sentence, who shall execute it accordingly. [L. '54, p. 124, § 148; Cd. '81, § 1126; 2 H. C., § 1348.]

Cited in 66 Wash. 11, 12.

One imprisoned in the county jail after a final judgment of conviction and sentence authorizing his detention is lawfully in custody and may be guilty of an attempt to escape jail, although the sheriff did not have in his possession any

commitment or written evidence of authority to detain him; this section merely providing that such a commitment shall be sufficient authority to the sheriff to execute sentence, not that it is essential: State v. Hatfield, 66 Wash. 9, 118 Pac. 893, 38 L. R. A. (N. S.) 609.

§ 2208. Form of Sentence to Penitentiary.

In every case where imprisonment in the penitentiary is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor; and he may also be sentenced to solitary imprisonment for such term as the court shall direct, not exceeding twenty days at any one time; and in the execution of such punishment the solitary [imprisonment] shall precede the punishment by hard labor, unless the court shall otherwise order. [L. '54, p. 124, § 149; Cd. '81, § 1127; 2 H. C., § 1349.]

See § 2281, indeterminate sentence.

See *infra*, § 10201, solitary confinement.

Where there are two judgments rendered and filed on the same date with two different sentences in them, the real sentence is void for uncertainty, and

punishment thereunder is not justified: Davis v. Catron, 22 Wash. 183, 60 Pac. 131.

§ 2209. Fine and Costs, How Worked Out.

When a defendant is committed to jail on failure to pay any fines and costs, he shall, under the order of the county commissioners, work out the amount of the fine and costs at the rate of two dollars per day; and in case he shall so work out the fine and costs, or in case he shall not be able to work, or the county commissioners fail to provide work, and he shall have been confined in the county jail one day for every two dollars of such fine and costs, no execution shall issue therefor. When any defendant is in the custody of the sheriff by virtue of a sentence of imprisonment in the county jail, and if there be no county jail in the county, he shall, under the order of the county commissioners, cause such person to work his unexpired term of imprisonment in such manner as said county commissioners may direct [L. '83, p. 38, § 1. Cf. L. '54, p. 124, § 151; L. '77, p. 206, § 8; Cd. '81, § 1129; 2 H. C., § 1350.]

§ 2210. Death Warrant, Contents, Return.

When judgment of death is rendered following conviction and no appeal is taken, or the judgment has been affirmed on appeal, a death warrant shall be issued by the clerk of the trial court, which said warrant shall be signed by a judge of said court and attested by the clerk thereof under the seal of the court. Said warrant shall be directed to the superintendent of the state penitentiary of the state of Washington, and shall state the conviction of the person named therein and the judgment of the court, and appoint a day in which the judgment shall be executed by the superintendent of the state penitentiary, which shall not be less than thirty

nor more than ninety days from the date of final judgment. [L. '01, Ex. Sess., p. 17, § 1. Cf. L. '54, p. 125, § 152; L. '60, p. 159, § 291; Cd. '81, § 1130; 2 H. C., § 1351.]

This section does not apply to crimes committed prior to its taking effect, which are governed by the laws existing at the time of their commission: See *infra*, § 2221.

Cited in 25 Wash. 272, 612.

It is irregular for a judgment to fix a specific day for execution but it is mere surplusage. The time should be fixed by the warrant: *Timmerman v. Territory*, 3 W. T. 445, 17 Pac. 624.

The order of the lower court fixing the day of execution of one convicted of murder is not reviewable on appeal, and hence an appeal from such order affords no ground for an application for a stay of execution of the death sentence: *State v. Seaton*, 27 Wash. 120, 67 Pac. 572.

§ 2212. Death Penalty, How Executed.

The punishment of death prescribed by law must be inflicted by hanging by the neck. [L. '54, p. 125, § 153; Cd. '81, § 1131; 2 H. C., § 1352.]

Cited in 9 Wash. 349; 25 Wash. 273.

The day for carrying into effect a sentence of death should not be designated in the judgment, but in the warrant for the execution: *Timmerman v. Territory*, 3 W. T. 445, 17 Pac. 624; but fixing a specific day in the death sentence is an irregularity amounting to mere surplusage, and does not affect the validity of the judgment: *Id.*

The order of the lower court fixing the day of execution of one convicted of murder is not reviewable on appeal, and hence an appeal from such order affords no ground for an application for a stay of execution of the death sentence: *State v. Seaton*, 27 Wash. 120, 67 Pac. 572; *State v. Boyce*, 25 Wash. 422, 65 Pac. 763.

§ 2213. Order to Sheriff to Deliver to State Penitentiary.

At the time of the issuance of said death warrant an order shall be issued by the clerk of the court, which shall be signed by the judge and attested by the clerk under the seal of the court. Said order shall direct the sheriff to hold the person condemned to death, who shall be named therein, in safe custody and forthwith deliver said person, together with the death warrant, into the hands of the superintendent of the state penitentiary. [L. '01, Ex. Sess., p. 18, § 2.]

§ 2214. Custody and Execution of Condemned at Penitentiary.

Upon delivery to him of said death warrant, and of the person therein named, the superintendent of the state penitentiary shall take the person condemned to be executed and keep said person in said custody within the said state penitentiary until the day appointed in the warrant for the execution, upon which appointed day he shall carry out the mandate contained in said warrant by executing said condemned person within the walls of the state penitentiary in the manner provided by law. And between the date of receiving such condemned person and the date fixed in such warrant for his execution, such superintendent shall not suffer or permit any person to visit, converse or communicate with such condemned person excepting the attendants in the state penitentiary, legal, spiritual and medical advisers, and the members of the immediate family of the condemned person, which visits and communications shall be under and subject to the rules and regulations of the state penitentiary. [L. '01, Ex. Sess., p. 18, § 3.]

§ 2215. Record of Death Warrant and Return by Superintendent.

The superintendent of the state penitentiary shall keep in his office as part of the public records a book in which shall be entered a copy of the death warrant and his return made thereon, together with a complete statement of his acts in pursuance of said warrant. [L. '01, Ex. Sess., p. 18, § 4.]

§ 2216. Return of Warrant to Clerk of Court.

Within twenty days after said execution the superintendent of the state penitentiary shall return said death warrant to the clerk of the court from which same was issued with his return thereon, showing all proceedings had by him thereunder. [L. '01, Ex. Sess., p. 19, § 5.]

§ 2217. Return of Execution of Order by Sheriff.

The sheriff to whom the above-named order is issued and delivered shall immediately execute such order and return the same into court within twenty days after he has delivered the death warrant and the person named therein into the hands of the superintendent of the state penitentiary, with his return thereon showing all proceedings had by him thereunder. [L. '01, Ex. Sess., p. 19, § 6.]

§ 2218. Clerk to File Returns.

The clerk of the court from which the death warrant and the order to the sheriff were issued shall, upon receipt of the returns from the superintendent of the state penitentiary and from the sheriff hereinbefore directed, file same with the records in the case and subjoin to the record of conviction and sentence a brief abstract of such returns. [L. '01, Ex. Sess., p. 19, § 7. Cf. L. '54, p. 125, § 154; Cd. '81, § 1132; 2 H. C., § 1353; Bal. Code, § 6995.]

§ 2219. Sheriff to Keep Prisoner Pending Issuance of Warrant.

Pending the issuance of the death warrant, the sheriff shall hold the condemned person in safe custody. [L. '01, Ex. Sess., p. 19, § 8.]

See supra, § 2214, sheriff to deliver to penitentiary.

§ 2220. Repeal—Exception.

All acts or parts of acts in conflict with this act are hereby repealed, except as hereinafter provided. [L. '01, Ex. Sess., p. 19, § 9.]

§ 2221. Saving Clause.

The provisions of this act shall not apply to any act done or crime heretofore committed, and all acts and crimes heretofore done or committed shall be prosecuted and punished under the laws existing at the time of the commission of said acts or crimes in the same manner as if this act had not been enacted, and all such existing laws and especially sections 6993 and 6995 of Ballinger's Annotated Codes and Statutes of Washington are hereby continued in force as to all such acts and crimes committed prior to the taking effect of this act. [L. '01, Ex. Sess., p. 19, § 10.]

See supra, § 2006, general saving clause.

"Act" in this and preceding section refers to § 2210 and §§ 2213-2221.

The Ballinger sections referred to are superseded (except as saved in this section) by §§ 2210, 2218, *supra*. They are as follows:

Bal. Code, § 6993: "When judgment of death is rendered, a warrant signed by the judge and attested by the clerk, under the seal of the court, shall be drawn and delivered to the sheriff; it shall state the conviction and judgment, and appoint a day in which the judgment shall be executed, which shall not be less than thirty nor more than ninety days from the time of judgment. And the sheriff or officer to whom said warrant was delivered shall return the same within twenty days after the time fixed for the execution."

Bal. Code, § 6995: "The sheriff shall return and file with the clerk the warrant, with a statement of his doings thereon, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence."

§ 2222. Proceedings on Failure to Execute Death Sentence.

Whenever the time appointed for the execution of a prisoner shall have passed, from any cause, the court by whom the time was fixed, or the judge or judges thereof, shall cause the prisoner to be brought immediately before the said court, judge or judges, and proceed to appoint a day for the carrying into effect the sentence of death. [L. '54, p. 125, § 155; Cd. '81, § 1133; 2 H. C., § 1354.]

Cited in 25 Wash. 273.

§ 2223. Governor may Grant Pardons, etc.

Whenever a prisoner has been sentenced to death, the governor shall have power to commute such sentence to imprisonment for life at hard labor; and in all cases in which the governor is authorized to grant pardons or commute sentence of death, he may, upon the petition of the person convicted, commute a sentence or grant a pardon upon such conditions and with such restrictions and under such limitations as he may think proper; and he may issue his warrant to all proper officers to carry into effect such pardon or commutation, which warrant shall be obeyed and executed instead of the sentence, if any, which was originally given. The governor may also, on good cause shown, grant respites or reprieves, from time to time, as he may think proper. [L. '54, p. 128, § 174; Cd. '81, § 1136; 2 H. C., § 1356.]

See Const., Art. III, §§ 9, 11, pardoning power vested in governor—Power to remit fines and forfeitures, etc.—Report to legislature.

See *infra*, § 10247, power of governor to parole.

See *infra*, § 10291, parole by governor of convicts in state reformatory.

See *infra*, § 10292, reimprisonment in reformatory of paroled prisoners.

See *infra*, § 10298, credits at state reformatory and discharge by governor.

Cited in 47 Wash. 280.

The provision that the governor may "issue his warrant to carry into effect such pardon" is not limited to the issuance of the warrant granting the pardon, but reposes power in the governor to issue a warrant revoking a pardon which expressly provides that violation of its conditions shall cause its revocation, in

the absence of any other statutory provision for determining when the conditions are violated: *Spencer v. Kees*, 47 Wash. 276, 91 Pac. 963.

Power to impose in pardon conditions extending beyond term of sentence. 5 L. R. A. (N. S.) 1064; 20 L. R. A. (N. S.) 337; 26 L. R. A. (N. S.) 110.

§ 2224. Final Record shall Contain What.

The clerk of the court shall make a final record of all the proceedings in a criminal prosecution within six months after the same

shall have been decided, which shall contain a copy of the minutes of the challenge to the panel of the grand jury, the indictment or information, journal entries, pleadings, minutes of challenges to panel of petit jurors, judgment, orders, or decision and bill of exceptions. [Cf. L. '54, p. 125, § 156; Cd. '81, § 1134; L. '91, p. 63, § 85; 2 H. C., § 1355.]

CHAPTER XX.

COSTS IN CRIMINAL CASES.

§ 2225. Costs—How Taxed Where Complaint Unfounded or Malicious.

When any person shall be brought before a court, justice of the peace, or other committing magistrate of any county, city or town in this state, having jurisdiction of the alleged offense, charged with the commission of a crime or misdemeanor, and such complaint upon examination shall appear to be unfounded, no costs shall be payable by such acquitted party, but the same shall be chargeable to the county, city, or town for or in which the said complaint is triable; but if the court, justice of the peace or other magistrate trying said charge shall decide the complaint was frivolous or malicious, the judgment or verdict shall also designate who is the complainant, and may adjudge that said complainant pay the costs. In such cases a judgment shall thereupon be entered for the costs against said complainant, who shall stand committed until such costs be paid or discharged by due process of law. [L. '69, p. 418, § 1; Cd. '81, § 2103; 1 H. C., § 3050.]

See supra, §§ 1942, 1954, costs against complainant when.

Cited in 3 Wash. 673; 8 Wash. 450; 19 Wash. 348; 37 Wash. 587; 40 Wash. 10; 70 Wash. 644.

Attachment of the Person: See Remington's Digest, Costs, § 91; Colby v. Backus, 19 Wash. 347, 53 Pac. 367, 67 Am. St. Rep. 732.

Liabilities of State. See Remington's Digest, Costs, § 93; State ex rel. Thurston County v. Grimes, 7 Wash. 445, 35 Pac. 361; State v. Rutledge, 40 Wash. 9, 82 Pac. 126.

Liabilities of County: See Remington's Digest, Costs, § 94; Stowe v. State, 2 Wash. 124, 25 Pac. 1085; State ex rel. Langhorne v. Superior Court, 32 Wash. 80, 72 Pac. 1027; State ex rel. Coeller v. Fenimore, 2 Wash. 370, 26 Pac. 807; State ex rel. News Pub. Co. v. Milligan, 4 Wash. 29, 29 Pac. 763; Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876.

Liabilities of City: See Remington's Digest, Costs, § 95; Spokane v. Smith, 37 Wash. 583, 79 Pac. 1125.

Liabilities of Prosecuting Witness—Probable Cause for Prosecution: Permstick, In re, 3 Wash. 672, 29 Pac. 350, 28 Am. St. Rep. 80; Ilwaco v. Miller, 8 Wash. 449, 36 Pac. 269; Colby v. Backus, 19 Wash. 347, 53 Pac. 367, 67 Am. St. Rep. 732.

Costs Taxable Against Defendant: See Remington's Digest, Costs, § 98; State v. McFadden, 42 Wash. 1, 84 Pac. 401.

A prisoner when convicted is chargeable with a jury fee of \$12, which is entered in the cost bill against him: State ex rel. Thurston County v. Grimes, 7 Wash. 445, 35 Pac. 361; State v. Armstrong, 29 Wash. 57, 69 Pac. 392.

Constitutionality of statute authorizing costs of prosecution to be imposed on prosecuting witness. 61 L. B. A. 489.

§ 2226. Enforcing Costs Against Complainant.

When a grand jury, upon a complaint submitted to them for investigation, fail to find a bill of indictment for an offense against the laws of the state, they shall also inquire whether the complaint is frivolous or malicious, and decide whether the county or complainant shall pay the costs, and make return of their finding in open court.

Any complainant adjudged by said grand jury as liable for the costs shall forthwith be brought into court, and sentenced to pay the same or stand committed until such judgment is satisfied or complied with. [L. '69, p. 418, § 2; Cd. '81, § 2104; 1 H. C., § 3051.]

§ 2227. Jury Fee to be Taxed to Defendant, When.

Every person convicted of a crime, or held to bail to keep the peace, shall be liable to all the costs of the proceedings against him, including, when tried by a jury in the superior court, twelve dollars for a jury fee, and when tried by a jury before a committing magistrate, six dollars for jury fee, for which judgment shall be rendered and collection had as in cases of fines. The jury fee, when collected for a case tried by the superior court, shall be paid to the clerk, to be by him applied as the jury fee in civil cases is applied. [L. '69, p. 418, § 3; Cd. '81, § 2105; 1 H. C., § 3052.]

Cited in 1 Wash. 414; 7 Wash. 448; 29 Wash. 60.

§ 2228. Cost Bills, How Made and Certified.

In all convictions for felony, whether capital or punishable by imprisonment in the penitentiary, the clerk of the superior court shall forthwith, after sentence, tax the costs in the case. The cost bill shall be made out in triplicate, and be examined by the prosecuting attorney of the county in which the trial was had. After which the judge of the superior court shall allow and approve such bill or so much thereof as is allowable by law. The clerk of the superior court shall thereupon, under his hand, and under the seal of the court, certify said triplicate cost bills, and shall file one with the papers of the cause, and shall transmit one to the state auditor and one to the county auditor of the county in which said felony was committed. [Cd. '81, § 2106; L. '83, p. 35, § 1; 2 H. C., § 1382a.]

See supra, § 491, costs against state or county.

Cited in 7 Wash. 446.

Under this section it is the duty of the county auditor to draw warrants in payment of costs in misdemeanor cases, which have been approved by the prosecuting attorney and certified by the judge

trying the case, without having such cost bills presented to the county commissioners for examination and allowance: State ex rel. Crawford v. Evenson, 18 Wash. 609, 52 Pac. 230.

§ 2229. Payment of Amount Stated in Cost Bill.

Upon the receipt of the cost bill as provided for in the last preceding section, the county auditor shall draw warrants for the amounts due each person, as certified in said cost bill, which warrants shall be paid as other county warrants are paid. On receipt of the certified copy of said cost bill, the state auditor shall examine and audit said bill and allow the same or so much thereof as may be allowable against the state, and shall credit the amount so allowed to the county from whence the bill came as so much state tax paid. The state auditor shall immediately notify the state treasurer and county auditor, each of whom shall credit and charge accordingly. [Cd. '81, § 2107; L. '83, p. 35, § 1; 1 H. C., § 3053.]

Cited in 7 Wash. 447; 18 Wash. 611.

It is the right and duty of a prosecuting attorney under this section to examine claims and tax costs in cases tried before a justice of the peace, and when 30

passed upon, they should be received and paid by the auditor irrespective of the will of the county commissioners: State ex rel. Crawford v. Evenson, 18 Wash. 609, 52 Pac. 230.

§ 2230. Costs and Other Moneys Collected Belong to County.

All costs collected against any person convicted of crime or misdemeanor, and all sums collected on recognizances of persons accused, or of witnesses in criminal cases for fines and forfeitures shall belong to the county from which the case came [L. '63, p. 425, § 12; L. '69, p. 421, § 11; Cd. '81, § 2112; 1 H. C., § 3054.]

Cited in 7 Wash. 447.

CHAPTER XXI.

FORFEITURE OF RECOGNIZANCES IN CRIMINAL ACTIONS.

§ 2231. Forfeiture of Recognizance—Judgment—Execution.

In criminal cases where a recognizance for the appearance of any person, either as a witness or to appear and answer, shall have been taken and a default entered, the recognizance shall be declared forfeited by the court, and at the time of adjudging such forfeiture said court shall enter judgment against the principal and sureties named in such recognizance for the sum therein mentioned, and execution may issue thereon the same as upon other judgments. [L. '67, p. 103; Cd. '81, § 1137; 2 H. C., § 1357.]

Cited in 69 Wash. 615.

A bail bond cannot be defeated for duress and want of consideration, where the prisoner, charged with crime, was not entitled to discharge without trial: State v. Whalen, 108 Wash. 287, 183 Pac. 130.

Calling accused and entering default upon record as conditions precedent to forfeiture of recognizance. 8 Ann. Cas. 1320; 5 L. R. A. (N. S.) 402.

§ 2232. Stay of Execution on Forfeited Recognizance.

The parties, or either of them, against whom such judgment may be entered in the superior or supreme courts, may stay said execution for sixty days by giving a bond, with two or more sureties, to be approved by the clerk conditioned for the payment of such judgment at the expiration of sixty days, unless the same shall be vacated before the expiration of that time. [Cf. L. '67, p. 103, § 2; Cd. '81, § 1138; L. '91, p. 63, § 86; 2 H. C., § 1358.]

See supra, § 2204, stay on judgment for fines and costs.

Cited in 69 Wash. 614, 616.

§ 2233. Judgment Vacated on Defendant's Production, When.

If a bond be given and execution stayed, as provided in the last preceding section, and the person for whose appearance such recognizance was given shall be produced in court before the expiration of said period of sixty days, the judge may vacate such judgment upon such terms as may be just and equitable; otherwise execution shall forthwith issue as well against the sureties in the new bond as against

the judgment debtors. [Cf. L. '67, p. 103, § 3; Cd. '81, § 1139; L. '91, p. 63, § 87; 2 H. C., § 1359.]

Cited in 69 Wash. 616; 76 Wash. 254.

This section is not to be construed as limiting the common-law power of the court or grant relief in proper cases, and the court has inherent discretionary power, irrespective of statute, to vacate a forfeiture of bail, and its order will not

be reversed except for abuse of discretion: *State v. Jackschitz*, 76 Wash. 253, 136 Pac. 132.

Relief from Liability or Forfeiture—Surrender of Principal: See *Remington's Digest*, Bail, § 9; *State v. Johnson*, 69 Wash. 612, 126 Pac. 56.

§ 2234. Recognizances Before Magistrates—Forfeiture—Action.

All recognizances taken and forfeited before any justice of the peace or magistrate shall be forthwith certified to the clerk of the superior court of the county; and it shall be the duty of the prosecuting attorney to proceed at once by action against all the persons bound in such recognizances, and in all forfeited recognizances, whatever, or such of them as he may elect to proceed against. [L. '54, p. 128, § 175; Cd. '81, § 1166; 2 H. C., § 1360.]

§ 2235. Action on Recognizance not to be Barred, etc.

No action brought on any recognizance given in any criminal proceeding whatever shall be barred or defeated, nor shall judgment be arrested thereon, by reason of any neglect or omission to note or record the default of any principal or surety at the time when such default shall happen, or by reason of any defect in the form of the recognizance, if it sufficiently appear, from the tenor thereof, at what court or before what justice the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance; and a recognizance may be recorded after execution awarded. [Cf. L. '54, p. 129, § 176; Cd. '81, § 1167; L. '91, p. 63, § 88; 2 H. C., § 1361.]

§ 2236. Costs, Liability for—How Taxed and Paid.

No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or, for want of prosecution, shall be liable for any costs or fees of any officer, or for any charge of subsistence while he was in custody, but in every such case the fees of the defendant's witnesses, and of the officers for services rendered at the request of the defendant, and charges for subsistence of the defendant while in custody, shall be taxed and paid as other costs and charges in such cases. [Cf. L. '54, p. 129, § 177; L. '77, p. 207, § 10; Cd. '81, § 1168; 2 H. C., § 1382.]

Cited in 7 Wash. 449; 18 Wash. 610; 37 Wash. 587; 40 Wash. 11.

CHAPTER XXII.

SEARCH-WARRANTS.

§ 2237. When Issued.

When complaint shall have been made on oath to any magistrate authorized to issue warrant in criminal cases that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular

house or place, the magistrate, if he be satisfied that there is a reasonable cause for such belief shall issue a warrant for such property. [L. '54, p. 100, § 1; Cd. '81, § 967; 2 H. C., § 1383.]

Cited in 43 Wash. 477; 69 Wash. 52.

A malicious prosecution may be based upon search proceedings; and sections 2237, 2239, not requiring the proceedings or warrant to designate the person suspected, it is not necessary that the proceedings name the plaintiff as the suspected party: *Olson v. Haggerty*, 69 Wash. 48, 124 Pac. 145.

Affidavit or complaint upon information and belief as basis for search-warrant. 1 Ann. Cas. 653; 18 Ann. Cas. 819.

Sufficiency of description of premises in search-warrant or affidavit therefor. 17 Ann. Cas. 232; Ann. Cas. 1916D, 952.

Power to issue warrant for search of train. 7 A. L. R. 121.

§ 2238. Additional Grounds for Issuing Warrant.

Any such magistrate, when satisfied that there is reasonable cause, may also, upon like complaint made on oath, issue search-warrant in the following cases, to wit:—

1. To search for and seize any counterfeit or spurious coin, or forged instruments, or tools, machines, or materials prepared or provided for making either of them;

2. To search for and seize any gaming apparatus used or kept and to be used in any unlawful gaming-house, or in any building, apartment, or place resorted to for the purpose of unlawful gaming. [L. '54, p. 101, § 2; Cd. '81, § 968; 2 H. C., § 1384.]

Cited in 9 Wash. 337, 339.

Under a statute permitting the destruction of gambling apparatus seized and held as evidence upon the trial, where the record is silent as to how the apparatus came into the possession of the sheriff, the court cannot presume that such possession was wrongfully obtained, or that the recitals and order of the

court directing the destruction were unauthorized: *Way v. Territory*, 1 Wash. 415, 25 Pac. 461.

Constitutional guaranties against unreasonable searches and seizures as applied to search for or seizure of intoxicating liquor. 3 A. L. R. 1514.

§ 2239. To Whom Directed—Contents of.

All such warrants shall be directed to the sheriff of the county or his deputy, or to any constable of the county, commanding such officer to search the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and property or things to be searched for shall be designated and described in the warrant, and to bring such stolen property or other things, when found, and the person in whose possession the same shall be found, before the magistrate, who shall issue the warrant, or before some other magistrate or court having cognizance of the case. [L. '54, p. 101, § 3; Cd. '81, § 969; 2 H. C., § 1385.]

Cited in 43 Wash. 477; 69 Wash. 53.

Search-warrant valid on face as pro-

tection to officer executing same. Ann. Cas. 1913D, 214.

§ 2240. Execution of Warrant, Custody and Disposition of Property.

When any officer, in the execution of a search-warrant, shall find any stolen or embezzled property, or shall seize any other things for which a search is allowed by this chapter, all the property and things so seized shall be safely kept by the direction of the court or magistrate

so long as shall be necessary for the purpose of being produced in evidence on any trial; and as soon as may be afterwards, all such stolen and embezzled property shall be restored to the owner thereof, and all other things seized by virtue of such warrant shall be destroyed under direction of the court or magistrate. [L. '54, p. 101, § 4; Cd. '81, § 970; 2 H. C., § 1386.]

Right to try title to, or right to possession of, property in search-war-

rant proceedings. *Ann. Cas.* 1914D, 172; 46 *L. R. A. (N. S.)* 970.

§ 2240-1. Search-warrant Necessary.

It shall be unlawful for any policeman or other peace officer to enter and search any private dwelling-house or place of residence without the authority of a search-warrant issued upon a complaint as by law provided. [L. '21, p. 207, § 1.]

§ 2240-2. Penalty for Search Without Warrant.

Any policeman or other peace officer violating the provisions of this act shall be guilty of a gross misdemeanor. [L. '21, p. 207, § 2.]

CHAPTER XXIII.

PROCEEDINGS RELATING TO FUGITIVES FROM JUSTICE.

§ 2241. Governor's Agent to Demand Fugitive—Proceedings.

The governor of this state may appoint agents to demand of the executive authority of any state or territory any fugitive from justice, or any other person charged with felony or any other crime in this state; and whenever an application shall be made to the governor for that purpose, the prosecuting attorney, when required by the governor, shall forthwith investigate the ground of such application, and report to the governor all material circumstances which may come to his knowledge, with an abstract of the evidence and his opinion as to the expediency of the demand; but the governor may, in any case, appoint such agents without requiring the opinion of or any report from the prosecuting attorney, and the accounts of the agents appointed for such purposes shall in all cases be audited by the state auditor and paid from the state treasury. [Cf. L. '54, p. 102, § 5; Cd. '81, § 971; L. '91, p. 65, § 98; 2 H. C., § 1387.]

For text treatment of "Extradition," see 11 *R. C. L.* 709.

Who is fugitive from justice within purview of interstate extradition laws. 7 *Ann. Cas.* 1076; 13 *Ann.*

Cas. 907; *Ann. Cas.* 1918D, 1011; 51 *L. R. A. (N. S.)* 668; 51 *L. R. A. (N. S.)* 669; *L. R. A.* 1918D, 680.

§ 2242. Demand on Governor—Proceedings.

When a demand shall be made upon the governor of this state by the executive of any state or territory, in any case authorized by the constitution and laws of the United States, for the delivery over of any person charged in such state or territory with treason, felony, or any other crime, the prosecuting attorney, or any other prosecuting officer, when required by the governor, shall forthwith investigate the ground of such demand, and report to the governor all material facts

which may come to his knowledge as to the situation and circumstances of the person so demanded, especially as to whether he is held in custody or is under recognizance to answer for any offense against the laws of this state or of the United States, or by force of any civil process, and also whether such demand is made according to law, so that such person ought to be delivered up; and if the governor be satisfied that such demand is conformable to law, and ought to be complied with, he shall issue his warrant, under the seal of the state, authorizing the agents who make such demand either forthwith, or at such time as shall be designated by the warrant, to take and transport such person to the line of the state at the expense of such agents, and shall also by such warrant require the civil officers within this state to afford all needful assistance in the execution thereof. [L. '54, p. 102, § 6; Cd. '81, § 972; 2 H. C., § 1388.]

Authority and Duty to Demand or Deliver Persons Accused—From the Territories: See Remington's Digest, Extrad., § 1; Gillis, In re, 38 Wash. 156, 80 Pac. 300.

Persons Subject to Extradition: See Remington's Digest, Extrad., §§ 2, 3. **Fugitives from Justice:** Poor v. Cudihee, 37 Wash. 609, 79 Pac. 1105. **Persons in Custody on Charge of Other Crime:** Maney, In re, 20 Wash. 509, 55 Pac. 930, 72 Am. St. Rep. 130.

Application for and Proceedings Thereon: See Remington's Digest, Extrad., § 5;

Foye, In re, 21 Wash. 250, 57 Pac. 825; Baker, In re, 21 Wash. 259, 57 Pac. 827; Sylvester, In re, 21 Wash. 263, 57 Pac. 829; State v. Roller, 30 Wash. 692, 71 Pac. 718; Gillis, In re, 38 Wash. 156, 80 Pac. 300.

Requisition and Accompanying Documents: See Remington's Digest, Extrad., § 6; Baker, In re, 21 Wash. 259, 57 Pac. 827; Sylvester, In re, 21 Wash. 263, 57 Pac. 829; Foye, In re, 21 Wash. 250, 57 Pac. 825; Armstrong v. Van De Vanter, 21 Wash. 682, 59 Pac. 510; Thorp v. Metzger, 77 Wash. 62, 137 Pac. 330.

§ 2243. Warrant for Fugitive—Issuance of.

Whenever any person shall be found within this state charged with an offense committed in any state or territory, and liable by the constitution and laws of the United States to be delivered on the demand of the executive of such state or territory, any court or magistrate authorized to issue warrants in criminal cases may, upon complaint under oath setting forth the offense, and such other matters as are necessary to bring the offense within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate so authorized within the state, to answer such complaint as in other cases. [L. '54, p. 102, § 7; Cd. '81, § 973; 2 H. C., § 1389.]

Cited in 40 Wash. 563.

Where a person charged with crime has been arrested and confined in jail without trial for a period of more than sixty days, he is, upon application for a writ of habeas corpus, entitled to a discharge under this section, where the only reason for failure to try him was that no term of court for which a jury had been called had been in session since the filing of the information: State v. Brodie, 7 Wash. 442, 35 Pac. 137.

This section requires a legal charge of crime made in the state having jurisdiction of the offense; and a person cannot be arrested and held in this state upon an

unauthenticated warrant from another state and a complaint filed in a court of this state reciting that the party is a fugitive from justice: State ex rel. Grass v. White, 40 Wash. 560, 82 Pac. 907, 2 L. R. A. (N. S.) 563.

An executive warrant for the extradition of a fugitive from justice need not define the crime with which the accused is charged, where it recites that he was charged with a crime, and was accompanied by the certified copy of the indictment or the charge made before a magistrate, as required by the act of congress: Thorn v. Metzger, 77 Wash. 62, 137 Pac. 330.

Arrest without warrant awaiting arrival of extradition papers. 26 L. R. A. 34.

Necessity of warrant of arrest for purposes of extradition. 28 L. R. A. 804.

§ 2244. Examination by Court or Magistrate.

If, upon the examination of the persons charged, it shall appear to the court or magistrate, by proof in addition to the oath of the complainant, that there is reasonable cause to believe that the complaint is true, and that such person may be lawfully demanded of the governor, he shall, if not charged with a capital crime, be required to recognize, with sufficient sureties, in a reasonable sum, to appear before such court or magistrate at a future day, allowing a reasonable time to obtain a warrant of the executive, and to abide the order of the court or magistrate; and if such person shall not so recognize, he shall be committed to prison, and there be detained until such day, in like manner as if the offense charged had been committed in this state: and if the person so recognizing shall fail to appear according to the conditions of his recognizance, he shall be defaulted, and the like proceedings shall be had as in the case of other recognizances entered into before such court or magistrate; but if such person be charged with a capital crime, he shall be committed to prison, and there be detained until the day so appointed for his appearance before the court or magistrate. [L. '54, p. 103, § 8; Cd. '81, § 974; 2 H. C., § 1390.]

Cited in 40 Wash. 563.

Arrest and Bail: See Remington's Digest, Extrad., § 7; Foye, In re, 21 Wash. 250, 57 Pac. 825.

Review of Proceedings: See Remington's Digest, Extrad., § 8; State v. Boggz, 16 Wash. 143, 47 Pac. 417; Armstrong v. Van De Vanter, 21 Wash. 682, 59 Pac. 510; Gillis, In re, 38 Wash. 156, 80 Pac. 300; State v. Knowles, 94 Wash. 351, 162 Pac. 518.

Rights and Liabilities of Accused After Extradition: See Remington's Digest, Extrad., § 9; Harlan v. Territory, 3 W. T. 131, 13 Pac. 453; State v. Lindgrind, 33

Wash. 440, 74 Pac. 565; State v. Roller, 30 Wash. 692, 71 Pac. 718.

Right of one arrested on extradition warrant to delay to enable him to present evidence that he is not subject to extradition. 11 A. L. R. 1410.

Burden of proof of identity of fugitive from justice within law of extradition. 29 Ann. Cas. 546.

Review by courts of executive action in interstate extradition proceedings. 3 Ann. Cas. 876; 13 Ann. Cas. 931.

§ 2245. Discharge, When.

If the person recognized or committed shall appear before the court or magistrate upon the day ordered, he shall be discharged, unless he be demanded by some persons authorized by the warrant of the execution to receive him, or unless the court or magistrate shall see cause to commit him, or require of him to recognize anew for his appearance at some other day; and if, when ordered, he shall not so recognize, he shall be committed and be detained as before provided. Whenever the person so appearing shall be recognized, committed, or discharged, any person authorized by the warrant of the executive may at all times take him into custody, and the same shall be a discharge of the recognizance, if any, and shall not be deemed an escape. [L. '54, p. 103, § 9; Cd. '81, § 975; 2 H. C., § 1391.]

Right to appeal from order releasing one in extradition proceedings. 5 A. L. R. 1156.

Right of extradited person to discharge on ground that extradition was unlawful or void. 7 Ann. Cas. 1056.

§ 2246. Complainant Liable for Costs, When.

The complainant in such cases shall be answerable for the actual costs and charges, and for the support in prison of any person so committed, and shall advance to the jailer one week's board at the time of commitment, and so from week to week, so long as such person shall remain in jail; and if he fails to do so, the jailer may forthwith discharge the person from his custody. [L. '54, p. 103, § 10; Cd. '81, § 976; 2 H. C., § 1392.]

CHAPTER XXIV.**REWARDS FOR THE APPREHENSION OF FUGITIVES.****§ 2247. Standing Rewards by Governor for Certain Offenses.**

The governor shall offer a standing reward of two hundred dollars for the arrest of each person who shall place any obstruction on any railroad track, or who shall misplace any switch, rail, or ties on any such road, whereby the life of any person passing over said road may be endangered; and for the arrest of each person engaged in the robbing or attempting to rob any person upon, or having in charge, in whole or in part, any stage-coach, wagon, railroad train, or other conveyance engaged in carrying passengers, or any private conveyance within this state, the reward to be paid to the person making such arrest, out of any money in the [state] treasury not otherwise appropriated, immediately upon the conviction of the person so arrested; but no reward shall be paid except after such conviction. [L. '77, p. 283, § 1; Cd. '81, § 1290; 1 H. C., § 2941.]

See *infra*, § 10982, subd. 8, rewards for fugitives.

Claims against state for rewards. 42 L. R. A. 63.

§ 2248. Auditor to Draw Warrant.

The auditor of state shall draw a warrant upon the treasurer for the amount of the reward, upon presentation to him of a certificate of the clerk of the court where the conviction was had, of such conviction, and the finding of the court that the satisfactory proof was made that the person claiming the reward is entitled thereto, under the provision of the preceding section. [L. '77, p. 284, § 2; Cd. '81, § 1291; 1 H. C., § 2942.]

§ 2249. Rewards by County Commissioners, When.

The county commissioners in the several counties of this state, when in their opinion the public good requires it, be and are hereby authorized to offer and pay a suitable reward, not to exceed five hundred dollars in any one case, to any person or persons who, in consequence of such offer, apprehends, brings back, and secures any person or persons convicted of or charged with any criminal offense, if the offense be a felony. [L. '86, p. 124, § 1; 1 H. C., § 2943.]

Use of public money for rewards for criminals. 14 L. R. A. 480.

§ 2250. Payment of Rewards Offered by Commissioners.

Whenever any such reward has been offered by any board of county commissioners for the apprehension of any person or persons

convicted of or charged with any criminal offense, if the offense be a felony, the person or persons who shall first apprehend, bring back, and secure such person or persons so charged shall be entitled to such reward, and the board of county commissioners who have offered such reward are authorized to draw a warrant or warrants on the county treasurer for the amount of such reward, who shall pay the amount of said warrant or warrants out of any money in the county treasury not otherwise appropriated. [L. '86, p. 124, § 2; 1 H. C., § 2944.]

§ 2251. Conflicting Claims for, How Determined.

When more than one claimant applies for the payment of any reward, offered by any board of county commissioners, such commissioners shall determine, in their respective counties, to whom the same shall be paid, and if to more than one person, in what proportion to each, and their determination shall be final and conclusive. [L. '86, p. 124, § 3; 1 H. C., § 2945.]

§ 2252. Validation of County Warrants for Rewards.

That whenever heretofore the board of county commissioners of any county, shall have offered a reward to any person or persons who shall apprehend, bring back and secure any person for the commission of a felony, but shall not have named, in such offer, the person whose apprehension is sought, and any person, in consequence of such offer, shall have apprehended, brought back and secured the person who committed such felony, and such person shall have been charged therewith and convicted thereof, and the board of county commissioners shall have ordered such reward paid to the person so effecting such arrest and conviction, and the county auditor of such county shall have issued a warrant in payment of such reward, and such warrant shall have been held or shall be invalid by reason of the fact that in the offer of such reward by the board of county commissioners, no particular person was named as the person for whose arrest and conviction such reward was offered, such warrant shall be and is hereby declared to be valid, and it shall be the duty of the county treasurer of such county to pay such warrant out of the fund in the county treasury upon which the same was drawn, but no interest shall be paid thereon. [L. '17, p. 615, § 1.]

CRIMINAL LAW.

TITLE XIV.

CRIMINAL LAW.

CHAPTER I.—GENERAL PROVISIONS.

- | | |
|---|---|
| 2253. Classification of crimes. | 2279. Employment of prisoners. |
| 2254. Persons punishable. | 2280. Suspending sentences. |
| 2255. Duress of married woman no defense. | 2281. Indeterminate sentences. |
| 2256. Duress as a defense. | 2282. The board having control to determine period of imprisonment. |
| 2257. Responsibility of children. | 2284. Removal of insane convict. |
| 2258. Intoxication no defense. | 2285. Imprisonment on two or more convictions. |
| 2260. Principal defined. | 2286. Habitual criminals. |
| 2261. Accessory defined. | 2287. Prevention of procreation. |
| 2262. Trial and punishment of accessories. | 2288. Convicts protected — Forfeitures abolished. |
| 2263. Conviction of lesser crime. | 2289. Conviction of public officer forfeits office. |
| 2264. Attempts, how punished. | 2290. Convict as witness. |
| 2265. Punishment of felony, when not fixed by statute. | 2291. Incriminating testimony not to be used. |
| 2266. Punishment of misdemeanor, when not fixed by statute. | 2292. Intent to defraud. |
| 2267. Punishment of gross misdemeanor, when not fixed by statute. | 2293. Crimes on railway trains, boats, etc. |
| 2268. Nonfeasance in office. | 2294. Application to prior offenses. |
| 2269. Prohibited acts. | 2295. Application to existing civil rights. |
| 2270. Acts punishable elsewhere. | 2296. Civil remedies preserved. |
| 2271. Foreign conviction or acquittal. | 2297. Proceedings to impeach, etc., preserved. |
| 2272. Conviction or acquittal in other county. | 2298. Rule of construction. |
| 2273. Punishment for contempt. | 2299. Common law to supplement statute. |
| 2274. Sending letter, when complete. | 2300. To be construed as continuation of former acts. |
| 2275. Omission, when not punishable. | 2301. Act as measure of law. |
| 2276. Commitment to Washington state training school. | 2302. Repeal does not revive former law. |
| 2277. Commitment to Washington state reformatory. | 2303. Definition of terms. |
| 2278. Transfer of prisoners. | 2304. Acts repealed. |

CHAPTER II.—RIGHTS OF ACCUSED.

- | | |
|---|---|
| 2305. Right to counsel. | 2311. Proceedings within thirty days. |
| 2306. Witnesses. | 2312. Trial within sixty days. |
| 2307. Right to subpoena. | 2313. Discharge of defendant and bail upon dismissal. |
| 2308. Presumption of innocence—Conviction of lowest degree, when. | 2314. Nolle prosequi. |
| 2309. Conviction, when had. | 2315. Dismissal, when a bar. |
| 2310. Bail, when allowable. | 2316. Acquittal, when a bar. |

CHAPTER III.—CRIMES AGAINST THE SOVEREIGNTY OF THE STATE.

- | | |
|---------------------------------|------------------------------|
| 2317. Treason, defined—Penalty. | 2319. Misprision of treason. |
| 2318. Levying war. | |

CHAPTER IV.—CRIMES BY OR AGAINST PUBLIC OFFICERS.

- | | |
|---|--|
| 2320. Bribery of public officer. | 2321-4. "Bribe" as to baseball game defined. |
| 2321. Asking or receiving bribe. | 2321-5. Corrupt baseball playing. |
| 2321-1. Offering a bribe as to baseball game. | 2321-6. Venue of action. |
| 2321-2. Accepting a bribe by baseball player. | 2321-7. Bonus or extra compensation. |
| 2321-3. Completion of baseball bribery. | 2321-8. Scope of act. |
| | 2322. Juror, etc., accepting bribe. |

CRIMINAL LAW.

- | | |
|---|---|
| <p>2323. Bribing witness.
 2324. Witness accepting bribe.
 2325. Influencing juror.
 2326. Juror, etc., promising verdict, etc.
 2327. Misconduct of officer drawing jury.
 2328. Soliciting jury duty.
 2329. Misconduct of officer in charge of jury.
 2330. Offender a competent witness.
 2331. Interfering with public officer.
 2332. Offering reward for appointment.
 2333. Grafting.
 2333-1. Suppression of competitive bidding.
 2333-2. Collusion in competitive bidding.
 2333-3. Penalty.
 2333-4. Agreement outside state.
 2334. Misconduct of public officer.
 2334-1. Public employment of alien evading military service.
 2334-2. Acceptance of such employment.
 2334-3. List of employees.
 2334-4. Penalty.
 2335. Grant of official powers.
 2336. Intrusion into and refusal to surrender public office.
 2337. Disturbing legislature or intimidating member.
 2338. Witness refusing to attend legislature or committee or to testify.
 2339. Rescuing prisoners.
 2340. Taking property from an officer.
 2341. Escaped prisoner recaptured.
 2342. Prisoner escaping.
 2343. Aiding prisoner to escape.
 2344. Custodian suffering escape.
 2345. Ministerial officer permitting escape.
 2346. Concealing escaped prisoner.
 2347. Injury to public record.
 2348. Injury to and misappropriation of record.
 2349. Offering false instrument for filing or record.
 2350. False report.
 2351. Perjury—First degree.</p> | <p>2352. Knowledge of materiality not necessary.
 2353. Perjury—Second degree.
 2354. "Oath" and "swear" defined.
 2355. Irregularity in administering oath or incompetency of witness no defense.
 2356. Deposition—When complete.
 2357. Statement of what one does not know to be true.
 2358. Offering false evidence.
 2359. Committal of witness—Detention of documents.
 2360. Subornation of perjury.
 2361. Attempt to suborn perjury.
 2362. Destroying evidence.
 2363. Tampering with witness.
 2364. Neglect or refusal to receive a person into custody.
 2365. Refusal to make arrest or to aid officer.
 2366. Resisting public officer.
 2367. Compounding crimes.
 2368. Intimidating public officer.
 2369. Malicious prosecution.
 2370. Barratry.
 2371. Buying demand or promising reward by justice or constable.
 2372. Criminal contempt.
 2373. Grand juror acting after challenge allowed.
 2374. Production of pretended heir.
 2375. Substitution of a child.
 2376. Instituting suit in name of another.
 2377. Unauthorized communication with prisoner.
 2378. Disclosing transaction of grand jury.
 2379. Disclosure of deposition returned by grand jury.
 2380. Public officer making false certificate.
 2381. Falsely auditing and paying claims.
 2382. Conspiracy.
 2383. Overt act not necessary.
 2384. Corporation to forfeit franchise.</p> |
|---|---|

CHAPTER V.—CRIMES AGAINST THE PERSON.

- | | |
|--|--|
| <p>2385. Suicide, defined.
 2386. Attempting suicide.
 2387. Aiding suicide.
 2388. Abetting attempt at suicide.
 2389. Incapacity of person aided no defense.
 2390. Homicide—Defined and classified.
 2391. Proof of death and of killing by defendant.
 2392. Murder in the first degree—Death penalty.
 2393. Murder in the second degree.
 2394. Killing in duel.
 2395. Manslaughter.
 2396. Killing unborn quick child.
 2397. Killing unborn quick child by administering drugs.</p> | <p>2398. Woman taking drugs.
 2399. Owner of vicious animal.
 2400. Killing by overloading passenger vessel.
 2401. Reckless operation of steamboat or engine.
 2402. Liability of intoxicated physician.
 2403. Keeping explosive unlawfully.
 2404. Homicide, when excusable.
 2405. Justifiable homicide by public officer.
 2406. Homicide by other person, when justifiable.
 2407. "Maiming" defined—How punished.
 2408. Instrument or manner of maiming.</p> |
|--|--|

CRIMINAL LAW.

- | | |
|---|---|
| <p>2409. Recovery from injury, when a defense.</p> <p>2410. Kidnaping defined—How punished.</p> <p>2411. Selling services of person kidnaped.</p> <p>2412. Venue—Effect of consent.</p> <p>2413. Assault in first degree defined—How punished.</p> <p>2414. Assault in the second degree—How punished.</p> <p>2415. Assault in the third degree—How punished.</p> <p>2416. Force, when lawful.</p> <p>2417. Provoking assault.</p> <p>2418. Robbery, defined.</p> <p>2419. Duel, how punished.</p> <p>2420. Challenger, abettor, etc.</p> | <p>2421. Attempt to induce challenge, posting.</p> <p>2422. Duel outside state, venue.</p> <p>2423. Witnesses.</p> <p>2424. Libel, defined.</p> <p>2425. How justified or excused—Malice, when presumed.</p> <p>2426. Publication, defined.</p> <p>2427. Liability of editors and others.</p> <p>2428. Report of proceedings privileged.</p> <p>2429. Venue.</p> <p>2430. Privileged communications.</p> <p>2431. Furnishing libelous information.</p> <p>2432. Threatening to publish libel.</p> <p>2432-1. Slander of financial institutions.</p> <p>2433. Slander of woman.</p> <p>2434. Testimony necessary to convict.</p> |
|---|---|

CHAPTER VI.—CRIMES AGAINST MORALITY, DECENCY, ETC.

- | | |
|--|---|
| <p>2435. Rape, defined.</p> <p>2436. Carnal knowledge of children.</p> <p>2437. Sexual intercourse and carnal knowledge defined.</p> <p>2438. Compelling a woman to marry.</p> <p>2439. Abduction.</p> <p>2440. Placing female in house of prostitution.</p> <p>2441. Seduction.</p> <p>2442. Indecent assault.</p> <p>2445. Keeper of concert and liquor saloons.</p> <p>2446. Employment of minors prohibited.</p> <p>2447. Employment of children.</p> <p>2448. Abortion, defined.</p> <p>2449. Pregnant women attempting abortion.</p> <p>2450. Selling drugs, etc.</p> <p>2451. Evidence.</p> <p>2452. Concealing birth.</p> <p>2453. Bigamy defined—How punished—Exceptions.</p> <p>2454. Punishment of consort.</p> <p>2455. Incest.</p> <p>2456. Crime against nature.</p> <p>2457. Adultery.</p> <p>2458. Lewdness.</p> <p>2459. Obscene literature.</p> <p>2460. Indecent articles, etc.</p> <p>2461. Prohibited publications.</p> <p>2462. Advertising cures of venereal diseases.</p> <p>2462-1. Use of certain words prima facie evidence.</p> <p>2463. Advertising for divorce business.</p> <p>2464. Lotteries, defined—A nuisance—Drawing, how punished.</p> <p>2465. Selling tickets—Advertising.</p> <p>2466. Disposal of property by lottery—Keeping office—Letting building.</p> <p>2467. Insuring lottery tickets—Advertising offers to insure.</p> | <p>2468. Lotteries out of state—Advertising by nonresidents.</p> <p>2469. Conducting gambling.</p> <p>2470. Gambling.</p> <p>2471. Swindling.</p> <p>2472. Possession of gambling devices.</p> <p>2473. Poolselling and book-making.</p> <p>2474. Allowing building to be used.</p> <p>2475. Bucket-shop, defined.</p> <p>2476. Maintaining bucket-shop—Penalty.</p> <p>2477. Written statement to be furnished—Presumption.</p> <p>2478. Seizure and disposition of gambling devices.</p> <p>2479. Bunco-steering.</p> <p>2480. Evidence—Testimony of player.</p> <p>2481. Pawnbroker and second-hand dealers—Duty to record transactions.</p> <p>2482. Inspection of records and goods.</p> <p>2483. Report to chief of police.</p> <p>2484. Retention of property.</p> <p>2485. Penalty.</p> <p>2486. Rates of interest and sale of pledged property.</p> <p>2487. "Pawnbrokers" defined.</p> <p>2488. "Second-handed dealer" defined.</p> <p>2489. Rights of sepulture—Dissection, when permitted.</p> <p>2490. Burial or cremating.</p> <p>2491. Opening grave—Stealing body—Receiving same.</p> <p>2492. Interfering with dead body or funeral.</p> <p>2493. Opening road through cemetery.</p> <p>2494. Sabbath-breaking, defined.</p> <p>2495. Obstructing view of saloon.</p> <p>2496. Observance of other day.</p> <p>2497. Service of process on the Sabbath prohibited.</p> <p>2498. Preventing religious act.</p> <p>2499. Disturbing religious meeting.</p> |
|--|---|

CHAPTER VII.—CRIMES AGAINST PUBLIC HEALTH AND SAFETY.

- | | |
|--|--|
| <p>2500. Public nuisance.</p> <p>2501. Unequal damage.</p> | <p>2502. Maintaining or permitting nuisance.</p> |
|--|--|

CRIMINAL LAW.

- | | |
|--|--|
| <p>2503. Abatement of nuisance.
 2504. Keeping explosives unlawfully.
 2505. Possession of uninspected oils and effacing brands from oil barrels.
 2506. Transporting explosives.
 2507. Person omitting to label drugs, or labeling them wrongly.
 2508. Selling poison without labeling and recording the sale.
 2509. Regulating the sale of narcotic drugs.
 2510. Fraudulent prescription by physician.
 2511. Presenting fraudulent prescription.
 2512. Regulating the sale of milk and cream in cities.
 2513. Regulating the sale of milk and cream generally.
 2514. "Unwholesome" defined.
 2515. "Skimmed milk" defined.
 2516. Willfully poisoning food.
 2517. Dangerous weapons—Evidence.
 2517-1. Aliens—Firearms without license prohibited.
 2518. Setting spring-gun.
 2519. Obstruction of extinguishment of fire.
 2520. Obstructing firemen.</p> | <p>2521. Smoking, where prohibited.
 2522. Setting prohibited fire.
 2523. Negligent fires.
 2524. Operating dangerous engine.
 2525. Door of public buildings to swing outward.
 2526. Engineer who cannot read.
 2527. Intoxication of employees.
 2528. Failure to ring bell.
 2529. Other violations of duty.
 2530. Obstructing and delaying train.
 2531. Speed of automobile.
 2532. Liability of person handling steamboat or steam boiler.
 2533. Endangering life by refusal to labor.
 2534. Disturbance on highway.
 2535. Dangerous exhibitions.
 2537. Deposit of unwholesome substance.
 2538. Allowing vicious animal at large.
 2539. Exposing contagious disease.
 2540. Diseased animals.
 2541. Diseased animals—Disposal of carcasses.
 2542. Polluting water supply.
 2543. Furnishing impure water.
 2544. Practicing medicine without a license.
 2545. Unlicensed pilotage.</p> |
|--|--|

CHAPTER VIII.—CRIMES AGAINST THE PUBLIC PEACE.

- | | |
|--|--|
| <p>2546. Armed association.
 2547. Disturbing meeting.
 2548. Riot, defined.
 2549. Riot—Penalty.
 2550. Unlawful assembly.
 2551. Remaining after warning.
 2552. Destruction of property.
 2553. Disguised and masked persons.
 2554. Owner of premises allowing masqueraders.
 2555. Combination to resist process.
 3556. Prizefighting—Aiding, betting or stake-holding.
 2557. Apprehension of persons about to fight.
 2558. Forcible entry and detainer.
 2559. Aiming or discharging firearms.
 2560. Use of firearms by minor.
 2561. Offenses in public conveyances.
 2562. Criminal anarchy, defined.
 2563. Advocacy of criminal anarchy.</p> | <p>2563-1. Criminal syndicalism, defined.
 2563-2. Use of property for promoting syndicalism.
 2563-3. Sabotage, defined.
 2563-4. Interference with owner's control.
 2563-5. Advocacy of sabotage.
 2563-6. Act cumulative.
 2563-7. Displaying emblems of seditious and anarchistic groups.
 2563-8. Unlawful possession of such emblems.
 2563-9. Penalties.
 2563-10. Searches and seizures.
 2563-11. Application of act.
 2564. Publishing matter inciting breach of peace.
 2565. Liability of editors and others.
 2566. Assemblages of anarchists.
 2567. Permitting premises to be used for assemblages of anarchists.
 2568. Witness' privilege.</p> |
|--|--|

CHAPTER IX.—CRIMES AGAINST PROPERTY.

- | | |
|--|---|
| <p>2569. Misappropriation and falsification of accounts by public officer.
 2570. Other violations by officers.
 2571. Misappropriation, etc., by treasurer.
 2572. Arson—First degree.
 2573. Arson—Second degree.
 2574. Contiguous fires.
 2575. "Set on fire" defined.
 2576. Ownership of building.
 2577. Preparation is attempt.
 2578. Burglary—First degree.
 2579. Burglary—Second degree.</p> | <p>2580. Presumption of intent.
 2581. Crime in building—Punished separately.
 2582. Making or having burglar tools.
 2583. Forgery—First degree.
 2584. False certificate to certain instruments.
 2585. Forgery—Second degree.
 2586. Falsely indicating person as corporate officer.
 2587. Uttering forged instruments, coins, etc., forgery.</p> |
|--|---|

CRIMINAL LAW.

2588. True writing signed by wrongdoer's name.
2589. Misconduct in signing a petition.
2590. Definitions.
2591. Possession of counterfeit coin.
2592. Advertising counterfeit money.
2593. False certificate of registration of animals—False representation as to breed.
2594. Removing lawful brands.
2595. Imitating lawful brand.
2596. Counterfeiting trademark, brand, etc.
2597. Displaying goods with false trademark.
2598. When deemed affixed.
2599. Fraudulent registration of trademark.
2600. Form and similitude defined.
2601. Larceny.
- 2601-1. Taking motor vehicle without permission.
- 2601-2. Unlawful issuance of bank checks or drafts.
- 2601-3. Motor serial numbers—Purchase, sale or possession, when altered.
- 2601-4. Possession prima facie evidence of guilt.
2602. Commission or part ownership no defense.
2603. Sale of mortgaged property—When larceny.
2604. Contractor failing to pay for labor or material.
2605. Grand larceny—Penalty.
2606. Value—How ascertained.
2607. Stealing railway tickets.
2608. Claim of title—When ground of defense.
2609. Restoration of stolen property—Duty of officers.
2610. Extortion.
2611. Oppression under color of office.
2612. Extortion by public officer.
2613. Blackmail.
2614. Coercion.
2615. Falsely personating another.
2616. Personating an officer.
2617. Use of false permit, license or diploma.
2618. Concealing foreign matter in merchandise.
2619. Obtaining signature by false pretense.
2620. False representation concerning credit.
2621. False representation concerning title.
2622. Publishing false statement to affect market price.
- 2622-1. False advertising.
2623. Obtaining employment by false letter or certificate.
2624. Fraud by employment agent.
2625. Frauds on innkeeper.
2626. Improper use of insignia.
2627. Fraudulently presenting claim to public officer.
2628. Fraud by bailee of animal.
2629. Destruction or removal of mortgaged property.
- 2629-1. Removal of timber from land delinquent for taxes.
- 2629-2. Penalty.
2630. Mock auctions.
2631. Fraudulent removal of property.
2632. Knowingly receiving fraudulent conveyance.
2633. Fraud in assignment for benefit of creditors.
2634. Willful destruction of vessel.
2635. Making false manifest, invoice, etc.
2636. Fraudulent destruction of insured property.
2637. Using false weights and measures.
2638. Fraud in stock subscription.
2639. Fraudulent issue of stock, scrip, etc.
2640. Insolvent bank receiving deposit.
2641. Corporation doing business without license.
2642. False report of corporation.
2643. Warehouseman or carrier refusing to issue receipt.
2644. Fictitious bill of lading and receipt.
2645. Warehouseman fraudulently mixing goods.
2646. Duplicate receipt.
2647. Bill of lading or receipt must be canceled on redelivery of property.
2648. Regulating sale of passage tickets.
2649. Redemption of unused passage ticket.
2650. Malicious mischief—Injury to railway.
2651. Attempt to commit train robbery.
2652. Endangering life and property by explosives.
2653. Damaging building, etc., by explosion.
2654. False signals for vessels, etc.
2655. Injury to United States light.
2656. Injuring public utilities.
2657. Unlawful interference with gas, electric, steam or water appliance.
2658. Interfering with dam, reservoir, etc.
2659. Injury to property.
2660. Tampering with papers.
2661. Falsifying accounts.
2662. Divulging telegram.
2663. Opening sealed letter.
2664. Trespass on railway track.
- 2664-1. Trespass on double track.
- 2664-2. Exceptions.
- 2664-3. Crossing warnings.
- 2664-4. Penalty.
2665. Trespass upon land of another—warning.
2666. Injury to baggage.
2667. Injury to other property.

CHAPTER X.—MISCELLANEOUS CRIMES.

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| 2668. Drunkenness. | 2683. Use of the words "coin silver," on mounting. |
| 2669. Common drunkard. | 2684. Unlawfully marking article "made of gold." |
| 2670. Opium joints. | 2685. "Marked, stamped or branded," defined. |
| 2671. Solemnizing unlawful marriage. | 2686. Protecting civil public rights. |
| 2672. Obstructing public officer. | 2687. Master of vessel bringing a foreign convict. |
| 2673. Acting without lawful authority. | 2688. Vagrancy. |
| 2674. Collecting for benefit without authority. | 2688-1. False representation of physical defects. |
| 2675-1. Uniform flag law — Definition of flag, etc. | 2689. Admitting convict to saloon, and selling liquor to drunkard. |
| 2675-2. Advertising—Use of flag. | 2690. Performing or selling undedicated play. |
| 2675-3. Desecration of flag. | 2693. Prohibiting drinking in public conveyances. |
| 2675-4. Application of act. | 2694. Common carrier not to permit drinking in public conveyance. |
| 2675-5. Penalty. | 2695. Selling liquors not aged. |
| 2675-6. Construction of act. | 2696. Mixing, distilling, selling, etc., low wines or spirits. |
| 2675-7. Citation of act. | 2696-1. Improper conduct by judges. |
| 2676. Bribery of labor representative. | 2696-2. Fraudulent use of name of secret societies. |
| 2677. Labor representative receiving bribe. | |
| 2678. Corrupt influencing of agent. | |
| 2679. Grafting by employee. | |
| 2680. Use of the words "sterling silver," etc. | |
| 2681. Use of words "coin silver," etc. | |
| 2682. Use of the word "sterling" on mounting. | |

CHAPTER XI.—CRIMES UNDER ACTS NOT REPEALED BY THE PENAL CODE OF 1909.

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| 2697. Selling cigarettes containing injurious drug—Penalty. | 2711. False pretenses, etc., in selling mines. |
| 2698. Sale of any cigarettes except in original package. | 2712. Altering sample or certificate of assay. |
| 2699. Sale to minors—Civil liability to parents of minor. | 2713. Making false sample or assay of ore. |
| 2700. Same — Wrappers or substitutes — Persuading minor to smoke. | 2714. Penalty for violation of last three sections. |
| 2701. Same—Penalty—Duty of prosecutors. | 2715. Extortion by ferryman, toll-gate keeper, etc. |
| 2702. Counterfeiting uncoined gold, etc. | 2716. Mutilation of sign-boards, mile-posts, etc. |
| 2703. Robbing sluice-boxes, etc. | 2717. Protection to mile-boards used for advertising. |
| 2704. Malicious disturbance of or injury to settlers on unsurveyed lands. | 2718. Fast driving over bridge. |
| 2705. Injury to buildings or contents. | 2719. Unlawful use of traction engine on highways. |
| 2706. Destruction of monuments, records, etc. | 2720. Throwing glass or tacks in highway—Penalty. |
| 2707. Penalty. | 2721. Race-track gambling a felony — Penalty. |
| 2708. Posting advertisements on public property. | 2721½. Indecent language, practices and drunkenness. |
| 2709. To prevent removal of mortgaged property. | |

CHAPTER I.

GENERAL PROVISIONS.

§ 2253. Classification of Crimes.

A crime is an act or omission forbidden by law and punishable upon conviction by death, imprisonment, fine, or other penal discipline. Every crime which may be punished by death or by imprisonment in the state penitentiary is a felony. Every crime punishable by a fine of not more than two hundred and fifty dollars, or by imprisonment

in a county jail for not more than ninety days, is a misdemeanor. Every other crime is a gross misdemeanor. [L. '09, p. 890, § 1.]

Cited in 56 Wash. 406; 58 Wash. 422; 63 Wash. 298; 64 Wash. 124.

The title to the "Penal Code," § 2253 et seq., an act "relating to crimes and punishments and the rights and custody of persons accused or convicted of crime," is broad enough to admit of amendments or implied repeals of sections of the former laws relating to criminal procedure: State v. George, 84 Wash. 113, 146 Pac. 378.

Offenses prior to the enactment of the new Penal Code are properly prosecuted under the laws in force at the time the

offense was committed, being expressly saved by the repealing clauses of the later enactment: State v. Morrow, 63 Wash. 297, 115 Pac. 161, Ann. Cas. 1912D, 570.

Under this section, subdivision 3, evidence is admissible of a conversation had with accused in another state, after full agreement and plans for the theft had been made in this state: State v. Vane, 105 Wash. 421, 178 Pac. 456.

For text treatment of "Criminal Law," see 8 R. O. L. 38.

§ 2254. Persons Punishable.

The following persons are liable to punishment:

1. A person who commits in the state any crime, in whole or in part.
2. A person who commits out of the state any act which, if after committed within it, would be larceny, and is afterward found in the state with any of the stolen property.
3. A person who, being out of the state, counsels, causes, procures, aids, or abets another to commit a crime in this state.
4. A person who, being out of the state, abducts or kidnaps, by force or fraud, any person, contrary to the laws of the place where the act is committed, and brings, sends or conveys such person into this state.
5. A person who commits an act without the state which affects persons or property within the state, or the public health, morals or decency of the state, which, if committed within the state, would be a crime. [L. '09, p. 890, § 2.]

See, also, § 2010.

Cited in 105 Wash. 425.

Under this section evidence is admissible of a conversation had with accused

in another state, after agreement for a theft had been made in this state: State v. Vane, 105 Wash. 421, 178 Pac. 456.

§ 2255. Duress of Married Woman No Defense.

It is no defense for a married woman charged with the commission of a crime, that the alleged act committed by her was committed in the presence of her husband. [L. '09, p. 891, § 3.]

Presumption of coercion by husband in case of commission of crime by wife.
4 A. L. R. 271.

§ 2256. Duress as a Defense.

Whenever any crime, except murder, is committed or participated in by two or more persons, any one of whom participates only under compulsion by another engaged therein, who by threats creates a reasonable apprehension in the mind of such participator that in case of refusal he is liable to instant death or grievous bodily harm, such threats and apprehension constitute duress, which will excuse such participator from criminal prosecution. [L. '09, p. 891, § 4.]

Cited in 66 Wash. 541.

Duress as an excuse for crime. 19
L. R. A. 357.

Burden of proof of duress as defense
to charge of crime. Ann. Cas.
1912B, 1111.

§ 2257. Responsibility of Children.

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. Whenever in legal proceedings it becomes necessary to determine the age of a child, he may be produced for inspection, to enable the court or jury to determine the age thereby; and the court may also direct his examination by one or more physicians, whose opinion shall be competent evidence upon the question of his age. [L. '09, p. 891, § 5.]

Criminal liability of children. 36 L. R. A. 196.

§ 2258. Intoxication No Defense.

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent. [L. '09, p. 891, § 6.]

What intoxication will excuse crime.
36 L. R. A. 465; 19 Ann. Cas. 1169.

Voluntary intoxication as defense to
homicide. 12 A. L. R. 861.

§ 2260. Principal Defined.

Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him. [L. '09, p. 892, § 8.]

See, also, § 2008.

Cited in 66 Wash. 468; 80 Wash. 100;
82 Wash. 673, 674; 94 Wash. 216; 97 Wash.
245; 105 Wash. 422, 424.

This section has no application to the offense of receiving deposits in a bank knowing it to be insolvent; inasmuch as by section 2640, the offense is confined to a class within the bank, and the act has its own aider and abetter clause, also confined to the same class, indicating an intention not to include anyone without the class who should aid or abet the criminal act; hence an outsider having no connection with the insolvent bank cannot

be prosecuted as aiding and abetting some officer or employee of the bank in receiving deposits knowing the bank to be insolvent: State v. Furth, 82 Wash. 665, 144 Pac. 907.

It is error to instruct that one jointly informed against for grand larceny may be convicted if the property was taken by his codefendants with his aid "or assent," in view of this section; since mere assent to an act is a mental attitude and does not imply a contribution or expressed concurrence: State v. Peasley, 80 Wash. 99, 141 Pac. 316.

§ 2261. Accessory Defined.

Every person not standing in the relation of husband or wife, brother or sister, parent or grandparent, child or grandchild, to the offender, who after the commission of a felony shall harbor, conceal or aid such offender with intent that he may avoid or escape from arrest, trial, conviction or punishment, having knowledge that such offender has committed a felony or is liable to arrest, is an accessory to the felony. [L. '09, p. 892, § 9.]

Criminal responsibility of one co-operating in offense which he is

incapable of committing personally.
5 A. L. B. 782.

§ 2262. Trial and Punishment of Accessories.

Every accessory to a felony may be indicted, tried and convicted either in the county where he became an accessory, or where the principal felony was committed; and whether the principal offender has or has not been convicted, or is or is not amenable to justice, or has been pardoned or otherwise discharged after conviction; and, except where a different punishment is specially provided by law, such accessory shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 892, § 10.]

See, also, *supra*, §§ 2009, 2010.

Cited in 94 Wash. 216.

§ 2263. Conviction of Lesser Crime.

Upon the trial of an indictment or information, the defendant may be convicted of the crime charged therein, or of a lesser degree of the same crime, or of an attempt to commit the crime so charged, or of any attempt to commit a lesser degree of the same crime. Whenever the jury shall find a verdict of guilty against a person so charged, they shall in their verdict specify the degree or attempt of which the accused is guilty. [L. '09, p. 893, § 11.]

See, also, *supra*, § 2167.

Cited in 76 Wash. 587; 109 Wash. 29.

Under this section, one informed against for larceny by false pretenses may be

convicted of an attempt to commit the offense: *State v. Peterson*, 109 Wash. 25, 186 Pac. 264.

§ 2264. Attempts, How Punished.

An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime; and every person who attempts to commit a crime, unless otherwise prescribed by statute, shall be punished as follows:

(1) If the crime attempted is punishable by death or life imprisonment, the person convicted of the attempt shall be punished by imprisonment in the state penitentiary for not more than twenty years.

(2) In every other case he shall be punished by imprisonment in such manner as may be prescribed for the commission of the completed offense, for not more than half the longest term, or by a fine of not more than half the largest sum, prescribed upon conviction for the commission of the offense attempted, or by both such fine and im-

prisonment; but nothing herein shall protect a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed; and a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court in its discretion shall discharge the jury and direct the defendant to be tried for the crime itself. [L. '09, p. 893, § 12.]

See *infra*, § 2361, attempt to suborn perjury.

See *infra*, § 2577, attempt to commit arson.

See *infra*, § 2651, attempt to commit train robbery.

Cited in 69 Wash. 591; 79 Wash. 264; 88 Wash. 162.

The fact that no penalty has been fixed by statute for the crime of sodomy does not prevent a prosecution for an attempt to commit the crime: *State v. Place*, 5 Wash. 773, 32 Pac. 736.

Provisions for the punishment of attempts to commit crime are not rendered inapplicable to a prosecution for sodomy by the fact that another section pre-

scribes punishment for assaults with intent to commit sodomy and certain other crimes, which defines a substantive offense, with the punishment therefor entirely distinct from that of an attempt to commit a crime: *State v. Romans*, 21 Wash. 284, 57 Pac. 819.

Nature and Extent of Punishment: *State v. Berzaman*, 10 Wash. 277, 38 Pac. 1037.

§ 2265. Punishment of Felony When not Fixed by Statute.

Every person convicted of a felony for which no punishment is specially prescribed by any statutory provision in force at the time of conviction and sentence, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 894, § 13.]

Cited in 111 Wash. 540.

This section renders enforceable the section defining a jointist as a felony

without specifying the place of imprisonment: *State v. Burgess*, 111 Wash. 537, 191 Pac. 635.

§ 2266. Punishment of Misdemeanor When not Fixed by Statute.

Every person convicted of a misdemeanor for which no punishment is prescribed by any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than ninety days, or by a fine of not more than two hundred and fifty dollars. [L. '09, p. 894, § 14.]

Cited in 62 Wash. 246; 78 Wash. 588.

§ 2267. Punishment of Gross Misdemeanor When not Fixed by Statute.

Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 894, § 15.]

Cited in 72 Wash. 655; 74 Wash. 249; 80 Wash. 94; 101 Wash. 154.

§ 2268. Nonfeasance in Office.

Whenever any duty is enjoined by law upon any public officer or other person holding any public trust or employment, their willful

neglect to perform such duty, except where otherwise specially provided for, shall be a misdemeanor. [L. '09, p. 894, § 16.]

Cited in 82 Wash. 535.

§ 2269. Prohibited Acts.

Whenever the performance of any act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the committing of such act shall be a misdemeanor. [L. '09, p. 894, § 17.]

§ 2270. Acts Punishable Elsewhere.

An act or omission punishable as a crime in this state is not less so because it is also punishable under the laws of another state, government or country, unless the contrary is expressly declared in the law relating thereto. [L. '09, p. 894, § 18.]

§ 2271. Foreign Conviction or Acquittal.

Whenever, upon the trial of any person for a crime, it appears that the offense was committed in another state or country, under such circumstances that the courts of this state had jurisdiction thereof, and that the defendant has already been acquitted or convicted upon the merits, upon a criminal prosecution under the laws of such state or country, founded upon the act or omission with respect to which he is upon trial, such former acquittal or conviction is a sufficient defense. [L. '09, p. 895, § 19.]

§ 2272. Conviction or Acquittal in Other County.

Whenever, upon the trial of any person for a crime, it shall appear that the defendant has already been acquitted or convicted upon the merits, of the same crime, in a court having jurisdiction of such offense in another county of this state, such former acquittal or conviction is a sufficient defense. [L. '09, p. 895, § 20.]

See, also, *supra*, § 2113; *infra*, § 2316.

§ 2273. Punishment for Contempt.

A criminal act which at the same time constitutes contempt of court, and has been punished as such, may also be punished as a crime, but in such case the punishment for contempt may be considered in mitigation. [L. '09, p. 895, § 21.]

See, also, "Contempts."

§ 2274. Sending Letter, When Complete.

Whenever any statute makes the sending of a letter criminal, the offense shall be deemed complete from the time it is deposited in any postoffice or other place, or delivered to any person, with intent that it shall be forwarded; and the sender may be proceeded against in the county wherein it was so deposited or delivered, or in which it was received by the person to whom it was addressed. [L. '09, p. 895, § 22.]

§ 2275. Omission, When not Punishable.

No person shall be punished for an omission to perform an act when such act has been performed by another acting in his behalf, and competent to perform it. [L. '09, p. 895, § 23.]

§ 2276. Commitment to Washington State Training School.

Whenever any boy between the ages of eight and sixteen years, or any girl between the ages of eight and eighteen years, shall be found guilty of any crime, except murder or manslaughter, the court may, in its discretion, order such person committed to the Washington state training school to remain, in case of a boy, until he shall arrive at the age of eighteen years and, in case of a girl, until she shall arrive at the age of nineteen years, unless sooner paroled or legally discharged. [L. '09, p. 896, § 24.]

See supra, § 1980, commitment of juvenile offenders to training school.

See supra, § 1986, commitment and effect of discharge.

See infra, § 10319, incorrigible truants, when to be committed.

See infra, § 4636, commitments to state school for girls.

§ 2277. Commitment to Washington State Reformatory.

Whenever any male person, between the ages of sixteen and thirty years, never before convicted in this state or elsewhere of any crime which under the laws of this state would amount to a felony, shall be convicted of any felony except murder, arson in the first degree, or robbery, the court may, in its discretion order such person to be committed to and confined in the Washington state reformatory. [L. '09, p. 896, § 25.]

Compare supra, §§ 2194, 2195, and infra, § 10288, commitment to state reformatory.

Cited in 75 Wash. 203.

This section supersedes section 10288, wherein no discretion is given to the court to sentence to the penitentiary male

persons between the ages of sixteen and thirty: *Fellissier v. Reed*, 75 Wash. 201, 134 Pac. 813.

§ 2278. Transfer of Prisoners.

Whenever in their judgment, the welfare of any prisoner or prisoners confined in any penal institution shall require that any prisoner be removed from one institution to another, the board having control of such institution shall have authority to order such removal. [L. '09, p. 986, § 26.]

See infra, § 2284, transfer of insane prisoners.

See infra, §§ 10238 and 10920, transportation of convicts and insane.

Cited in 75 Wash. 203.

§ 2279. Employment of Prisoners.

The sheriff of each county shall employ all male persons sentenced to imprisonment in the county jail thereof in such manner and at such places within the county as may be directed by the board of county commissioners of such county. [L. '09, p. 896, § 27.]

See supra, §§ 1933, 2209, fines, how worked out.

See infra, §§ 10189, 10190, prisoners sentenced to labor when.

§ 2280. Suspending Sentences.

Whenever any person never before convicted of a felony or gross misdemeanor shall be convicted of any crime except murder, burglary in the first degree, arson in the first degree, robbery, carnal knowledge of a female child under the age of ten years, or rape, the court may in its discretion, at the time of imposing sentence upon such person, direct that such sentence be stayed and suspended until otherwise ordered by such court, and that the sentenced person be placed under the charge of a parole or peace officer during the term of such suspension, upon such terms as the court may determine. In no case shall a sentence be suspended under the provisions of this section unless the prisoner if sentenced to confinement in a penal institution be placed under the charge of a parole officer, who is a duly appointed and acting officer of the institution to which the person is sentenced. [L. '21, p. 204, § 1; L. '09, p. 896, § 28.]

Cited in 65 Wash. 289; 102 Wash. 602.

Suspension of Sentence: See Remington's Digest, Crim. Law, § 370; State v. Mallahan, 65 Wash. 287, 118 Pac. 42; State ex rel. Lundin v. Superior Court, 102 Wash. 600, 174 Pac. 473.

Power of court to suspend sentence or stay execution of sentence. 8 Ann. Cas. 386; 14 Ann. Cas. 722; Ann. Cas. 1912B, 1192; 33 L. R. A. (N. S.) 112; 39 L. R. A. (N. S.) 242; L. R. A. 1915C, 1169; L. R. A. 1918C, 551.

§ 2281. Indeterminate Sentences.

Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington state reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment. [L. '09, p. 897, § 29.]

See supra, § 2195, indeterminate sentence to reformatory not repealed.

Cited in 71 Wash. 184; 75 Wash. 287, 288; 98 Wash. 87.

PUNISHMENT AND PREVENTION OF CRIME: See Remington's Digest, Crim. Law, §§ 458—464.

§ 458. Extent of Punishment in General: State v. Berzaman, 10 Wash. 277, 38 Pac. 1037; Blystone, In re, 75 Wash. 286, 134 Pac. 827; Pellissier v. Reed, 75 Wash. 201, 134 Pac. 813; State v. Deer, 80 Wash. 92, 141 Pac. 321; State v. Johnson, 80 Wash. 522, 141 Pac. 1040.

Under this section the court may fix a minimum term of fifteen years for forgery in the first degree, under section 2583, *infra*, providing a maximum term of twenty years without fixing any minimum term: Blystone, In re, 75 Wash. 286, 134 Pac. 827.

§ 461. Cruel or Unusual Punishment: State v. Berzaman, 10 Wash. 277, 38 Pac. 1037; State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Newton, 29 Wash. 373, 70 Pac. 31; State v. Fenton, 30 Wash. 325, 70 Pac. 741; State v. Ryan, 34 Wash. 597, 76 Pac. 90; State v. Patchen, 37 Wash. 24, 79 Pac. 479; Brown, In re, 39 Wash. 160, 81 Pac. 552, 109 Am. St. Rep. 868, 4 Ann. Cas. 488, 1 L. R. A. (N. S.) 540; State v. Douglas, 66 Wash. 71, 118 Pac. 915; State v. Feilen, 70 Wash. 65, 126 Pac. 75, Ann. Cas. 1914B, 512, 41 L. R. A. (N. S.) 418.

See, also, State v. Hessel, 112 Wash. 53, 191 Pac. 637.

§ 462. Excessive Fines: Foster v. Territory, 1 Wash. 411, 25 Pac. 459.

§ 463. **Imprisonment in Addition to Fine:** State v. Dunlap, 25 Wash. 292, 65 Pac. 544; State v. Hatupin, 99 Wash. 468, 169 Pac. 966.

§ 464. **Term of Imprisonment:** Bojar, In re, 7 Wash. 355, 35 Pac. 71; State v. Kenney, 83 Wash. 441, 145 Pac. 450.

— **Indeterminate Sentence:** See Remington's Digest, Crim. Law, § 371-1; State v. Mallahan, 65 Wash. 287, 118 Pac. 42; State v. Andrews, 71 Wash. 181, 127 Pac. 1102; State v. Clark, 98 Wash. 81, 167 Pac. 84.

§ 2282. **The Board Having Control to Determine Period of Imprisonment.**

The state board of control, acting in conjunction with the warden of the state penitentiary, or the board of managers of the Washington state reformatory, acting in conjunction with the superintendent of such reformatory, as the case may be, may at any time after the expiration of the minimum term of imprisonment for which such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case. [L. '09, p. 897, § 30.]

See supra, § 2223, pardons by governor.

See infra, § 10240, record of credits.

See infra, §§ 10247, 10291, paroles by governor.

See infra, §§ 10249, 10292, recommitment for violating paroles.

Cited in 75 Wash. 205.

§ 2284. **Removal of Insane Convict.**

Whenever in the judgment of the state board of control the welfare of any person confined in any penal institution, or in any institution for the care of the insane, shall require that he be removed for treatment or confinement to another institution for the care of the insane, or to the insane ward of the state penitentiary, they shall be authorized to order such removal, but whenever a change is made in the location of any such inmate, a record open to the public shall be made and the relatives of such inmate shall be notified of the change. [L. '09, p. 898, § 32.]

§ 2285. **Imprisonment on Two or More Convictions.**

Whenever a person shall be convicted of two or more offenses before sentence has been pronounced for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction shall commence at the termination of the first or other prior term or terms of imprisonment to which he is sentenced; and whenever a person while under sentence of felony shall commit another felony and be sentenced to another term of imprisonment, such latter term shall not begin until the expiration of all prior terms. [L. '09, p. 898, § 33.]

§ 2286. **Habitual Criminals.**

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been twice convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud

is an element, shall be adjudged to be an habitual criminal and shall be punished by imprisonment in the state penitentiary for not less than ten years.

Every person convicted in this state of any crime of which fraud or intent to defraud is an element, or of petit larceny, or of any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony, or who shall previously have been four times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or intent to defraud is an element, shall be punished by imprisonment in the state penitentiary for life. [L. '09, p. 899, § 34.]

This section repeals Rem. & Bal. Code, §§ 2177, 2178.

Cited in 65 Wash. 489; 84 Wash. 162; 87 Wash. 614, 615, 616; 94 Wash. 164.

Punishment of Second or Subsequent Offenses: See Remington's Digest, Crim. Law, § 460; State v. Bush, 41 Wash. 13, 82 Pac. 1024; State v. Le Pitre, 54 Wash. 166, 103 Pac. 27, 18 Ann. Cas. 922; State v. Miller, 78 Wash. 268, 138 Pac. 896; State v. Rowan, 84 Wash. 158, 146 Pac. 374; State v. Driscoll, 86 Wash. 245, 150 Pac. 2; State v. Cotz, 94 Wash. 163, 161 Pac. 1191.

See, also, State v. Dericho, 107 Wash. 468, 182 Pac. 597; State v. Dale, 110 Wash. 181, 188 Pac. 473.

Notwithstanding Rem. & Bal. Code, § 2178, requiring one accused of being an habitual criminal to be tried within five days after conviction of an offense, this section, covering the same subject

and making no such provision, is an independent act; and one charged as an habitual criminal under this section need not be tried in five days: State v. Alexander, 65 Wash. 488, 118 Pac. 645.

Rem. & Bal. Code, section 2177, requiring that an information against an habitual criminal must set forth the fact, time and place of the former convictions, was repealed by this section, a later enactment covering the whole subject matter: State v. Gustafson, 87 Wash. 613, 152 Pac. 335; State v. Cotz, 94 Wash. 163, 161 Pac. 1191.

Validity and construction of statute enhancing penalty when crime committed by habitual criminals or prior offenders. 18 Ann. Cas. 923; 19 Ann. Cas. 732; 34 L. R. A. 398; 24 L. R. A. (N. S.) 432; 48 L. R. A. (N. S.) 204.

§ 2287. Prevention of Procreation.

Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, or of rape, or shall be adjudged to be an habitual criminal, the court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person, for the prevention of procreation. [L. '09, p. 899, § 35.]

Cited in 70 Wash. 67.

The operation of vasectomy for the prevention of procreation, authorized by this section, cannot be judicially determined to be cruel punishment, where the sentence required it to be carefully and skillfully performed and there was no showing that it was attended with any

marked degree of physical torture, suffering or pain: State v. Feiler, 70 Wash. 65, 126 Pac. 75, Ann. Cas. 1914B, 512, 41 L. R. A. (N. S.) 418.

Constitutionality of asexualization or sterilization statutes. Ann. Cas. 1914B, 515; 41 L. R. A. (N. S.) 419; L. R. A. 1918D, 236.

§ 2288. Convicts Protected—Forfeitures Abolished.

Every person sentenced to imprisonment in any penal institution shall be under the protection of the law, and any unauthorized injury to his person shall be punished in the same manner as if he were not so convicted or sentenced. A conviction of crime shall not work a forfeiture of any property, real or personal, or of any right or in-

terest therein. All forfeitures in the nature of deodands, or in case of suicide or where a person flees from justice, are abolished. [L. '09, p. 899, § 36.]

§ 2289. Conviction of Public Officer Forfeits Office.

The conviction of a public officer of any felony or malfeasance in office shall entail, in addition to such other penalty as may be imposed, the forfeiture of his office, and shall disqualify him from ever afterward holding any public office in this state. [L. '09, p. 900, § 37.]

§ 2290. Convict as Witness.

Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer thereto. [L. '09, p. 900, § 38.]

Cited in 64 Wash. 124; 66 Wash. 630; 68 Wash. 567; 93 Wash. 158, 159.

The title, "An act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime and repealing certain acts," is broad enough to include this section: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

Competency of Convict as Witness: See *Remington's Digest*, Witn., § 14; *State v. Harris*, 22 Wash. 57, 60 Pac. 58; *State v. Pearson*, 37 Wash. 405, 79 Pac. 985; *State v. Moser*, 94 Wash. 465, 162 Pac. 582.

Under this section, it is competent to show on cross-examination that a witness for the accused had been convicted of disorderly conduct, as affecting her credibility: *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

Upon cross-examination of the accused, it may, under this section, be shown that he has previously been convicted of a crime; whether a felony or a misdemeanor: *State v. Overland*, 68 Wash. 566, 123 Pac. 1011.

It is not a violation of the constitutional guaranty of a fair trial that the court compelled the accused on cross-examination to testify to a former conviction, under this section, where the jury were instructed that evidence of a former conviction could be considered only for the purpose of determining the weight to be given to his testimony: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

An assault and battery, even if made punishable by a municipal ordinance as a misdemeanor, being *malum in se*, is a "crime," within this section: *Marshall v. Dunn*, 93 Wash. 156, 160 Pac. 298.

§ 2291. Incriminating Testimony not to be Used.

In every case where it is provided in this act that a witness shall not be excused from giving testimony tending to criminate himself, no person shall be excused from testifying or producing any papers or documents on the ground that his testimony may tend to criminate or subject him to a penalty or forfeiture; but he shall not be prosecuted or subjected to a penalty or forfeiture for or on account of any action, matter or thing concerning which he shall so testify, except for perjury or offering false evidence committed in such testimony. [L. '09, p. 900, § 39.]

See, also, §§ 2149, 2150.

See *infra*, § 2330, in bribery and corruption.

See *infra*, § 2451, in abortion and selling drugs.

See *infra*, § 2480, in gambling and swindling.

See *infra*, § 2568, in criminal anarchy.

§ 2292. Intent to Defraud.

Whenever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporate whatsoever. [L. '09, p. 900, § 40.]

Cited in 102 Wash. 565.

§ 2294. Application to Prior Offenses.

Nothing contained in any provisions of this act shall apply to an offense committed or act done at any time before the day when this act shall take effect. Such an offense shall be punished according to, and such act shall be governed by, the provisions of law existing when it is done or committed, in the same manner as if this act had not been passed. [L. '09, p. 901, § 42.]

See, *supra*, §§ 2006, 2221, saving clauses.

Cited in 58 Wash. 422; 59 Wash. 309.

The saving clause in this section of the Penal Code is sufficient to continue in force the penal provisions repealed by the act until the date when the new act went into effect: *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Ware*, 58 Wash. 526, 109 Pac. 359; *State v. Lor-*

enzy, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

Under the general savings clause in the former law of 1901 and in this section, it is not essential to a prosecution for such prior offense that it was pending when the penal code of 1909 took effect: *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

§ 2295. Application to Existing Civil Rights.

Nothing in this act shall be deemed to affect any civil right or remedy existing at the time when it shall take effect, by virtue of the common law or of the provision of any statute. [L. '09, p. 901, § 43.]

§ 2296. Civil Remedies Preserved.

The omission to specify or affirm in this act any liability to any damages, penalty, forfeiture or other remedy, imposed by law, and allowed to be recovered or enforced in any civil action or proceeding, for any act or omission declared punishable herein, shall not affect any right to recover or enforce the same. [L. '09, p. 901, § 44.]

§ 2297. Proceedings to Impeach, etc., Preserved.

The omission to specify or affirm in this act any ground of forfeiture of a public office or other trust or special authority conferred by law, or any power conferred by law to impeach, remove, depose or suspend any public officer or other person holding any trust, appointment or other special authority conferred by law, shall not affect such forfeiture or power, or any proceeding authorized by law to carry into effect such impeachment, removal, deposition or suspension. [L. '09, p. 901, § 45.]

§ 2298. Rule of Construction.

Every provision of this act shall be construed according to the fair import of its terms. [L. '09, p. 902, § 46.]

§ 2299. Common Law to Supplement Statute.

The provisions of the common law relating to the commission of crime and the punishment thereof, in so far as not inconsistent with the in-

stitutions and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the superior courts of this state. [L. '09, p. 902, § 47.]

Cited in 82 Wash. 534.

Application and Operation of Common Law—Adoption and Abrogation: See Remington's Digest, Crim. Law, § 1; Bradshaw v. Territory, 3 W. T. 265, 14 Pac. 594; State v. Womack, 4 Wash. 19, 29 Pac. 939.

Though the crime against nature is punishable as a felony at common law,

and all common-law crimes are indictable under Code of 1881, section 782, it is not so punishable in this state, because no penalty has been fixed by statute: State v. Place, 5 Wash. 773, 32 Pac. 736.

Adoption of common law in relation of crimes. Ann. Cas. 1913E, 1249; Ann. Cas. 1918A, 990; 22 L. R. A. 501.

§ 2300. To be Construed as Continuation of Former Acts.

The provisions of this act, in so far as they are substantially the same as existing statutes, shall be construed as continuations thereof and not as new enactments. [L. '09, p. 902, § 48.]

Cited in 86 Wash. 463.

§ 2301. Act as Measure of Law.

No statute, law or rule is continued in force because it is consistent with the provisions of this act on the same subject; but in all cases provided for by this act, all statutes, laws and rules heretofore in force in this state, whether consistent or not with the provisions of this act, unless expressly continued in force by it, are repealed and abrogated. [L. '09, p. 902, § 49.]

Cited in 86 Wash. 463.

§ 2302. Repeal Does not Revive Former Law.

The repeal or abrogation by this act of any existing law shall not revive any former law heretofore repealed, nor affect any right already existing or accrued or any action or proceeding already taken, except as in this act provided; nor does it repeal any private statute or statutes affecting civil rights or liabilities not expressly repealed. [L. '09, p. 902, § 50.]

The repeal of a law after conviction arrests judgment, and works a reversal on a pending writ of error: Corbett v. Territory, 1 W. T. 431.

When a statute requiring an indictment is repealed, an information will not lie for an offense committed before the repeal: McCarty v. State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

The repeal of Penal Code, section 192, by the laws of 1895, page 371, without any saving clause as to prior offenses, or pending cases, operated as a bar to the prosecution of parties, charged with adultery committed prior to the passage of the act of 1895: State v. Oliver, 12 Wash. 547, 41 Pac. 895.

§ 2303. Definition of Terms.

In construing the provisions of this act, save when otherwise plainly declared or clearly apparent from the context, the following rules shall be observed:

(1.) Each of the words "neglect," "negligence," "negligent," and "negligently" shall import a want of such attention to the nature or probable consequences of an act or omission as an ordinarily prudent man usually exercises in his own business.

(2.) Each of the words "corrupt" and "corruptly" shall import a wrongful desire to acquire or cause some pecuniary or other advantage to himself or another, by the person to whom applicable.

(3.) "Malice" and "maliciously" shall import an evil intent, wish or design to vex, annoy or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

(4.) The word "knowingly" imports a knowledge that the facts exist which constitute the act or omission of a crime, and does not require knowledge of its unlawfulness; knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry.

(5.) Whenever an intent to defraud constitutes a part of a crime, it is not necessary to aver or prove an intent to defraud any particular person.

(6.) The word "boat" shall include ships, steamers and other structures adapted to navigation or movement from place to place by water.

(7.) The word "signature" shall include any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto.

(8.) The word "writing" shall include printing.

(9.) The word "property" shall include both real and personal property.

(10.) The term "real property" shall include every estate, interest and right in lands, tenements and hereditaments, corporeal or incorporeal.

(11.) The term "personal property" shall include dogs and all domestic animals and birds, water, gas and electricity, all kinds or descriptions of money, chattels and effects, all instruments or writings completed and ready to be delivered or issued by the maker, whether actually delivered or issued or not, by which any claim, privilege, right, obligation or authority, or any right or title to property real or personal, is, or purports to be, or upon the happening of some future event may be evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, and every right and interest therein.

(12.) The word "bond" shall include an undertaking.

(13.) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

(14.) The word "person" shall include a corporation or joint stock association; and whenever it is used to designate a party whose property may be the subject of the offense, it shall also include the state, or any other state, government or country which may lawfully own property within this state.

(15.) The term "judge" shall include every judicial officer authorized, alone or with others, to hold or preside over a court of record.

(16.) Any person shall be deemed an "owner" of any property who has a general or special property in the whole or any part thereof, or lawful possession thereof, either actual or constructive.

(17.) The words "dwelling-house" shall include every building or structure which shall have been usually occupied by a person lodging therein at night, and whenever it shall be so constructed as to consist of two or more parts or rooms occupied or intended to be occupied, whether permanently or temporarily, by different tenants separately by usually lodging therein at night, or for any other separate purpose, each part shall be deemed a separate dwelling-house of the tenant occupying the same.

(18.) The word "building" shall include every house, shed, boat, water craft, railway car, tent or booth, whether completed or not, suitable for affording shelter for any human being, or as a place where any property is or shall be kept for use, sale or deposit.

(19.) The word "night-time" shall include the period between sunset and sunrise; the word "daytime" the period between sunrise and sunset.

(20.) The word "break" when used in connection with the crime of burglary, shall include:

(a) Breaking or violently detaching any part, internal or external, of a building;

(b) Opening, for the purpose of entering therein, any outer door of a building or of any room, apartment or set of apartments therein separately used and occupied, or any window, shutter, scuttle or other thing used for covering any opening thereto or therein, or which gives passage from one part thereof to another;

(c) Obtaining entrance into such building or apartment by any threat or artifice, used for that purpose, or by collusion with any person therein;

(d) Entering such building, room or apartment by or through any pipe, chimney or other opening, or by excavating or digging through or under a building or the walls or foundation thereof.

(21.) The word "enter," when constituting an element or part of a crime, shall include the entrance of the offender, or the insertion of any part of his body, or of any instrument or weapon held in his hand and used or intended to be used to threaten or intimidate a person, or to detach or remove property.

(22.) The term "railway" or "railroad" shall include all railways, railroads and street railways, whether operated by steam, electricity or any other motive power.

(23.) The words "indicted" and "indictment" shall include "informed against" and "information"; and the words "informed against" and "information" shall include the words "indicted" and "indictment."

(24.) The words "officer" and "public officer" shall include all assistants, deputies, clerks and employees of any public officer and all persons exercising or assuming to exercise any of the powers or functions of a public officer.

(25.) The word "juror" shall include a talesman, and extend to jurors in all courts, whether of record or not.

(26.) The word "prisoner" shall include any person held in custody under process of law, or under lawful arrest.

(27.) The word "prison" shall mean any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest. [L. '09, p. 902, § 51.]

Cited in 62 Wash. 586; 67 Wash. 89; 76 Wash. 471; 82 Wash. 540; 84 Wash. 484; 109 Wash. 496.

"Property," within this section: *State v. Klinkenberg*, 76 Wash. 466, 136 Pac. 692, Ann. Cas. 1915D, 468, 49 L. R. A. (N. S.) 965; *State v. Barr*, 67 Wash. 87, 120 Pac. 509.

"Owner" of property, within this section: *State v. Ray*, 62 Wash. 582, 114

Pac. 439; *Prentiss v. Bogart*, 84 Wash. 481, 147 Pac. 39.

In a prosecution of a bank officer for the embezzlement of a special deposit, it is proper to instruct that upon either a general or special deposit the money becomes the property of the bank; especially in view of this section: *State v. Morris*, 109 Wash. 490, 187 Pac. 350.

§ 2304. Acts Repealed.

All acts or parts of acts enumerated in the following schedule, and all acts and parts of acts in conflict with the provisions hereof, are hereby repealed.

Schedule of Acts Repealed.

Ballinger's Annotated Codes and Statutes of Washington, sections 3485, 3486, 3766, 4372, 4376, 6724, 6727 to 6736, inclusive; 6773 to 6776 inclusive; 6866, 6908, 6910 to 6916, inclusive; 6925 to 6927, inclusive; 6945; 7035 to 7071, inclusive; 7073, to 7089, inclusive; 7094 to 7101, inclusive; 7103 to 7116, inclusive; 7118 to 7126, inclusive; 7128 to 7132, inclusive; 7136 to 7142, inclusive; 7144, 7145, 7146a, 7147, 7154, 7155, 7156, 7160, 7165 to 7168, inclusive; 7175, 7176, 7185 to 7231, inclusive; 7233 to 7256, inclusive; 7259, 7260, 7261, 7264, 7265, 7266, 7268, 7269, 7275 to 7286, inclusive; 7288, 7293 to 7296, inclusive; 7298 to 7301, inclusive; 7305, 7306, 7310 to 7317, inclusive; 7322, 7323, 7324, 7334 to 7343, inclusive; 7404, 7405, 7435 to 7440, inclusive;

Laws of Washington, 1901, chapters 17, 25, 34, 40, 59, 145, 154;

Laws of Washington, 1903, chapters 5, 13, 14, 45, 51, 52, 55, 56, 112, 123, 128, 131, section 1;

Laws of Washington, 1905, chapters 24, 33, 42, 49, 77, 98, 158, 179;

Laws of Washington, 1907, chapters 35, 39, 103, 128, 148, 155, 169, 170. [L. '09, p. 906, § 52.]

Cited in 62 Wash. 245; 63 Wash. 36; 64 Wash. 133; 84 Wash. 116, 117; 86 Wash. 463; 106 Wash. 224.

CHAPTER II.

RIGHTS OF ACCUSED.

§ 2305. Right to Counsel.

Whenever a defendant shall be arraigned upon the charge that he has committed any felony, and shall request the court to appoint counsel to assist in his defense, and shall by his own oath or such other proof as may be required to satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant, to be paid, upon its order by the county in which such proceeding is had, compensation not exceeding ten dollars per day for each counsel, for the number of days such counsel is actually employed in court upon the trial. [L. '09, p. 906, § 53.]

See, also, *supra*, § 2095.

§ 2306. Witnesses.

Every person accused of crime shall have the right to meet the witnesses produced against him face to face: Provided, that whenever any witness whose deposition shall have been taken pursuant to law by a magistrate, in the presence of the defendant and his counsel, shall be absent, and cannot be found when required to testify upon any trial or hearing, so much of such deposition as the court shall deem admissible and competent shall be admitted and read as evidence in such case. [L. '09, p. 907, § 54.]

Cited in 103 Wash. 534.

Custody and Restraint: See Remington's Digest, Crim. Law, §§ 204, 205. **Of Accused:** State v. Williams, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821; State v. Miller, 78 Wash. 268, 138 Pac. 896. **Of Witnesses:** State v. Williams, 18 Wash. 47, 50 Pac. 580, 63 Am. St. Rep. 869, 39 L. R. A. 821; State v. Hodoff, 88 Wash. 413, 153 Pac. 377.

Counsel for Prosecution: See Remington's Digest, Crim. Law, §§ 206—208.

In General: State v. Hawkins, 27 Wash. 875, 67 Pac. 814.

§ 207. — Private Counsel: State v. Elswood, 15 Wash. 453, 46 Pac. 727; State v. Hoshor, 26 Wash. 643, 67 Pac. 386; Stern v. State Board of Dental Examiners, 50 Wash. 100, 96 Pac. 693; State v. Miller, 80 Wash. 75, 141 Pac. 293, 1139.

See, also, State v. Storrs, 112 Wash. 675, 192 Pac. 984; 197 Pac. 17.

§ 208. Appointment of Counsel for Accused: Presby v. Klickitat County, 5 Wash. 329, 31 Pac. 876; State v. Bush, 41 Wash. 13, 82 Pac. 1024; State v. Kelch, 95 Wash. 277, 163 Pac. 757; State v. Smith, 95 Wash. 271, 163 Pac. 759.

Appointment and Services of Interpreter: See Remington's Digest, Crim. Law, § 209; Elick v. Territory, 1 W. T. 136; State v. Thompson, 14 Wash. 285, 44 Pac. 533; State v. Michel, 20 Wash. 162, 54 Pac. 995; State v. Simini, 53 Wash. 268, 101 Pac. 891; State v. Shea, 78 Wash. 342, 139 Pac. 203.

Right of Accused to Confront Witnesses: See Remington's Digest, Crim. Law, §§ 221, 222; State v. Baldwin, 15 Wash. 15, 45 Pac. 650; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Keech, 103 Wash. 533, 175 Pac. 176. **Use of Deposition:** Freidrich v. Territory, 2 Wash. 358, 26 Pac. 976; State v. Humason, 5 Wash. 499, 32 Pac. 111; State v. Paggett, 8 Wash. 579, 36 Pac. 487; State v. Hunter, 18 Wash. 670, 52 Pac. 247.

Compelling Calling of Witness and Production of Evidence: See Remington's Digest, Crim. Law, § 224; State v. Payne, 10 Wash. 545, 39 Pac. 157.

— Compulsory Process for the Attendance of Witnesses for Accused: See Remington's Digest, Crim. Law, § 225; State ex rel. Thurston County v. Grimes, 7 Wash. 445, 35 Pac. 361; State ex rel. Carraher v. Graves, 13 Wash. 485, 43 Pac. 376.

§ 2307. Right to Subpoena.

Every person charged with the commission of a crime shall have the right upon the trial of such charge to be heard in person or by counsel, and to produce witnesses and proofs in his favor and to have compulsory process to compel the attendance of all witnesses who may be necessary for his proper defense. [L. '09, p. 907, § 55.]

TIME OF TRIAL—Right to Speedy Trial in General: See Remington's Digest, Crim. Law, § 186; Thompson v. Territory, 1 W. T. 547; State ex rel. Repath v. Caldwell, 9 Wash. 336, 37 Pac. 669; State v. Hansen, 10 Wash. 235, 38 Pac. 1023;

State v. Miller, 72 Wash. 154, 129 Pac. 1100.

Time for Trial: See Remington's Digest, Crim. Law, § 190; State v. Humason, 5 Wash. 499, 32 Pac. 111; State v. Alexander, 65 Wash. 488, 118 Pac. 645; State v. Macleod, 78 Wash. 175, 138 Pac. 648.

§ 2308. Presumption of Innocence—Conviction of Lowest Degree, When.

Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against

him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest. [L. '09, p. 907, § 56.]

See, also, *supra*, § 2263.

Cited in 85 Wash. 223.

Under the constitution and this section, the inadvertence of the court in failing to instruct on the presumption of innocence is not prejudicial error, where no request had been made for such

instruction, and the court gave a correct instruction as to reasonable doubt and the requirements of the prosecution in establishing a case: *State v. Ross*, 85 Wash. 218, 147 Pac. 1149.

§ 2309. Conviction, When had.

No person informed against or indicted for a crime shall be convicted thereof, unless by admitting the truth of the charge in his plea, by confession in open court, or by the verdict of a jury, accepted and recorded by the court. [L. '09, p. 907, § 57.]

Cited in 68 Wash. 12.

Under this section, and Const., Art. I, § 22, in a criminal prosecution, it is

error for the court to direct a verdict of guilty: *State v. Holmes*, 68 Wash. 7, 122 Pac. 345.

§ 2310. Bail, When Allowable.

Every person charged with an offense, except that of murder in the first degree, where the proof is evident or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided by law. The amount of bail in each case shall be determined by the court in its discretion and may from time to time be increased or decreased as circumstances may justify. [L. '09, p. 908, § 58.]

See, also, *supra*, § 1957.

Cited in 64 Wash. 141.

§ 2311. Proceedings Within Thirty Days.

Whenever a person has been held to answer to any criminal charge, if an indictment be not found or information filed against him within thirty days, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown. [L. '09, p. 908, § 59.]

Cited in 64 Wash. 50.

Time of Filing: See *Remington's Digest*, Ind. & Inf., § 17; *State v. Lewis*, 35 Wash. 261, 77 Pac. 198; *State v. Fletcher*, 50 Wash. 303, 97 Pac. 242; *State v. Strange*, 50 Wash. 321, 97 Pac. 233; *State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

Under the statute requiring the dis-

missal of a criminal prosecution if an indictment is not found or information filed within thirty days after the holding of the person, the motion for dismissal must be made at the time the accused is called to plead; since such dismissal is not a bar to another prosecution, and the objection is waived by pleading and going to trial: *State v. Seright*, 48 Wash. 307, 93 Pac. 521.

§ 2312. Trial Within Sixty Days.

If a defendant indicted or informed against for an offense, whose trial has not been postponed upon his own application, be not brought to trial within sixty days after the indictment is found or the information filed, the court shall order it to be dismissed, unless good cause to the contrary is shown. [L. '09, p. 908, § 60.]

Cited in 64 Wash. 50; 65 Wash. 489; 71 Wash. 188; 72 Wash. 157, 450; 80 Wash. 337; 82 Wash. 332, 478; 100 Wash. 418; 107 Wash. 561.

Right to Speedy Trial in General: See Remington's Digest, Crim. Law, § 186; Thompson v. Territory, 1 W. T. 547; State ex rel. Repath v. Caldwell, 9 Wash. 336, 37 Pac. 669; State v. Hansen, 10 Wash. 235, 38 Pac. 1023; State v. Miller, 72 Wash. 154, 129 Pac. 1100.

This section has no application to appeals from convictions in justice court, in view of sections 1919 and 1920, providing that the bond on appeal shall require the defendant to appear in the superior court and prosecute the appeal, and directing default of his recognizance and sentence against him if he fails to do so: State v. Jones, 80 Wash. 335, 141 Pac. 700.

Rem. Code, § 2312, requiring the dismissal of prosecutions where the accused is not brought to trial within sixty days, applies only to criminal prosecutions, and not to proceedings against a delinquent child, under Rem. Code, § 1987-1,

par. 6, of the juvenile act: Chartrand, In re, 107 Wash. 560, 182 Pac. 610.

Discharge of Accused for Delay: See Remington's Digest, Crim. Law, § 188; State v. Brodie, 7 Wash. 442, 35 Pac. 137; State v. Lewis, 35 Wash. 261, 77 Pac. 198; State v. Fox, 71 Wash. 185, 127 Pac. 1111; State v. Alexander, 65 Wash. 488, 118 Pac. 645; State v. Jones, 80 Wash. 335, 141 Pac. 700.

— **Delay in Second Trial:** See Remington's Digest, Crim. Law, § 189; Murphy, In re, 7 Wash. 257, 34 Pac. 834; State v. Parmeter, 49 Wash. 435, 95 Pac. 1012; State v. Miller, 72 Wash. 154, 129 Pac. 1100.

Discretion: See Remington's Digest, Crim. Law, § 191; State v. Grune, 72 Wash. 448, 130 Pac. 751.

Under this section, it must be presumed on appeal, in the absence of any record as to the showing made below, that there was good cause for denying a motion to dismiss a prosecution for failure to bring it to trial within time: State v. Clay, 100 Wash. 417, 171 Pac. 241.

§ 2313. Discharge of Defendant and Bail upon Dismissal.

Whenever the court shall direct any criminal prosecution to be dismissed, the defendant shall, if in custody, be discharged therefrom, or if admitted to bail, his bail shall be exonerated, and if money has been deposited instead of bail it shall be refunded to the person depositing the same. [L. '09, p. 908, § 61.]

Discharge of Sureties: State v. Lewis, 35 Wash. 261, 77 Pac. 198.

§ 2314. Nolle Prosequi.

The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section. [L. '09, p. 908, § 62.]

Cited in 64 Wash. 50; 92 Wash. 504, 505.

The dismissal of a prosecution in a justice court for assault in the third degree, which is a gross misdemeanor, by section 2415, for the stated reason that an information had been filed in the superior court, does not bar a prosecution in the superior court for assault in the second degree, which is a felony under this section; since the reasons given show there was no intent to abandon the prosecution; and the later charge of a felony was not a charge of the same gross misdemeanor, and therefore is not within the act: State v. Wickstrom, 92 Wash. 503, 159 Pac. 753.

Order or Judgment: See Remington's

Digest, Ind. & Inf., §§ 84, 85; State v. Hansen, 10 Wash. 235, 38 Pac. 1023. **Operation and Effect of Decision:** State v. Bodekar, 11 Wash. 417, 39 Pac. 645; State v. Williams, 43 Wash. 505, 86 Pac. 847.

It is within the discretion of the court to allow the prosecuting attorney to withdraw an information prior to the commencement of a trial, and file another charging the same offense: State v. Gile, 8 Wash. 12, 35 Pac. 417.

Nolle Prosequi or Discontinuance: See Remington's Digest, Crim. Law, § 46; State v. Burns, 54 Wash. 113, 102 Pac. 886; State v. Poole, 64 Wash. 47, 116 Pac. 468.

§ 2315. Dismissal, When a Bar.

An order dismissing a prosecution under the provisions of sections 2311, 2312, or 2314 shall bar another prosecution for a misdemeanor or gross misdemeanor where the prosecution dismissed charged the same misdemeanor or gross misdemeanor, but in no other case shall such order of dismissal bar another prosecution. [L. '09, p. 909, § 63.]

Cited in 64 Wash. 49; 65 Wash. 489; 82 Wash. 332; 92 Wash. 505.

Rem. & Bal. Code, §§ 2124, 2125, superseded by this, and the last previous sections were held to have no reference to an order "setting aside" an information, provided for in section 2101, in case it is not signed, or verified, etc.; but applies only to dismissals which take the place of the common law nolle prosequi: State v. Haffer, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917E, 229, L. R. A. 1917C, 610.

Successive Informations for Same Offense: See Remington's Digest, Ind. & Inf., § 19; State v. Gile, 8 Wash. 12, 35 Pac. 417; State v. Hansen, 10 Wash. 235, 38 Pac. 1023; State v. Williams, 13 Wash. 335, 43 Pac. 15; State v. Williams, 43 Wash. 505, 86 Pac. 847.

Dismissal as Bar: See Remington's Digest, Crim. Law, §§ 45—48-3.

§ 45. Effect of Proceedings Before Jeopardy Attaches: State v. Nordstrom, 7 Wash. 506, 35 Pac. 382; State v. Herold, 68 Wash. 654, 123 Pac. 1076, 40 L. R. A. (N. S.) 1213.

See, also, State v. Collins, 112 Wash. 201, 191 Pac. 831.

§ 47. — Dismissal or Nolle Prosequi After Swearing Jury: State v. Burns, 54 Wash. 113, 102 Pac. 886; State v. Kinghorn, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136.

§ 48. Discharge of Jury Without Verdict—In General: State v. Reiff, 14 Wash. 664, 45 Pac. 318; State v. Hubbell, 18 Wash. 482, 51 Pac. 1039.

§ 48-1. — Necessity for Discharge: State v. Kinghorn, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136; State v. Dye, 81 Wash. 388, 142 Pac. 873.

§ 48-2. — Failure of Jurors to Agree: State v. Costello, 29 Wash. 366, 69 Pac. 1099; State v. Lewis, 31 Wash. 515, 72 Pac. 121; State v. Barnes, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932.

§ 48-3. — Withdrawal of Charge: State v. Wilmot, 95 Wash. 326, 163 Pac. 742.

§ 2316. Acquittal, When a Bar.

No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense. Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof. [L. '09, p. 909, § 64.]

See, also, supra, §§ 2113, 2271, 2272.

Cited in 64 Wash. 49, 52; 84 Wash. 116; 92 Wash. 507; 94 Wash. 146.

The title to the Penal Code (§ 2253 et seq.), is sufficiently broad to include this section, which impliedly repeals section 2113, supra: State v. George, 84 Wash. 113, 146 Pac. 378.

The fact that a defendant has been discharged before verdict upon a prosecution for larceny of certain property by fraudulently and falsely personating another is not a bar to a subsequent prosecution for obtaining the property under false pretenses, when the first discharge resulted from a variance between the information

and the proof: State v. Reiff, 14 Wash. 664, 45 Pac. 318.

This section does not use the word "proof" in its technical sense as distinguished from "evidence," and hence applies where the prosecuting attorney moved to dismiss before trial on the ground of a variance between the charge and the "evidence" disclosed to him on interviewing the witnesses and preparing the case: State v. Poole, 64 Wash. 47, 116 Pac. 468.

This section does not apply to dismissals before trial: State v. Wickstrom, 92 Wash. 503, 159 Pac. 753.

FORMER JEOPARDY: See Remington's Digest, Crim. Law, §§ 44, 49—55.

§ 44. Offenses as to Which Former Jeopardy is a Defense: State v. Armstrong, 29 Wash. 57, 69 Pac. 392; State v. Campbell, 40 Wash. 480, 82 Pac. 752; State v. George, 84 Wash. 113, 146 Pac. 378.

See, also, State v. Collins, 112 Wash. 201, 191 Pac. 831.

§ 49. Acquittal: State v. Murphy, 13 Wash. 229, 43 Pac. 44.

§ 50. Conviction: State v. Payne, 6 Wash. 563, 34 Pac. 317.

See, also, State v. Collins, 112 Wash. 201, 191 Pac. 831.

§ 52. Verdict Set Aside: State v. Riley, 36 Wash. 441, 78 Pac. 1001.

§ 53. Judgment Reversed: State v. Freidrich, 4 Wash. 204, 29 Pac. 1055,

30 Pac. 328, 31 Pac. 332; State v. White, 8 Wash. 230, 35 Pac. 1100; State v. Riley, 36 Wash. 441, 78 Pac. 1001.

§ 54. Identity of Offenses—In General: State v. Durbin, 32 Wash. 289, 73 Pac. 373; State v. Poole, 64 Wash. 47, 116 Pac. 468; State v. Dye, 81 Wash. 388, 142 Pac. 873; State v. Wilson, 91 Wash. 136, 157 Pac. 474.

See, also, State v. McGuff, 104 Wash. 501, 177 Pac. 316.

§ 55. — Different Offenses in Same Act or Transaction: State v. Robinson, 12 Wash. 491, 41 Pac. 884; State v. Reiff, 14 Wash. 664, 45 Pac. 318; State v. Campbell, 40 Wash. 480, 82 Pac. 752; State v. Hatch, 73 Wash. 424, 131 Pac. 1130; State v. Elliott, 69 Wash. 62, 124 Pac. 212; State v. Dye, 81 Wash. 388, 142 Pac. 873; State v. Kenney, 83 Wash. 441, 145 Pac. 450.

CHAPTER III.

CRIMES AGAINST THE SOVEREIGNTY OF THE STATE.

§ 2317. Treason, Defined—Penalty.

Treason against the people of the state consists in—

1. Levying war against the people of the state, or
2. Adhering to its enemies, or
3. Giving them aid and comfort.

Treason is punishable by death.

No person shall be convicted for treason unless upon the testimony of two witnesses to the same overt act or by confession in open court. [L. '09, p. 909, § 65.]

What constitutes adherence to enemies within law of treason. *Ann. Cas.* 1917D, 479.

§ 2318. Levying War.

To constitute levying war against the state an actual act of war must be committed. To conspire to levy war is not enough. When persons arise in insurrection with intent to prevent, in general, by force and intimidation, the execution of a statute of this state, or to force its repeal, they shall be guilty of levying war. But an endeavor, although by numbers and force of arms, to resist the execution of a law in a single instance, and for a private purpose, is not levying war. [L. '09, p. 909, § 66.]

§ 2319. Misprision of Treason.

Every person having knowledge of the commission of treason, who conceals the same, and does not, as soon as may be, disclose such treason to the governor or a judge of the supreme court or a superior court, shall be guilty of misprision of treason and punished by a fine of not more than one thousand dollars, or by imprisonment in the state penitentiary for not more than five years or in a county jail for not more than one year. [L. '09, p. 910, § 67.]

CHAPTER IV.

CRIMES BY OR AGAINST PUBLIC OFFICERS.

§ 2320. Bribery of Public Officer.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the state, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a member of the legislature, or attempt, directly or indirectly, by menace, deceit, suppression of truth or other corrupt means, to influence such member to give or withhold his vote, or to absent himself from the house of which he is a member or from any committee thereof; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a judicial officer, juror, referee, arbitrator, appraiser, assessor or other person authorized by law to hear or determine any question, matter, cause, proceeding, or controversy, with intent to influence his action, vote, opinion or decision thereupon; or shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars or both. [L. '09, p. 910. § 68.]

See, *infra*, § 2676, bribery of labor representative.

Cited in 66 Wash. 135; 67 Wash. 527; 90 Wash. 86, 91.

In General: See Remington's Digest, Bribery, and cases cited.

This section is not subject to the rule of *ejusdem generis*; but covers the bribery of all public officers: *State v. Nick*, 66 Wash. 134, 119 Pac. 15.

When an indictment for bribing a police officer is not demurrable as failing

to allege that a policeman of a city is a "public officer" within this section: *State v. Nick*, 66 Wash. 134, 119 Pac. 15.

Effect on question of bribery of public officer that act for which bribe is taken or offered is beyond his power or jurisdiction: 14 *Ann. Cas.* 246; 15 *L. R. A. (N. S.)* 1173.

§ 2321. Asking or Receiving Bribe.

Every executive or administrative officer or person elected or appointed to an executive or administrative office who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion or action upon any matter then pending, or which may by law be brought before him in his official capacity, shall be influenced thereby; and every member of either house of the legislature of the state who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his official vote, opinion, judgment or action shall be influenced thereby, or shall be given in any particular manner, or upon any particular side of any question or matter upon which he may be required to act in his official capacity; and every judicial officer, and every person who executes any of the functions of a public office not hereinbefore specified, and every person

employed by or acting for the state or for any public officer in the business of the state, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion, judgment, action, decision or other official proceeding shall be influenced thereby, or that he will do or omit any act or proceeding or in any way neglect or violate any official duty, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 911, § 69.]

Cited in 67 Wash. 506, 527.

§ 2321-1. Offering a Bribe as to Baseball Game.

Any person who shall bribe or offer to bribe, any baseball player with intent to influence his play, action or conduct in any baseball game, or any person who shall bribe or offer to bribe any umpire of a baseball game, with intent to influence him to make a wrong decision or to bias his opinion or judgment in relation to any baseball game or any play occurring therein, or any person who shall bribe or offer to bribe any manager, or other official of a baseball club, league or association, by whatsoever name called, conducting said game of baseball to throw or lose a game of baseball, shall be guilty of a gross misdemeanor. [L. '21, p. 716, § 1.]

§ 2321-2. Accepting a Bribe by Baseball Player.

Any baseball player who shall accept or agree to accept, a bribe offered for the purpose of wrongfully influencing his play, action or conduct in any baseball game, or any umpire of a baseball game who shall accept or agree to accept a bribe offered for the purpose of influencing him to make a wrong decision, or biasing his opinions, rulings or judgment with regard to any play, or any manager of a baseball club, or league official, who shall accept or agree to accept, any bribe offered for the purpose of inducing him to lose or cause to be lost any baseball game, as set forth in the preceding section of this act, shall be guilty of a gross misdemeanor. [L. '21, p. 716, § 2.]

§ 2321-3. Completion of Baseball Bribery.

To complete the offenses mentioned in the two preceding sections of this act, it shall not be necessary that the baseball player, manager, umpire or official, shall, at the time, have been actually employed, selected or appointed to perform their respective duties; it shall be sufficient if the bribe be offered, accepted or agreed to with the view of probable employment, selection or appointment of the person to whom the bribe is offered, or by whom it is accepted. Neither shall it be necessary that such baseball player, umpire or manager actually play or participate in a game or games concerning which said bribe is offered or accepted; it shall be sufficient if the bribe be given, offered or accepted in view of his or their possibly participating therein. [L. '21, p. 717, § 3.]

§ 2321-4. "Bribe" as to Baseball Game Defined.

By a "bribe" as used in this act, is meant any gift, emolument, money or thing of value, testimonial, privilege, appointment or personal ad-

vantage, or the promise of either, bestowed or promised for the purpose of influencing, directly or indirectly, any baseball player, manager, umpire, club or league official, to see which game an admission fee may be charged, or in which game of baseball any player, manager or umpire is paid any compensation for his services. Said bribe as defined in this act need not be direct; it may be such as is hidden under the semblance of a sale, bet, wager, payment of a debt, or in any other manner designed to cover the true intention of the parties. [L. '21, p. 717, § 4.]

§ 2321-5. Corrupt Baseball Playing.

Any baseball player, manager or club or league official who shall commit any willful act of omission or commission in playing, or directing the playing, of a baseball game, with intent to cause the ball club, with which he is affiliated, to lose a baseball game; or any umpire officiating in a baseball game, or any club or league official who shall commit any willful act connected with his official duties for the purpose and with the intent to cause a baseball club to win or lose a baseball game, which it would not otherwise have won or lost under the rules governing the playing of said game, shall be guilty of a gross misdemeanor. [L. '21, p. 717, § 5.]

§ 2321-6. Venue of Action.

In all prosecutions under this act the venue may be laid in any county where the bribe herein referred to was given, offered or accepted, or in which the baseball game was played in relation to which the bribe was offered, given or accepted, or the acts referred to in section 2321-5 committed. [L. '21, p. 718, § 6.]

§ 2321-7. Bonus or Extra Compensation.

Nothing in this act shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager or baseball player by any person to encourage such manager or player to a higher degree of skill, ability or diligence in the performance of his duties. [L. '21, p. 718, § 7.]

§ 2321-8. Scope of Act.

This act shall apply only to baseball league and club officials, umpires, managers and players who act in such capacity in games where the public is generally invited to attend and a general admission fee is charged. [L. '21, p. 718, § 8.]

"Act" refers to seven preceding sections.

§ 2322. Juror, etc., Accepting Bribe.

Every juror, referee, arbitrator, appraiser, assessor, or other person authorized by law to hear or determine any question, matter, cause, controversy or proceeding, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his vote, opinion, action, judgment or decision shall be influenced thereby, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by fine of not more than five thousand dollars, or by both. [L. '09, p. 911, § 70.]

§ 2323. Bribing Witness.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any witness or person who may be called as a witness upon an agreement or understanding that the testimony of such witness shall be thereby influenced, or who shall willfully attempt by any other means to induce any witness or person who may be called as a witness to give false testimony, or to withhold true testimony, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 912, § 71.]

See *infra*, § 2363, tampering with witness.

§ 2324. Witness Accepting Bribe.

Every person who is or may be a witness upon a trial, hearing, investigation or other proceeding before any court, tribunal or officer authorized to hear evidence or take testimony, who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that his testimony shall be influenced thereby, or that he will absent himself from the trial, hearing or other proceeding, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 912, § 72.]

Cited in 82 Wash. 484.

One who for a consideration offers to make an affidavit to be used on a motion for a new trial, stating that his former testimony in the case was a fabrication, is a "witness" within the meaning of, and is guilty of violating, this section;

since by sections 399, 401, *supra*, an affidavit is made a distinct means for bringing the testimony of witnesses before the court on motions for a new trial, and one who testifies by affidavit is a witness: *State v. Dooley*, 82 Wash. 483, 144 Pac. 654.

§ 2325. Influencing Juror.

Every person who shall influence, or attempt to influence, improperly, a juror in a civil or criminal action or any proceeding, or any person chosen or appointed as an arbitrator or referee, in respect to his verdict, judgment, report, award or decision in any cause or matter pending or about to be brought before him, in any case or in any manner not hereinbefore provided for, shall be guilty of a gross misdemeanor. [L. '09, p. 912, § 73.]

§ 2326. Juror, etc., Promising Verdict, etc.

Every juror and every person chosen or appointed arbitrator or referee, who shall make any promise or agreement to give a verdict, judgment, report, award or decision for or against any party, or who shall willfully receive any communication, book, paper, instrument or information relating to a cause or matter pending before him, except according to the regular course of proceeding upon the trial or hearing of such cause or matter, shall be guilty of a gross misdemeanor. [L. '09, p. 913, § 74.]

§ 2327. Misconduct of Officer Drawing Jury.

Every person charged by law with the preparation of any jury list or list of names from which any jury is to be drawn, and every person

authorized by law to assist at the drawing of a grand or petit jury to attend a court or term of court or to try any cause or issue, who shall—

(1.) Place in any such list any name at the request or solicitation, direct or indirect, of any person; or

(2.) Designedly put upon the list of jurors, as having been drawn, any name which was not lawfully drawn for that purpose; or

(3.) Designedly omit to place upon such list any name which was lawfully drawn; or

(4.) Designedly sign or certify a list of such jurors as having been drawn which were not lawfully drawn; or

(5.) Designedly and wrongfully withdraw from the box or other receptacle for the ballots containing the names of such jurors any paper or ballot lawfully placed or belonging there and containing the name of a juror, or omit to place therein any name lawfully drawn or designated, or place therein a paper or ballot containing the name of a person not lawfully drawn, and designated as a juror; or

(6.) In drawing or impaneling such jury, do any act which is unfair, partial or improper in any respect;

Shall be guilty of a gross misdemeanor. [L. '09, p. 913, § 75.]

Misconduct of officers in selection or
summoning jurors or grand jurors

as contempt of court. 7 A. L. R.
345.

§ 2328. Soliciting Jury Duty.

Every person who shall, directly or indirectly, solicit or request any person charged with the duty of preparing any jury list to put his name, or the name of any other person, on any such list, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 76.]

§ 2329. Misconduct of Officer in Charge of Jury.

Every person to whose charge a jury shall be committed by a court or magistrate, who shall knowingly, without leave of such court or magistrate, permit them or any one of them to receive any communication from any person, to make any communication to any person, to obtain or receive any book, paper or refreshment, or to leave the jury-room, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 77.]

§ 2330. Offender a Competent Witness.

Every person offending against any of the provisions of law relating to bribery or corruption shall be a competent witness against another so offending and shall not be excused from giving testimony tending to criminate himself. [L. '09, p. 914, § 78.]

See, also §§ 2149, 2150.

§ 2331. Interfering With Public Officer.

Every person who, by means of any threat, force or violence, shall attempt to deter or prevent any executive or administrative officer from performing any duty imposed upon him by law, or who shall knowingly resist by force or violence any executive or administrative officer in the performance of his duty, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 79.]

Sec, also, *infra*, § 2366.

Sufficiency of an information for resisting an officer in serving or attempting to execute legal process as defined by Rem.

& Bal. Code, § 2874, superseded by this section: *State v. Knapf*, 50 Wash. 229, 96 Pac. 1076, 21 L. R. A. (N. S.) 66.

§ 2332. Offering Reward for Appointment.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward, in consideration that he or another person shall be appointed to a public office, or to a clerkship, deputation or other subordinate position in such office, or that he or any other person shall be permitted to exercise, perform or discharge any prerogative or duty or receive any emolument of such office, shall be guilty of a gross misdemeanor. [L. '09, p. 914, § 80.]

§ 2333. Grafting.

Every person who shall ask or receive any compensation, gratuity or reward, or any promise thereof, upon the representation that he can, directly or indirectly, or in consideration that he shall, or shall attempt to, directly or indirectly, influence any public officer, whether executive, administrative, judicial or legislative, to refuse, neglect, or defer the performance of any official duty; or who shall ask or receive any compensation, gratuity or reward, or any promise thereof, the right to retain or receive which shall be conditioned that such person shall, directly or indirectly, successfully influence by any means whatever any executive, administrative or legislative officer, in respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall ask or receive any compensation, gratuity or reward, or any promise thereof, upon the representation that he can, directly or indirectly, or in consideration that he shall, or shall attempt to, directly or indirectly, influence any public officer, whether executive, administrative, judicial or legislative, in respect to any act, decision, vote, opinion or other proceeding, as such officer, unless it be clearly understood and agreed in good faith between the parties thereto, on both sides, that no means or influence shall be employed except explanation and argument upon the merits, shall be guilty of a gross misdemeanor, and, in any prosecution, under the third clause of this section, evidence of the means actually employed to influence such officer shall be admitted as proof of the means originally contemplated by the defendant. [L. '09, p. 915, § 81.]

Cited in 68 Wash. 676; 78 Wash. 344; 100 Wash. 497, 500.

In General: See Remington's Digest, "Bribery"; "Extortion."

While a sufficient information is pending against a person in custody, it is the "official duty" of the prosecuting attorney to prosecute the case, within the

meaning of this section: *State v. Marion*, 68 Wash. 675, 124 Pac. 125.

Essentials of Offense Under This Section: *State v. Roberts*, 100 Wash. 493, 171 Pac. 225.

Sufficiency of Evidence: *State v. Shea*, 78 Wash. 342, 139 Pac. 203.

Meaning of term "graft." 19 Ann. Cas. 1079.

§ 2333-1. Suppression of Competitive Bidding.

When any competitive bid or bids are to be or have been solicited, requested, or advertised for by the state of Washington, or any county, city, town or other municipal corporation therein, or any department of either thereof, for any work or improvement to be done or con-

structed for or by such state, county, city, town, or other municipal corporation, or any department of either thereof, it shall be unlawful for any person acting for himself or as agent of another, or as agent for or as a member of any partnership, unincorporated firm or association, or as an officer or agent of any corporation, to offer, give, or promise to give, any money, check, draft, property, or other thing of value, to another or to any firm, association, or corporation for the purpose of inducing such other person, firm, association, or corporation, either to refrain from submitting any bids upon such public work or improvement, or to enter into any agreement, understanding or arrangement whereby full and unrestricted competition for the securing of such public work will be suppressed, prevented, or eliminated; and it shall be unlawful for any person to solicit, accept, or receive any money, check, draft, property, or other thing of value upon a promise or understanding, express or implied, that he individually or as an agent or officer of another person, persons, or corporation, will refrain from bidding upon such public work or improvement, or that he will on behalf of himself or such others submit or permit another to submit for him any bid upon such public work or improvement in such sum as to eliminate full and unrestricted competition thereon. [L. '21, p. 77, § 1.]

§ 2333-2. Collusion in Competitive Bidding.

It shall be unlawful for any person for himself or as an agent or officer of any other person, persons, or corporation to in any manner enter into collusion or an understanding with any other person, persons, or corporation to prevent or eliminate full and unrestricted competition upon any public work or improvement mentioned in section 2333-1. [L. '21, p. 78, § 2.]

§ 2333-3. Penalty.

Any person violating any provisions of this act shall be guilty of a gross misdemeanor. [L. '21, p. 78, § 3.]

"Act," in this section refers to sections 2333-1 to 2333-4, inclusive.

§ 2333-4. Agreement Outside State.

It shall be no defense to a prosecution under this act that a payment or promise of payment of any money, check, draft, or anything of value, or any other understanding or arrangement to eliminate unrestricted competitive bids was had or made outside of the state of Washington, if such work or improvement for which bids are called is to be done or performed within the state. [L. '21, p. 78, § 4.]

§ 2334. Misconduct of Public Officer.

Every public officer who shall—

(1.) Ask or receive, directly or indirectly, any compensation, gratuity or reward, or promise thereof, for omitting or deferring the performance of any official duty; or for any official service which has not been actually rendered, except in case of charges for prospective costs or fees demandable in advance in a case allowed by law; or

(2.) Be beneficially interested, directly or indirectly, in any contract, sale, lease or purchase which may be made by, through or under the super-

vision of such officer, in whole or in part, or which may be made for the benefit of his office, or accept, directly or indirectly, any compensation, gratuity or reward from any other person beneficially interested therein; or

(3.) Employ or use any person, money or property under his official control or direction, or in his official custody, for the private benefit or gain of himself or another;

Shall be guilty of a gross misdemeanor, and any contract, sale, lease or purchase mentioned in subdivision 2 hereof shall be void. [L. '09, p. 915, § 82.]

Cited in 102 Wash. 457; 107 Wash. 654.
Sufficiency of Information Under This Section: Thiemens v. Sanders, 102 Wash. 453, 173 Pac. 26.

Under this section, it is against public

policy for a county treasurer, while in office, to purchase tax delinquency certificates: Okanogan Power & Irr. Co. v. Quackenbush, 107 Wash. 651, 182 Pac. 618.

§ 2334-1. Public Employment of Alien Evading Military Service.

It shall be unlawful for any officer or agent of, or any contractor with, the state of Washington, or any county, city, town or municipal corporation to knowingly employ any alien, whether a declarant or otherwise, who claimed and was granted exemption from military service in the war with Germany and her allies, under the provisions of the "Act of Congress, May 18, 1917," or any acts amendatory thereof, on the ground that he was not a citizen of the United States. [L. '19, p. 272, § 1.]

Validity of statute prohibiting employment of aliens on public work. **Ann. Cas.** 1915B, 1271; **Ann. Cas.** 1917B, 293.

Validity of statute discriminating against laborers in employment of aliens. **Ann. Cas.** 1917B, 286.

§ 2334-2. Acceptance of Such Employment.

It shall be unlawful for any such alien to accept employment with any officer or agent of, or any contractor for, the state of Washington, or any county, city, town or municipal corporation thereof. [L. '19, p. 273, § 2.]

§ 2334-3. List of Employees.

Every contractor shall, upon demand of the executive officer of the state or municipal corporation with which he has contracted, furnish a list of his employees which shall set forth whether they are citizens of the United States. [L. '19, p. 273, § 3.]

§ 2334-4. Penalty.

Every person violating the provisions of this act shall be guilty of a misdemeanor. [L. '19, p. 273, § 4.]

"Act" refers to three previous sections.

§ 2335. Grant of Official Powers.

Every public officer who, for any reward, consideration or gratuity paid or agreed to be paid, shall, directly or indirectly, grant to another the right or authority to discharge any function of his office, or permit

another to perform any of his duties, shall be guilty of a gross misdemeanor. [L. '09, p. 916, § 83.]

§ 2336. Intrusion into and Refusal to Surrender Public Office.

Every person who shall falsely personate or represent any public officer, or who shall willfully intrude himself into a public office to which he has not been duly elected or appointed, or who shall willfully exercise any of the functions or perform any of the duties of such officer, without having duly qualified therefor, as required by law, or who, having been an executive or administrative officer, shall willfully exercise any of the functions of his office after his right to do so has ceased, or wrongfully refuse to surrender the official seal or any books or papers appertaining to such office, upon the demand of his lawful successor, shall be guilty of a gross misdemeanor. [L. '09, p. 916, § 84.]

§ 2337. Disturbing Legislature or Intimidating Member.

Every person who shall willfully disturb the legislature of this state, or either house thereof, while in session, or who shall commit any disorderly conduct in the presence or view of either house thereof, tending to interrupt its proceedings or impair the respect due to its authority, or who willfully, by intimidation or otherwise, shall prevent any member of the legislature from attending any session of the house of which he shall be a member or any committee thereof, or from giving his vote upon any question which may come before such house or committee, or from performing any other official act, shall be guilty of a gross misdemeanor. [L. '09, p. 916, § 85.]

Cited in 108 Wash. 207.

§ 2338. Witness Refusing to Attend Legislature or Committee or to Testify.

Every person duly summoned to attend as a witness before either house of the legislature of this state, or any committee thereof authorized to summon witnesses, who shall refuse or neglect, without lawful excuse, to attend pursuant to such summons, or who shall willfully refuse to be sworn or to affirm or to answer any material or proper question, or to produce, upon reasonable notice, any material or proper books, papers or documents in his possession or under his control, shall be guilty of a gross misdemeanor. [L. '09, p. 917, § 86.]

See *infra*, §§ 8188-8190, penalties on same subject.

RESCUES AND ESCAPES.

§ 2339. Rescuing Prisoner.

Every person who shall, by force or fraud, rescue from lawful custody, or from an officer or person having him in lawful custody, a prisoner held upon a charge, arrest, commitment, conviction or sentence for felony, shall be guilty of a felony; and every person who shall rescue a prisoner held upon a charge, arrest, commitment, conviction or sentence for a gross misdemeanor or misdemeanor shall be guilty of misdemeanor. [L. '09, p. 917, § 87.]

§ 2340. Taking Property from an Officer.

Every person who shall take from the custody of any officer or other person any personal property in his charge under any process of law, or who shall willfully injure or destroy such property, shall be guilty of a misdemeanor. [L. '09, p. 917, § 88.]

§ 2341. Escaped Prisoner Recaptured.

Every person in custody, under sentence of imprisonment for any crime, who shall escape from custody, may be recaptured and imprisoned for a term equal to the unexpired portion of the original term. [L. '09, p. 917, § 89.]

§ 2342. Prisoner Escaping.

Every prisoner confined in a prison, or being in the lawful custody of an officer or other person, who shall escape or attempt to escape from such prison or custody, by force or fraud, if he is held on a charge, conviction or sentence of a felony, shall be guilty of a felony; if held on a charge, conviction or sentence of a gross misdemeanor or misdemeanor, he shall be guilty of a misdemeanor. [L. '09, p. 918, § 90.]

Cited in 69 Wash. 271, 272.

§ 2343. Aiding Prisoner to Escape.

Every person who, with intent to effect or facilitate the escape of a prisoner, whether such escape shall be effected or attempted or not, shall convey or send to a prisoner any information or aid, or convey or send into a prison any disguise, instrument, weapon or other thing, or aid or assist a prisoner in escaping or attempting to escape from the lawful custody of a sheriff or other officer or person, shall be guilty of a felony if such prisoner is held upon a charge, arrest, commitment, conviction or a sentence for a felony, and shall be guilty of a misdemeanor if such prisoner is held upon a charge, arrest, commitment, conviction or sentence for a gross misdemeanor or misdemeanor. [L. '09, p. 918, § 91.]

See *infra*, § 10232, assisting prisoner to escape from penitentiary.

See *infra*, § 10233, supplying with weapons or drugs.

§ 2344. Custodian Suffering Escape.

Every person who shall allow a prisoner lawfully in his custody to escape, or shall connive at or assist such escape, or shall omit any act or duty by reason of which omission such escape is occasioned, contributed to or assisted, shall, if he connive at or assist such escape, be guilty of a felony; and in any other case, of a gross misdemeanor. [L. '09, p. 918, § 92.]

§ 2345. Ministerial Officer Permitting Escape.

Every officer who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or promise thereof, to procure, assist, connive at or permit any prisoner in his custody to escape, whether such escape shall be attempted or not, or shall commit any unlawful act tending to hinder justice, shall be guilty of a gross misdemeanor. [L. '09, p. 918, § 93.]

§ 2346. Concealing Escaped Prisoner.

Every person who shall conceal, or harbor for the purpose of concealment, a prisoner who has escaped or is escaping from custody, shall be guilty of a felony if the prisoner is held upon a charge or conviction or sentence of felony, and of a misdemeanor if the prisoner is held upon a charge or conviction of a gross misdemeanor or misdemeanor. [L. '09, p. 919, § 94.]

§ 2347. Injury to Public Record.

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal or obliterate a record, map, book, paper, document or other thing filed or deposited in a public office, or with any public officer, by authority of law, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 919, § 95.]

PUBLIC RECORDS.

§ 2348. Injury to and Misappropriation of Record.

Every officer who shall mutilate, destroy, conceal, erase, obliterate or falsify any record or paper appertaining to his office, or who shall fraudulently appropriate to his own use or to the use of another person, or secrete with intent to appropriate to such use, any money, evidence of debt or other property intrusted to him by virtue of his office, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 919, § 96.]

§ 2349. Offering False Instrument for Filing or Record.

Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 919, § 97.]

§ 2350. False Report.

Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor. [L. '09, p. 920, § 98.]

See *infra*, § 2380, false certificates by officers.

See *infra*, § 7841, false appraisement of public lands.

PERJURY AND OTHER CRIMES.

§ 2351. Perjury—First Degree.

Every person who, in any action, proceeding, hearing, inquiry or investigation, in which an oath may lawfully be administered, shall swear that he will testify, declare, depose or certify truly, or that any testimony,

declaration, deposition, certificate, affidavit or other writing by him subscribed is true, and who, in such action, proceeding, hearing, inquiry or investigation shall state or subscribe as true any material matter which he knows to be false, shall be guilty of perjury in the first degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years. [L. '09, p. 920, § 99.]

Cited in 83 Wash. 422—425; 105 Wash. 174.

Perjury in General: See Remington's Digest, "Perjury."

An information for perjury sufficiently charges the materiality of the testimony, within this section, defining perjury, even if insufficient at common law, where it alleges that accused willfully testified falsely "to the following material facts

in the case," setting forth the testimony; in view of sections 2065, 2066, supra: State v. Vane, 105 Wash. 170, 177 Pac. 728.

Form of oath as affecting crime of perjury. *Ann. Cas.* 1914B, 595; *Ann. Cas.* 1916A, 497.

False statement made under fear or compulsion as perjury. 4 A. L. R. 1319.

§ 2352. Knowledge of Materiality not Necessary.

It shall be no defense to a prosecution for perjury in the first degree that the defendant did not know the materiality of his false statement or that it did not in fact affect the proceeding in or for which it was made. It shall be sufficient that it was material and might have affected such proceeding. [L. '09, p. 920, § 100.]

Cited in 83 Wash. 425.

This section does not contemplate that, if the testimony be material to the issue, the offense would be perjury in the first

degree, and, if not material, "perjury in the second degree": State v. Wilson, 83 Wash. 419, 145 Pac. 455.

§ 2353. Perjury—Second Degree.

Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree and shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year. [L. '09, p. 920, § 101.]

Cited in 69 Wash. 86; 83 Wash. 423—425; 84 Wash. 116; 91 Wash. 482—485.

"Perjury in the second degree" as defined by this section is not included within, and conviction thereof cannot be had under, a charge of perjury under section 2351, defining perjury in the "first degree": State v. Wilson, 83 Wash. 419, 145 Pac. 455.

A prosecution for perjury in the second

degree may be predicated upon an affidavit as to the financial condition of a bank voluntarily made by one of its officers and not required by law, under this section, the use of the disjunctive plainly manifesting the intent to treat voluntary false swearing the same as false swearing in a proceeding or investigation: State v. Howard, 91 Wash. 481, 158 Pac. 104.

§ 2354. "Oath" and "Swear" Defined.

The term "oath" shall include an affirmation and every other mode authorized by law of attesting the truth of that which is stated. A person who shall state any matter under oath shall be deemed to "swear" thereto. [L. '09, p. 920, § 102.]

Cited in 91 Wash. 483, 485.

In view of this section an "oath" as a basis of a prosecution for false swearing or perjury in the second degree does not

imply a form of inquiry required by law: State v. Howard, 91 Wash. 481, 158 Pac. 104.

**§ 2355. Irregularity in Administering Oath or Incompetency of Witness
No Defense.**

It shall be no defense to a prosecution for perjury that an oath was administered or taken in an irregular manner or that the defendant was not competent to give the testimony, deposition, certificate or affidavit of which falsehood is alleged. It shall be sufficient that he actually gave such testimony or made such deposition, certificate or affidavit. [L. '09, p. 921, § 103.]

False swearing, where no oath, or the particular one administered, was

not required, as perjury. 39 L. R. A. (N. S.) 96.

§ 2356. Deposition—When Complete.

The making of a deposition, certificate or affidavit shall be deemed to be complete when it is subscribed and sworn to or affirmed by the defendant with intent that it be uttered or published as true. [L. '09, p. 921, § 104.]

§ 2357. Statement of What One Does not Know to be True.

Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false. [L. '09, p. 921, § 105.]

§ 2358. Offering False Evidence.

Every person who, upon any trial, hearing, inquiry, investigation or other proceeding authorized by law, shall offer or procure to be offered in evidence, as genuine, any book, paper, document, record or other instrument in writing, knowing the same to have been forged or fraudulently altered, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 921, § 106.]

§ 2359. Committal of Witness—Detention of Documents.

Whenever it shall appear probable to a judge, justice of the peace, magistrate, or other officer lawfully authorized to conduct any hearing, proceeding or investigation, that a person who has testified before him has committed perjury in any testimony so given, or offered any false evidence, he may, by order or process for that purpose, immediately commit such person to jail or take a recognizance for his appearance to answer such charge. In such case he may detain any book, paper, document, record or other instrument produced before him or direct it to be delivered to the prosecuting attorney. [L. '09, p. 921, § 107.]

§ 2360. Subornation of Perjury.

Every person who shall willfully procure another to commit perjury, in either degree, or to offer any false evidence, shall be guilty of subornation of perjury and shall be punished in the same manner as if he had himself committed the perjury so procured or offered the false evidence so offered. [L. '09, p. 922, § 108.]

§ 2361. Attempt to Suborn Perjury.

Every person who, without giving, offering or promising a bribe, shall incite or attempt to procure another to commit perjury, in either

degree, or to offer any false evidence, or to withhold true testimony, though no perjury be committed or false evidence offered or true testimony withheld, shall be guilty of a gross misdemeanor. [L. '09, p. 922, § 109.]

What constitutes offense of attempting to suborn perjury. 17 *Ann. Cas.* 1182.

§ 2362. Destroying Evidence.

Every person who, with intent to conceal the commission of any felony, or to protect or conceal the identity of any person committing the same, or with intent to delay or hinder the administration of the law or to prevent the production thereof at any time, in any court or before any officer, tribunal, judge or magistrate, shall willfully destroy, alter, erase, obliterate or conceal any book, paper, record, writing, instrument or thing, shall be guilty of a gross misdemeanor. [L. '09, p. 922 § 110.]

§ 2363. Tampering With Witness.

Every person who shall willfully prevent or attempt to prevent, by persuasion, threats or otherwise, any person from appearing before any court, or officer authorized to subpoena witnesses, as a witness in any action, proceeding or investigation, with intent thereby to obstruct the course of justice, shall be guilty of a gross misdemeanor. [L. '09, p. 922, § 111.]

Cited in 92 Wash. 221.

An information charging accused with tampering with witnesses in a certain action before a designated justice court is

sufficient without alleging that such court was "authorized to subpoena witnesses": *State v. Wingard*, 92 Wash. 219, 158 Pac. 725.

§ 2364. Neglect or Refusal to Receive a Person into Custody.

Every officer who, in violation of any legal duty, shall willfully neglect or refuse to receive a person into his official custody or into a prison under his charge, shall, in a case where no other punishment is specially provided by law, be guilty of a gross misdemeanor. [L. '09, p. 922, § 112.]

§ 2365. Refusal to Make Arrest or to Aid Officer.

Every person who, after having been lawfully commanded by any magistrate to arrest another person, shall willfully neglect or refuse so to do; and every person who, after having been lawfully commanded to aid an officer in arresting any person, or in retaking any person who has escaped from lawful custody, or in executing any lawful process, shall willfully neglect or refuse to aid such officer, shall be guilty of a misdemeanor. [L. '09, p. 923, § 113.]

Cited in 90 Wash. 153.

Under this section, the owner of a boat is not liable for the acts of the purser in ejecting a person from the boat, if the purser was acting under the

direct command of a police officer and aiding him to make an arrest: *Duval v. Inland Nav. Co.*, 90 Wash. 149, 155 Pac. 768.

§ 2366. Resisting Public Officer.

Every person who, in any case or under any circumstances not otherwise specially provided for, shall willfully resist, delay or obstruct a public officer in discharging or attempting to discharge any legal duty of his office, shall be guilty of a misdemeanor. [L. '09, p. 923, § 114.]

See supra, § 2331, interfering with or resisting officer.
 See supra, § 2365, resisting and refusing to aid in arrest.
 See infra, § 2520, obstructing firemen.
 See infra, § 2555, combination to resist process.
 See infra, § 2672, obstructing officer.

§ 2367. Compounding Crimes.

Every person who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon an agreement or understanding that he will compound or conceal a crime or violation of a statute, or abstain from testifying thereto, delay a prosecution therefor or withhold any evidence thereof, except in a case where a compromise is allowed by law, shall be guilty—

(1) Of a felony and punished by imprisonment in the state penitentiary for not more than five years, where the agreement or understanding relates to a felony;

(2) Of a misdemeanor, where the agreement or understanding relates to a gross misdemeanor or misdemeanor, or to a violation of statute for which a pecuniary penalty or forfeiture is prescribed.

In any proceeding against a person for compounding a crime, it shall not be necessary to prove that any person has been convicted of the crime or violation of statute in relation to which an agreement or understanding herein prohibited was made. [L. '09, p. 923, § 115.]

Necessity of alleging and proving
 actual commission of offense
 charged to have been compounded.

9 Ann. Cas. 565; 7 L. R. A. (N. S.)
 709.

§ 2368. Intimidating Public Officer.

Every person who shall, directly or indirectly, address any threat or intimidation to a public officer or to a juror, referee, arbitrator, appraiser or assessor, or to any other person authorized by law to hear or determine any controversy or matter, with intent to induce him, contrary to his duty to do or make or to omit or delay any act, decision or determination, shall be guilty of a misdemeanor. [L. '09, p. 924, § 116.]

§ 2369. Malicious Prosecution.

Every person who shall, maliciously and without probable cause therefor, cause or attempt to cause another to be arrested or proceeded against for any crime of which he is innocent—

(1) If such crime be a felony, shall be punished by imprisonment in the state penitentiary for not more than five years; and.

(2) If such crime be a gross misdemeanor or misdemeanor, shall be guilty of a misdemeanor. [L. '09, p. 924, § 117.]

Cited in 85 Wash. 353, 354.

Under this section, an information charging a malicious prosecution without specifying the charge on which the arrest was made is fatally defective, in that it charges two offenses, if any, in

violation of section 2059, and also in that it fails to comply with section 2057, providing that an information must be direct and certain as regards the crime charged: State v. Smith, 85 Wash. 352, 148 Pac. 25.

§ 2370. Barratry—Solicitation by Attorneys.

Every person who shall bring on his own behalf, or instigate, incite or encourage another to bring, any false suit at law or in equity in any

court of this state, with intent thereby to distress or harass a defendant therein; and every person, being an attorney or counselor at law, who shall personally, or through the agency of another, solicit employment as such attorney, in any suit pending or prospective, or, with intent to obtain such employment shall, directly or indirectly, loan any money or give or promise to give any money, property or other consideration to the person from whom such employment is sought; and every person who shall serve or send any paper or document purporting to be or resembling a judicial process, not in fact a judicial process shall be guilty of a misdemeanor; and in case the person offending is an attorney, he may, in addition thereto be disbarred from practicing law within this state. [L. '15, p. 492, § 1; L. '09, p. 924, § 118.]

§ 2371. Buying Demand or Promising Reward by Justice or Constable.

Every justice of the peace or constable who shall, directly or indirectly, buy or be interested in buying anything in action for the purpose of commencing a suit thereon before a justice of the peace, or who shall give or promise any valuable consideration to any person as an inducement to bring, or as a consideration for having brought, a suit before a justice of the peace, shall be guilty of a misdemeanor. [L. '09, p. 924, § 119.]

§ 2372. Criminal Contempt.

Every person who shall commit a contempt of court of any one of the following kinds shall be guilty of a misdemeanor:

(1.) Disorderly, contemptuous or insolent behavior committed during the sitting of the court, in its immediate view and presence, and directly tending to interrupt its proceeding or to impair the respect due to its authority; or,

(2.) Behavior of like character in the presence of a referee, while actually engaged in a trial or hearing pursuant to an order of court, or in the presence of a jury while actually sitting in the trial of a cause or upon an inquest or other proceeding authorized by law; or,

(3.) Breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of a court, jury or referee; or,

(4.) Willful disobedience to the lawful process or mandate of a court; or,

(5.) Resistance, willfully offered, to its lawful process or mandate; or,

(6.) Contumacious and unlawful refusal to be sworn as a witness, or after being sworn, to answer any legal and proper interrogatory; or,

(7.) Publication of a false or grossly inaccurate report of its proceedings; or,

(8.) Assuming to be an attorney or officer of a court or acting as such without authority. [L. '09, p. 925, § 120.]

See *supra*, §§ 1049-1062, contempts and their punishment.

Cited in 63 Wash. 28; 79 Wash. 555; 104 Wash. 680, 682, 684.

This section defining contempt of court as disorderly or insolent behavior committed during the sitting of the court, "in its immediate view and presence,"

is declaratory of the common law and equivalent to contempt "in the face of the court": *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

When a judgment shows a contempt within this section by a breach of the

peace or other disturbance directly tending to interrupt the proceedings of the court: *State v. Buddress*, 63 Wash. 26, 114 Pac. 879.

The publication of a false or grossly inaccurate report of the proceedings of a court is criminal contempt, within this section, subdivision 7, whether the proceedings are pending at the time of the publication or concluded prior thereto: *State v. Angevine*, 104 Wash. 679, 177 Pac. 701.

In a prosecution for criminal contempt by publishing a false report of court proceedings, the admission of the publication, and evidence of its gross inaccuracy and the synchronous pendency of the action, sustained a verdict, the weight and credibility of the evidence being for the jury: *State v. Angevine*, 104 Wash. 679, 177 Pac. 701.

Power of court to punish as for contempt act made punishable by statute. *Ann. Cas.* 1915B, 157.

§ 2373. Grand Juror Acting After Challenge Allowed.

Every grand juror who, with knowledge that a challenge interposed against him by a defendant has been allowed, shall be present at, or take part, or attempt to take part, in the consideration of the charge against the defendant who interposed such challenge, or the deliberations of the grand jury thereon, shall be guilty of a misdemeanor. [L. '09, p. 925, § 121.]

§ 2374. Production of Pretended Heir.

Every person who shall fraudulently or falsely pretend that any infant child was born of a parent whose child is or would be entitled to inherit real property or to receive any personal property, or who shall falsely represent himself or another to be a person entitled to an interest or share in the estate of a deceased person as executor, administrator, husband, wife, heir, legatee, devisee, next of kin or relative of such deceased person, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 926, § 122.]

§ 2375. Substitution of a Child.

Every person to whom a child has been confided for nursing, education or any other purpose, who, with intent to deceive a person [parent], guardian or relative of such child, shall substitute or produce to such parent, guardian or relative, another child or person in the place of the child so confided, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 926, § 123.]

§ 2376. Instituting Suit in Name of Another.

Every person who shall institute or prosecute any action or other proceeding in the name of another, without his consent and contrary to law, shall be guilty of a gross misdemeanor. [L. '09, p. 926, § 124.]

§ 2377. Unauthorized Communication With Prisoner.

Every person who, not being authorized by law or by any officer authorized thereto, shall have any verbal communication with any prisoner in any jail, reformatory, penitentiary, or other penal institution, or shall bring into or convey out of the same any writing, clothing, food, tobacco or any article whatsoever, shall be guilty of a misdemeanor. [L. '09, p. 926, § 125.]

§ 2378. Disclosing Transaction of Grand Jury.

Every judge, grand juror, prosecuting attorney, clerk, stenographer or other officer who, except in the due discharge of his official duty, shall

disclose the fact that a presentment has been made or indictment found or ordered against any person, before such person shall be in custody; and every grand juror, clerk or stenographer who, except when lawfully required by the court or officer, shall disclose any evidence adduced before the grand jury, or any proceeding, discussion or vote of the grand jury or any member thereof, shall be guilty of a misdemeanor. [L. '09, p. 927, § 126.]

See, also, § 2046, *supra*.

§ 2379. Disclosure of Deposition Returned by Grand Jury.

Every clerk of any court or other officer who shall willfully permit any deposition, or the transcript of any testimony, returned by a grand jury and filed with such clerk or officer, to be inspected by any person except the court, the deputies or assistants of such clerk, and the prosecuting attorney and his deputies, until after the arrest of the defendant, shall be guilty of a misdemeanor. [L. '09, p. 927, § 127.]

§ 2380. Public Officer Making False Certificate.

Every public officer who, being authorized by law to make or give a certificate or other writing, shall knowingly make and deliver as true such a certificate or writing containing any statement which he knows to be false, in a case where the punishment thereof is not expressly prescribed by law, shall be guilty of a gross misdemeanor. [L. '09, p. 927, § 128.]

See *supra*, § 2350, false reports by officers.

See *infra*, § 2584, false certificates to certain instruments.

§ 2381. Falsely Auditing and Paying Claims.

Every public officer or person holding or discharging the duties of any public office or place of trust under the state or in any county, town or city, a part of whose duty it is to audit, allow or pay, or take part in auditing, allowing or paying, claims or demands upon the state or such county, town or city, who shall knowingly audit, allow or pay, or, directly or indirectly, consent to or in any way connive at the auditing, allowance or payment of any claim or demand against the state or such county, town or city, which is false or fraudulent or contains any charge, item or claim which is false or fraudulent, shall be guilty of a gross misdemeanor. [L. '09, p. 927, § 129.]

Cited in 88 Wash. 665.

The use of the word "false" in connection with the word "fraudulent" in this section does not show a legislative intent to include only such claims as are corruptly false or acts done with willful design to cheat the public: *State v. Case*, 88 Wash. 664, 153 Pac. 1070.

The crime of submitting a false audit by a public officer, without intent to cheat was not an offense at common law, and being an offense *malum prohibitum*, an intent to violate the law is implied from the fact of violation: *State v. Case*, 88 Wash. 664, 153 Pac. 1070.

§ 2382. Conspiracy.

Whenever two or more persons shall conspire—

- (1.) To commit a crime; or
- (2.) Falsely and maliciously to procure another to be arrested or proceeded against for a crime; or

- (3.) Falsely to institute or maintain any action or proceeding; or
 (4.) To cheat or defraud another out of any property by unlawful or fraudulent means; or
 (5.) To prevent another from exercising any lawful trade or calling, or from doing any other lawful act, by force, threats or intimidation, or by interfering or threatening to interfere with any tools, implements or property belonging to or used by another, or with the use or employment thereof; or
 (6.) To commit any act injurious to the public health, public morals, trade or commerce, or for the perversion or corruption of public justice or the due administration of the law; or
 (7.) To accomplish any criminal or unlawful purpose, or to accomplish a purpose, not in itself criminal or unlawful, by criminal or unlawful means;

Every such person shall be guilty of a gross misdemeanor. [L. '09, p. 928, § 130.]

Cited in 72 Wash. 655; 79 Wash. 206.

In General: See Remington's Digest, Conspiracy.

Sufficiency of Information Under This Section, Subdivision 5: State v. Mardesich, 79 Wash. 204, 140 Pac. 573.

Criminal responsibility for conspiring to commit offense of one who is personally incapable of com-

mitting the offense. 5 A. L. R. 787.

Conspiracy to commit adultery or other offense which can only be committed by the concerted action of the parties to it. 11 A. L. R. 196.

Criminal responsibility of wife for conspiracy with husband. 4 A. L. R. 282.

§ 2383. Overt Act not Necessary.

In any proceeding for [a] violation of section 2382, it shall [not] be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination. [L. '09, p. 928, § 131.]

Cited in 79 Wash. 206.

§ 2384. Corporation to Forfeit Franchise.

Every corporation, whether foreign or domestic, which shall violate any provision of section 2382, shall forfeit every right and franchise to do business in this state. The attorney general shall begin and conduct all actions and proceedings necessary to enforce the provisions of this section. [L. '09, p. 928, § 132.]

Criminal liability of corporation for conspiracy. Ann. Cas. 1916C, 462.

CHAPTER V.

CRIMES AGAINST THE PERSON.

§ 2385. Suicide Defined.

Suicide is the intentional taking of one's own life. [L. '09, p. 929, § 133.]

§ 2386. Attempting Suicide.

Every person who, with intent to take his own life, shall commit upon himself any act dangerous to human life, or which, if committed upon or toward another person and followed by death as a consequence,

would render the perpetrator chargeable with homicide, shall be punished by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars. [L. '09, p. 929, § 134.]

Attempt to commit suicide as indictable offense. 8 Ann. Cas. 354; 7 L. R. A. (N. S.) 286.

§ 2387. Aiding Suicide.

Every person who, in any manner, shall willfully advise, encourage, abet or assist another in taking his own life shall be guilty of manslaughter. [L. '09, p. 929, § 135.]

Guilt of one aiding or abetting suicide. 13 A. L. R. 1259; 66 L. R. A. 304; 22 L. R. A. (N. S.) 243.

§ 2388. Abetting Attempt at Suicide.

Every person who, in any manner, shall willfully advise, encourage, abet or assist another person in attempting to take the latter's life shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 929, § 136.]

§ 2389. Incapacity of Person Aided No Defense.

The fact that the person attempting to take his own life was incapable of committing crime shall not be a defense to a prosecution under either of sections 2387 or 2388. [L. '09, p. 929, § 137.]

HOMICIDE.

§ 2390. Homicide—Defined and Classified.

Homicide is the killing of a human being by the act, procurement or omission of another and is either (1) murder, (2) manslaughter, (3) excusable homicide or (4) justifiable homicide. [L. '09, p. 929, § 138.]

Cited in 88 Wash. 309.

For text treatment of "Homicide," see 13 E. O. L. 697.

§ 2391. Proof of Death and of Killing by Defendant.

No person shall be convicted of murder or manslaughter unless the death of the person alleged to have been killed and the fact of killing by the defendant, as alleged, are each established as independent facts beyond a reasonable doubt. [L. '09, p. 930, § 139.]

§ 2392. Murder in the First Degree—Death Penalty.

The killing of a human being, unless it is excusable or justifiable, is murder in the first degree when committed either—

1. With a premeditated design to effect the death of the person killed, or of another; or,

2. By an act imminently dangerous to others and evincing a depraved mind, regardless of human life, without a premeditated design to effect the death of any individual; or,

3. Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the

scene of, a robbery, rape, burglary, larceny or arson in the first degree; or,

4. By maliciously interfering or tampering with or obstructing any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any engine, motor or car of such railway.

Murder in the first degree shall be punishable by imprisonment in the state penitentiary for life, unless the jury shall find that the punishment shall be death; and in every trial for murder in the first degree the jury shall, if it find the defendant guilty, also find a special verdict as to whether or not the death penalty shall be inflicted; and if such special verdict is in the affirmative, the penalty shall be death, otherwise, it shall be as herein provided. All executions in accordance herewith shall take place at the state penitentiary under the direction of and pursuant to arrangements made by the superintendent thereof. [L. '19, p. 273, § 1. Cf. L. '13, p. 581, § 1; L. '09, p. 930, § 140.]

Cited in 61 Wash. 637; 64 Wash. 129, 130; 65 Wash. 597; 66 Wash. 541; 83 Wash. 3; 88 Wash. 309; 89 Wash. 454; 94 Wash. 123; 104 Wash. 400; 105 Wash. 160.

In General: See Remington's Digest, Homicide.

Upon the defense that accused participated in a robbery because of duress, it is not error to instruct that, on a resulting murder, there was no question of justifiable or excusable homicide, where the accused had participated in the robbery and the victim was murdered by a confederate in committing the robbery; in view of this section, subdivision 3: State v. Moretti, 66 Wash. 537, 120 Pac. 102.

Under this section, it is not necessary that the indictment or information negative that the killing was without excuse or justification; at least, not further than to allege that the killing was done "willfully, unlawfully, feloniously and with a premeditated design"; in view of sections 2055, 2057, 2064—2066, supra, defining the requisites of indictments and informa-

tions and declaring the effect of informal defects that do not affect the substantial rights of the defendant: State v. Siefert, 65 Wash. 596, 118 Pac. 746.

An information charging that the accused did, with premeditated design to effect her death, kill and murder A. J. by beating and mortally wounding, etc., follows the language of this section, and is sufficient, without further alleging that the person died: State v. Jahns, 61 Wash. 636, 112 Pac. 747.

Sufficient evidence to sustain a conviction of second degree murder is by evidence of malice or "premeditated design to effect the death," within this section: State v. Hawkins, 89 Wash. 449, 154 Pac. 827.

Under this and the following sections, killing with a design to effect death is murder and the element of manslaughter is excluded, even if under provocation or sudden heat of passion: State v. Palmer, 104 Wash. 396, 176 Pac. 547; State v. Hoyer, 105 Wash. 160, 177 Pac. 683.

§ 2393. Murder in the Second Degree.

The killing of a human being, unless it is excusable or justifiable, is murder in the second degree when—

(1.) Committed with a design to effect the death of the person killed or of another, but without premeditation; or

(2.) When perpetrated by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a felony other than those enumerated in section 2392.

Murder in the second degree shall be punished by imprisonment in the state penitentiary for not less than ten years. [L. '09, p. 931, § 141.]

Cited in 64 Wash. 129; 88 Wash. 310; 94 Wash. 123; 104 Wash. 400.

§ 2394. Killing in Duel.

Every person who shall fight or participate in, as second or assistant, any duel within this state, in which any person is killed, or who, by previous appointment made within this state, shall fight or participate in, as second or assistant, any duel out of the state, in which any person is killed, shall be guilty of murder in the second degree; and, in the latter case, may be proceeded against in any county in this state. [L. '09, p. 931, § 142.]

Cited in 88 Wash. 310; 94 Wash. 123;
104 Wash. 400.

Homicide and degree thereof in case
of killing in duel. 63 L. R. A. 377;
5 L. R. A. (N. S.) 821.

§ 2395. Manslaughter.

In any case other than those specified in sections 2392, 2393 and 2394, homicide, not being excusable or justifiable, is manslaughter.

Manslaughter is punishable by imprisonment in the state penitentiary for not more than twenty years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 931, § 143.]

Cited in 64 Wash. 129, 130; 66 Wash. 470; 80 Wash. 534; 88 Wash. 310; 104 Wash. 399.

Under this section defining manslaughter, the court cannot determine the degree and decide, as a matter of law, that the defendant was necessarily guilty of one of the higher degrees, where it appears that defendant was having a dispute with the deceased over a fence, called his attention to the gun carried by defendant's daughter, who evidently heard the remark and who had made threats against the deceased; since defendant's guilt did not depend entirely on the presence or absence of design on her part, the same being a question for the jury: State v. Beebe, 66 Wash. 463, 120 Pac. 122.

Under this section, if a homicide is neither excusable nor justifiable, it must at least be manslaughter, and the purpose of the code is to do away in homicide with instructions submitting lesser degrees of statutory offenses: State v. Blaine, 64 Wash. 122, 116 Pac. 660.

Under this section, the accused is not entitled to an instruction upon the subject of manslaughter, where it appears by his own testimony that the killing was with the admitted design to effect death and was not in any manner connected with any offense less than a felony: State v. Gounagias, 88 Wash. 304, 153 Pac. 9, L. R. A. 1916C, 581.

Under this statute, it is not error in defining manslaughter to use the words "voluntarily" and "involuntarily" as excluded in the definitions of first and second degree murder; and such words are

not confusing as capable of a varied meaning without any further definition: State v. Totten, 67 Wash. 192, 121 Pac. 70.

The act of selling unbranded poison, from which death results is manslaughter, although without intent to take human life, under this section: State v. Takano, 94 Wash. 119, 162 Pac. 35.

Under a plea of self-defense, admitting that the killing was with a design to kill, the accused is guilty of murder or not guilty, and is not entitled to an instruction on the subject of manslaughter, as defined by this section: State v. Palmer, 104 Wash. 396, 176 Pac. 547.

Killing or assaulting friend or relative as sufficient provocation to reduce homicide to manslaughter. 13 Ann. Cas. 1084; Ann. Cas. 1914B, 457.

Criminality of unintentional killing by person engaged in unlawful act not malum in se. 4 Ann. Cas. 800.

What amounts to participation in homicide on part of one not the actual perpetrator, who was present without preconcert or conspiracy. 12 A. L. R. 275.

Wife's confession of adultery as affecting degree of homicide in killing her paramour. 10 A. L. R. 470.

Failure to provide medical or surgical attention as homicide. 10 A. L. R. 1137; 6 L. R. A. (N. S.) 685; 45 L. R. A. (N. S.) 559.

Effect on liability of one inflicting personal injury on another who dies of fact that negligence, mistake or lack of skill of physician

or surgeon contributed to the death. 8 A. L. R. 516.

Effect of voluntary intoxication to reduce homicide to manslaughter. 12 A. L. R. 879.

Criminal character of homicide by accident while hunting. 1 L. R. A. (N. S.) 991.

Automobile causing death by reason of negligent operation as manslaughter. 18 Ann. Cas. 239; Ann. Cas. 1914A, 684; Ann. Cas. 1918B,

1082; Ann. Cas. 1918E, 1146; 30 L. R. A. (N. S.) 458; 33 L. R. A. (N. S.) 403; L. R. A. 1918B, 954.

Homicide by wanton or reckless use of firearm without express intent to inflict injury. 1 Ann. Cas. 34; 5 A. L. R. 603.

Negligent homicide by overturning boat. 3 A. L. R. 1104.

Homicide in operation of railroad or street railway. L. R. A. 1917C, 536.

§ 2396. Killing Unborn Quick Child.

The willful killing of an unborn quick child, by any injury committed upon the mother of such child, is manslaughter. [L. '09, p. 931, § 144.]

Cited in 88 Wash. 310.

§ 2397. Killing Unborn Quick Child by Administering Drugs.

Every person who shall provide, supply or administer to a woman whether pregnant or not, or shall prescribe for or advise or procure a woman to take any medicine, drug or substance, or shall use or employ, or cause to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman or of any quick child of which she is pregnant is thereby produced, shall be guilty of manslaughter. [L. '09, p. 931, § 145.]

Homicide in commission of, or attempt to commit, abortion. 63 L. R. A. 902; 49 L. R. A. (N. S.) 580.

Pregnancy as element of offense of attempting to procure a miscarriage or of homicide predicated on such attempt. 10 A. L. R. 314.

§ 2398. Woman Taking Drugs.

Every woman quick with child who shall take or use, or submit to the use of, any drug, medicine or substance, or any instrument or other means, with intent to procure her own miscarriage, unless the same is necessary to preserve her own life or that of the child whereof she is pregnant, and thereby causes the death of such child, shall be guilty of manslaughter. [L. '09, p. 932, § 146.]

§ 2399. Owner of Vicious Animal.

If the owner or custodian of any vicious or dangerous animal, knowing its propensities, shall willfully or negligently allow it to go at large, and such animal while at large shall kill a human being not himself in fault, such owner or custodian shall be guilty of manslaughter. [L. '09, p. 932, § 147.]

§ 2400. Killing by Overloading Passenger Vessel.

Every person navigating a vessel for gain who shall willfully or negligently receive so many passengers or such a quantity of other lading on board, that by means thereof such vessel shall sink, be overset or

injured, and thereby a human being shall be drowned or otherwise killed, shall be guilty of manslaughter. [L. '09, p. 932, § 148.]

Criminal liability of master of vessel for loss of life of passenger. 14 Ann. Cas. 461.

§ 2401. Reckless Operation of Steamboat or Engine.

Every person having charge of a steamboat used for the conveyance of passengers, or of a boiler or engine thereof, who, from ignorance, recklessness or gross negligence, or for the purpose of excelling another boat in speed, shall create or allow to be created such an undue quantity of steam as to burst the boiler or other apparatus in which it is generated or contained, or to break any apparatus or machinery connected therewith, whereby the death of a human being is occasioned; and every engineer or other person having charge of a steam boiler, steam engine or other apparatus for generating or applying steam, who willfully or from ignorance or gross negligence, shall create or allow to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or to cause any other accident, whereby the death of a human being is occasioned, shall be guilty of manslaughter. [L. '09, p. 932, § 149.]

§ 2402. Liability of Intoxicated Physician.

Every physician or surgeon, or person practicing as such, who, being in a state of intoxication, or under the influence of any narcotic drug, shall prescribe or administer any poison, drug or medicine, or do any other act as a physician, to another person, which, though done without design, shall cause the death of the latter, shall be guilty of manslaughter. [L. '09, p. 933, § 150.]

Improper treatment of disease as homicide. 9 A. L. R. 211.

§ 2403. Keeping Explosive Unlawfully.

Every person who shall make or keep gunpowder, or any other explosive substance, in a city or village, in any quantity or manner prohibited by law or by ordinance of such municipality, if an explosion thereof shall occur whereby the death of a human being is occasioned, shall be guilty of manslaughter. [L. '09, p. 933, § 151.]

§ 2404. Homicide, When Excusable.

Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, with ordinary caution and without any unlawful intent. [L. '09, p. 933, § 152.]

Cited in 88 Wash. 310.

In General: See Remington's Digest, Homic., §§ 14—19-1.

§ 2405. Justifiable Homicide by Public Officer.

Homicide is justifiable when committed by a public officer, or person acting under his command and in his aid, in the following cases:

(1.) In obedience to the judgment of a competent court.

(2.) When necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty.

(3.) When necessary in retaking an escaped or rescued prisoner who has been committed, arrested for, or convicted of a felony; or in arresting a person who has committed a felony and is fleeing from justice; or in attempting, by lawful ways or means, to apprehend a person for a felony actually committed; or in lawfully suppressing a riot or preserving the peace. [L. '09, p. 933, § 153.]

Cited in 88 Wash. 310.

Degree of force that may be employed in arresting one charged

with a misdemeanor. 3 A. L. R. 1170; 4 Ann. Cas. 760; 67 L. R. A. 293.

§ 2406. Homicide by Other Person, When Justifiable.

Homicide is also justifiable when committed either—

(1.) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

(2.) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode in which he is. [L. '09, p. 934, § 154.]

Cited in 64 Wash. 126; 66 Wash. 397, 399; 88 Wash. 310; 96 Wash. 264.

This section is but declaratory of the common law: State v. Meyer, 96 Wash. 257, 164 Pac. 926.

Under this section, it is not error against the defendant to instruct as to the right of self-defense "if the defendant believes and has reasonable ground to believe" that the killing was necessary to protect himself from great personal danger; as the instruction is more liberal to the defendant than the law, and the "reasonable ground to apprehend" must be such as to produce an honest belief of the existence of danger: State v. Bowinkelman, 66 Wash. 396, 119 Pac. 824.

Upon an issue as to self-defense, an instruction that before the killing there must have been some overt act of the person killed is not erroneous in failing to use the words "assault with the naked fist," where there was no dispute as to the deceased's having used his hands only in the immediately preceding encounter, in view of proper following instructions from which the jury could not have been misled by the words "overt act": State v. Hoyer, 105 Wash. 160, 177 Pac. 683.

In a prosecution for murder, where there was evidence that accused armed himself and then provoked an attack and shot the deceased, it is proper to instruct that the right of self-defense is allowed as a shield and not a sword, and that a person must act honestly and not provoke an attack as an excuse for killing: State v. Hoyer, 105 Wash. 160, 177 Pac. 683.

An instruction that a homicide is excusable when committed by accident or misfortune in doing a lawful act without unlawful intent and that an accident is an event without occurrence of the will or expectation, is clear and sufficient on the subject: State v. Sowders, 109 Wash. 10, 186 Pac. 260.

Homicide in defense of habitation. 21 Ann. Cas. 721.

Homicide in defense of one occupying a particular relation to slayer as justifiable. 13 Ann. Cas. 1055.

Homicide in attempting to prevent elopement. 8 A. L. R. 660.

Right of self-defense as affected by defendant's violation of law only casually related to the encounter. 10 A. L. R. 861.

MAIMING.

§ 2407. "Maiming" Defined—How Punished.*

Every person who, with intent to commit a felony, or to injure, disfigure or disable another, shall willfully inflict upon him an injury which—

- (1.) Seriously disfigures his person by any mutilation thereof; or
- (2.) Destroys or displaces any member or organ of his body; or
- (3.) Seriously diminishes his physical vigor by the injury of any member or organ;

Shall be guilty of maiming and be punished by imprisonment in the state penitentiary for not more than ten years, and the willful infliction of the injury shall be prima facie evidence of the intent. [L. '09, p. 934, § 155.]

Cited in 62 Wash. 71.

An information practically in the language of the statute, charging the accused with biting off the end of the nose of a person with intent to disfigure him, sufficiently charges maiming, as defined

by this section: *State v. Catsampas*, 62 Wash. 70, 112 Pac. 1116.

Malice and premeditation as element of offense of mayhem or maiming. *L. R. A.* 1916E, 494.

§ 2408. Instrument or Manner of Maiming.

To constitute maiming it is immaterial by what means or instrument or in what manner the injury was inflicted. [L. '09, p. 934, § 156.]

Mayhem as depending upon the means or instrument used to in-

flict the injury. 40 *L. R. A.* (N. S.) 1132.

§ 2409. Recovery from Injury, When a Defense.

Whenever upon a trial for maiming another person it shall appear that the injury inflicted will not result in any permanent disfiguration of appearance, diminution of vigor, or other permanent injury, no conviction for maiming shall be had, but the defendant may be convicted of assault in any degree. [L. '09, p. 934, § 157.]

Self-defense as defense to prosecution for mayhem. 15 *Ann. Cas.* 82.

KIDNAPING.

§ 2410. Kidnaping Defined—How Punished.

Every person who shall willfully—

(1.) Seize, confine or inveigle another with intent to cause him without authority of law to be secretly confined or imprisoned, or in any way held to service, or with intent to extort or obtain money or reward for his return, release, or disposition, or to lead, take, entice away, or detain, a child under the age of sixteen years with intent to conceal him from his parent, guardian or other person having lawful care or control of him, or to steal any article upon his person; or

(2.) Abduct, entice, or by force or fraud unlawfully take or carry away another to or from a place without the state, and shall afterwards send, bring or keep such person, or cause him to be kept or secreted within this state;

Shall be guilty of kidnaping, and punished by imprisonment in the state penitentiary for not less than ten years. [L. '09, p. 935, § 158.]

Criminal liability of parent taking child from another to whom custody has been awarded. *Ann. Cas.*

1914B, 274; 32 *L. R. A.* (N. S.) 845; *L. R. A.* 1915E, 189.

§ 2411. Selling Services of Person Kidnaped.

Every person, who within this state or elsewhere, shall sell or in any manner transfer for any term, the services or labor of any person who has been forcibly taken, inveigled, or kidnaped in or from this state, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 935, § 159.]

§ 2412. Venue—Effect of Consent.

Any proceeding for kidnaping may be instituted either in the county where the offense was committed or in any county through or in which the person kidnaped or confined was taken or kept while under confinement or restraint. Upon a trial for violation of section 2410 or 2411, the consent thereto of the person kidnaped or confined shall not be a defense unless it appears satisfactorily to the jury that such person was above the age of sixteen years and that his consent was not extorted by threats, duress or fraud. [L. '09, p. 935, § 160.]

ASSAULT.

§ 2413. Assault in First Degree Defined—How Punished.

Every person who, with intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another—

(1.) Shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death; or

(2.) Shall administer to or cause to be taken by another, poison or any other destructive or noxious thing so as to endanger the life of another person, shall be guilty of assault in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 936, § 161.]

Cited in 60 Wash. 111; 66 Wash. 245; 69 Wash. 563, 564; 79 Wash. 226; 83 Wash. 471; 84 Wash. 172; 98 Wash. 84.

Formerly, there was no such offense as assault with a deadly weapon, under the law of this state, and rejecting the words "with a deadly weapon" as surplusage in an indictment the defendant could be found guilty of assault which is necessarily included in the offense charged: State v. Snider, 32 Wash. 229, 73 Pac. 355.

Under this section, making both the assault and the intent to kill material in a prosecution for assault in the first degree by shooting and wounding a police officer, it is admissible to prove the defendant's conduct immediately prior to the shooting, when he entered a saloon in a drunken condition and committed other offenses, as bearing upon the intent to kill, and the same is not objectionable in that it includes evidence of other crimes: State v. Clark, 98 Wash. 81, 167 Pac. 84.

Nature and Elements of Criminal Assault: See Remington's Digest, Assault, §§ 6—7-1.

§ 6. Use of Weapons: State v. McFadden, 42 Wash. 1, 84 Pac. 401.

See, also, Martin v. Jansen, 113 Wash. 290, 193 Pac. 674, 198 Pac. 393.

§ 7. Assault With Dangerous or Deadly Weapon: State v. Snider, 32 Wash. 229, 73 Pac. 355.

§ 7-1. Defenses—Self-defense: State v. McConaghy, 84 Wash. 168, 146 Pac. 396; State v. Daugherty, 102 Wash. 501, 173 Pac. 437.

Indictment or Information: See Remington's Digest, Assault, §§ 8, 9.

§ 8. Requisites and Sufficiency in General: State v. Bohn, 19 Wash. 36, 52 Pac. 325; State v. Young, 22 Wash. 273, 60 Pac. 650; State v. Klein, 19 Wash. 368, 53 Pac. 364; State v. John Port Townsend, 7 Wash. 462, 35 Pac. 367.

§ 9. — **Matter Constituting Aggravation or Special Form of Assault:** *Clarke v. Territory*, 1 W. T. 68; *State v. Clayborne*, 14 Wash. 622, 45 Pac. 203; *State v. Michel*, 20 Wash. 162, 54 Pac. 995; *State v. Young*, 22 Wash. 273, 60 Pac. 650.

Sufficiency of information under former laws: *State v. Keen*, 10 Wash. 93, 38 Pac. 880.

Evidence: See *Remington's Digest, Assault*, §§ 10—15.

§ 10. **Admissibility in General:** *State v. Ackles*, 8 Wash. 462, 36 Pac. 597; *State v. Costello*, 29 Wash. 366, 69 Pac. 1099; *State v. Weisenberger*, 42 Wash. 426, 85 Pac. 20; *State v. O'Brien*, 66 Wash. 219, 119 Pac. 609; *State v. Davis*, 72 Wash. 261, 130 Pac. 95.

§ 11. — **Character and Physical Condition of Parties:** *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

§ 12. — **Threats, Preparations and Previous Attempts:** *State v. McFadden*, 42 Wash. 1, 84 Pac. 401; *State v. Weisenberger*, 42 Wash. 426, 85 Pac. 20.

§ 13. — **Nature and Circumstances**

of Act: *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

§ 14. **Weight and Sufficiency, in General:** *State v. Surry*, 23 Wash. 655, 63 Pac. 557.

§ 15. — **Aggravated Assault, or Special Form of Assault:** *State v. Romano*, 41 Wash. 241, 83 Pac. 1; *State v. Lillie*, 60 Wash. 200, 110 Pac. 801; *State v. Crist*, 62 Wash. 326, 113 Pac. 772; *State v. Davis*, 72 Wash. 261, 130 Pac. 95; *State v. Autio*, 78 Wash. 326, 139 Pac. 31.

Trial: See *Remington's Digest, Assault*, §§ 16—19.

§ 16. **Instructions:** *State v. Dunn*, 22 Wash. 67, 60 Pac. 49; *State v. Surry*, 23 Wash. 655, 63 Pac. 557; *State v. Davis*, 72 Wash. 261, 130 Pac. 95; *State v. McConaghy*, 84 Wash. 168, 146 Pac. 396; *State v. Ross*, 85 Wash. 213, 147 Pac. 1149; *State v. Albutt*, 99 Wash. 253, 169 Pac. 584.

§ 18. **Verdict:** *State v. Snider*, 32 Wash. 299, 73 Pac. 355.

§ 19. **Sentence and Punishment:** *State v. Dunlap*, 25 Wash. 292, 65 Pac. 544.

§ 2414. Assault in the Second Degree—How Punished.

Every person who, under circumstances not amounting to assault in the first degree—

(1.) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(2.) With intent thereby to enable or assist himself or any other person to commit any crime, shall administer to, or cause to be taken by, another, chloroform, ether, laudanum or any other intoxicating narcotic or anaesthetic; or

(3.) Shall willfully inflict grievous bodily harm upon another with or without a weapon; or

(4.) Shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(5.) Being armed with a deadly weapon shall willfully assault another with a whip; or

(6.) Shall assault another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court officer, or the lawful apprehension or detention of himself or another person; or

(7.) While hunting any game or other animals or birds, shall shoot another;

Shall be guilty of assault in the second degree and be punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 936, § 162.]

Cited in 59 Wash. 530; 60 Wash. 543; 61 Wash. 630; 64 Wash. 126; 66 Wash. 159, 246; 69 Wash. 563, 564; 79 Wash. 226; 83 Wash. 471; 84 Wash. 172; 85 Wash. 222; 92 Wash. 506; 94 Wash. 270; 95 Wash. 545.

Information for Aggravated Assault: See Remington's Digest, Ind. & Inf., § 102-1; State v. Beatty, 59 Wash. 235, 109 Pac. 1011; State v. Kruger, 60 Wash. 542, 111 Pac. 769; State v. Hamilton, 69 Wash. 561, 125 Pac. 950; State v. Copeland, 66 Wash. 243, 119 Pac. 607; State v. Steele, 83 Wash. 470, 145 Pac. 581.

Sufficiency of an information for an assault with intent to commit sodomy, under this section, subdivision 6, without stating the precise facts constituting the attempt: State v. Harsted, 66 Wash. 158, 119 Pac. 24.

Sufficiency of an information charging second degree under this section, subdivision 3: State v. Richter, 95 Wash. 544, 164 Pac. 250.

A conviction of assault in the second

degree, when warranted, under this section: State v. Ross, 85 Wash. 218, 147 Pac. 1149.

An information charging first degree assault with intent to kill by stabbing with a knife sustains a conviction for second degree assault with intent to do "grievous bodily harm," or that the "weapon or other instrument or thing was likely to produce bodily harm": State v. Letica, 61 Wash. 629, 112 Pac. 748.

In a prosecution for assault by shooting another with a pistol, in which the accused admitted the shooting and claimed that it was done in self-defense, which constitutes assault in the second degree under this section, subdivisions 3 and 4, it is reversible error to submit an instruction upon the subject of assault in the third degree; since accused was either guilty of assault in the second degree or not at all, even if grievous bodily harm was not inflicted: State v. Reynolds, 94 Wash. 270, 162 Pac. 358.

What constitutes deadly weapon. *Ann. Cas.* 1912A, 1328.

§ 2415. Assault in the Third Degree—How Punished.

Every person who shall commit an assault or an assault and battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, and shall be punished as for a gross misdemeanor. [L. '09, p. 937, § 163.]

Cited in 60 Wash. 543; 69 Wash. 563, 564; 80 Wash. 15; 83 Wash. 471; 84 Wash. 172; 92 Wash. 506.

Under this section, an assault in the third degree is not necessarily included in the greater offense, and there can be no conviction of assault in the third degree, under a charge of assault with the intent to commit a felony (second degree assault), where the evidence of the prosecutrix showed a consummated rape, and that of the defendant proved an alibi, and there was no evidence of assault in the third degree: State v. Kruger, 60 Wash. 542, 111 Pac. 769.

A conviction for assault in the third degree may be had under an information for manslaughter charging an assault upon a pregnant woman and her unborn child with intent to cause a miscarriage and resulting in her death, where, omit-

ting that portion relating to the death, it satisfies all requirements of a charge of assault and battery: State v. Hamilton, 69 Wash. 561, 125 Pac. 950.

Under this section, an information charging assault with intent to commit a felony, to wit, a rape, which is a charge of second degree assault, is sufficient to sustain a conviction for the lesser offense of third degree assault, without specifically defining the crime of assault in the third degree: State v. Steele, 83 Wash. 470, 145 Pac. 581.

Pointing unloaded firearm as assault. 13 *Ann. Cas.* 484; 15 *L. R. A. (N. S.)* 1272; 41 *L. R. A. (N. S.)* 181.

Discharging firearm to frighten person as assault. *Ann. Cas.* 1917D, 617.

§ 2416. Force, When Lawful.

The use, attempt, or offer to use force upon or toward the person of another shall not be unlawful in the following cases:

(1.) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting him and acting under his direction;

(2.) Whenever necessarily used by a person arresting one who has committed a felony and delivering him to a public officer competent to receive him into custody;

(3.) Whenever used by a party about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against his person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his possession, in case the force is not more than shall be necessary;

(4.) Whenever used in a reasonable and moderate manner by a parent or his authorized agent, a guardian, master, or teacher in the exercise of lawful authority to restrain or correct his child, ward, apprentice or scholar;

(5.) Whenever used by a carrier of passengers or his authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than shall be necessary to expel the offender with reasonable regard to his personal safety;

(6.) Whenever used by any person to prevent an idiot, lunatic or insane person from committing an act dangerous to himself or another, or in enforcing necessary restraint for the protection of his person, or his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint or custody of his person. [L. '09, p. 937, § 164.]

Cited in 64 Wash. 128.

This section, warranting the repulsion of a robbery by force, even to taking life, is not applicable where the deceased was only guilty of a trespass in taking a whisky bottle away from the accused after learning that the accused had given his son whisky, and with no intent to commit a robbery: *State v. Blaine*, 64 Wash. 122, 116 Pac. 660.

Degree of force allowable in recap-

tion by owner of personal property. 6 Ann. Cas. 504.

Degree of force that may be employed in arresting one charged with a misdemeanor. 3 A. L. R. 1170.

Liability for assault in forcibly taking property sold conditionally. 9 A. L. R. 1180.

Right to eject customer from store. 9 A. L. R. 379.

§ 2417. Provoking Assault.

Every person who shall by word, sign or gesture, willfully provoke, or attempt to provoke, another person to commit an assault or breach of the peace, shall be guilty of misdemeanor. [L. '09, p. 938, § 165.]

Provocation as justification for assault on woman. 6 A. L. R. 999.

ROBBERY.

§ 2418. Robbery, Defined.

Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge

of the person from whom taken, such knowledge was prevented by the use of force or fear. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 938, § 166.]

Cited in 63 Wash. 397; 64 Wash. 126; 69 Wash. 591; 84 Wash. 160.

In General: See Remington's Digest, Robbery.

An information charging an attempt to commit robbery is not insufficient in that the physical acts done toward the commission of the offense are not set forth, where it follows the language of this section, defining robbery and charges the defendant with an attempt to do the precise thing recited in the statute as.

constituting the crime: State v. Baker, 69 Wash. 589, 125 Pac. 1016.

The value of goods taken is not an element of the crime of robbery, and hence need not be alleged, under this section: State v. Rowan, 84 Wash. 158, 146 Pac. 374.

Robbery, or intent to commit robbery, as affected by intent to collect debt. 13 A. L. R. 151.

Taking property from the person by stealth as robbery. 8 A. L. R. 359.

DUELS.

§ 2419. Duel, How Punished.

Every person who shall fight a duel or engage in any combat with another with a deadly weapon, by previous agreement, or upon a previous quarrel, although no death or wound shall ensue, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 938, § 167.]

§ 2420. Challenger, Abettor, etc.

Every person who shall challenge another to fight a duel, or who shall send a written or verbal message purporting or intended to be a challenge to fight a duel, or an invitation to a combat with deadly weapons, or shall accept such a challenge or message, or shall knowingly carry or deliver such challenge or message, or be present at the time appointed for such duel or combat, or when the same is fought, either as second, aide, or surgeon, or who shall advise, or abet, or give any countenance or assistance to such duel or combat upon previous agreement, shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 939, § 168.]

Cited in 62 Wash. 658.

What constitutes challenge to fight duel. 19 Ann. Cas. 72.

§ 2421. Attempt to Induce Challenge, Posting.

Every person who shall send or use to another any word or sign whatever with intent to provoke or induce such person to give or receive a challenge to fight a duel, or who shall post or advertise another for not fighting a duel or for not sending or accepting a challenge to fight a duel, or who, in writing or in print, shall use reproachful or contemptuous language to or concerning anyone for not sending or accepting a challenge to fight a duel, or for not fighting a duel, shall be guilty of a gross misdemeanor. [L. '09, p. 939, § 169.]

§ 2422. Duel Outside State, Venue.

Every person who shall leave the state with intent to elude any provision of section 2419 or 2420, or to commit any act outside of the

state punished by the provisions thereof, if committed in the state, shall be guilty of the same offense and subject to the same punishment as if the act had been committed or was to have been consummated in the state and may be proceeded against and tried in any county therein, but a former conviction or acquittal in another state or county for the same offense shall be a bar to further proceedings against him for such offense. [L. '09, p. 939, § 170.]

§ 2423. Witnesses.

Every person offending against any provision contained in sections 2419 to 2422, inclusive, shall be a competent witness against any other offender in the same transaction, and shall not be excused from giving testimony tending to incriminate himself. [L. '09, p. 940, § 171.]

LIBEL AND SLANDER.

§ 2424. Libel, Defined.

Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend:

(1.) To expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse; or

(2.) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or

(3.) To injure any person, corporation or association of persons in his or their business or occupation, shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor. [L. '09, p. 940, § 172.]

Cited in 63 Wash. 308; 64 Wash. 694; 74 Wash. 97; 82 Wash. 534; 85 Wash. 514, 515; 86 Wash. 223; 90 Wash. 91; 93 Wash. 369; 94 Wash. 137, 141, 142; 100 Wash. 660.

Elements of Libel: See Remington's Digest, Libel, §§ 6, 7.

§ 6. Exposing Person to Hatred, Contempt or Ridicule: Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270; Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595; Wells v. Times Printing Co., 77 Wash. 171, 137 Pac. 457; Wood v. Star Publishing Co., 90 Wash. 85, 155 Pac. 400; McKillip v. Grays Harbor Publishing Co., 100 Wash. 657, 171 Pac. 1026.

The publication of plaintiff's photograph, which was a true likeness and inoffensive in itself, in connection with a story of her father's crime, is not a libel as defined by this section, since the photograph did not make the article "of and concerning" the plaintiff: Hillman v. Star Publishing Co., 64 Wash. 691, 117 Pac. 594, 35 L. R. A. (N. S.) 595.

§ 7. Tending to Injure in Profession or Business: Urban v. Helmick, 15 Wash. 155, 45 Pac. 747; Lathrop v. Sundberg, 55 Wash. 144, 104 Pac. 176, 25 L. R. A.

(N. S.) 381; Lathrop v. Sundberg, 62 Wash. 136, 113 Pac. 574, Ann. Cas. 1912C, 891, 33 L. R. A. (N. S.) 90; Wilson v. Sun Publishing Co., 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442; Dick v. Northern Pac. R. Co., 86 Wash. 211, 150 Pac. 8, Ann. Cas. 1917A, 638; Olympia Water Works v. Mottman, 88 Wash. 694, 153 Pac. 1074; Cyclohome Amusement Co. v. Hayward-Larkin Co., 93 Wash. 367, 160 Pac. 1051; General Market Co. v. Post-Intelligencer Co., 96 Wash. 575, 165 Pac. 482.

CRIMINAL RESPONSIBILITY: See Remington's Digest, Libel, §§ 44—53. **Intent and Malice:** State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

§ 45. Oral Defamation: State v. McArthur, 5 Wash. 558, 32 Pac. 367.

§ 46. Libelous Words and Acts: State v. Takeuchi, 80 Wash. 556, 141 Pac. 1145.

§ 48. Defenses: State v. Mays, 57 Wash. 540, 107 Pac. 363, 21 Ann. Cas. 830; State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

§ 49. Jurisdiction and Venue: State v. Piver, 74 Wash. 96, 132 Pac. 858, Ann. Cas. 1915A, 695, 49 L. R. A. (N. S.) 941.

§ 50. Indictment and Information: State v. Nichols, 15 Wash. 1, 45 Pac. 647; State v. Darwin, 63 Wash. 303, 115 Pac. 309, 33 L. R. A. (N. S.) 1026; State v. Takeuchi, 80 Wash. 556, 141 Pac. 1145; State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

§ 51. Evidence: State v. Mays, 57 Wash. 540, 107 Pac. 363, 21 Ann. Cas. 830; State v. Takeuchi, 80 Wash. 556, 141 Pac. 1145; State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

§ 52. — Weight and Sufficiency: State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

§ 53. Instructions: State v. Nichols, 15 Wash. 1, 45 Pac. 647; State v. Sefrit, 82 Wash. 520, 144 Pac. 725.

See, also, Ecuyer v. New York Life Ins. Co., 107 Wash. 411, 181 Pac. 871, 186 Pac. 327.

For text treatment of "Libel and Slander," see 17 **R. C. L.** 254.

§ 2425. How Justified or Excused—Malice, When Presumed.

Every publication having the tendency or effect mentioned in section 2424 shall be deemed malicious unless justified or excused. Such publication is justified whenever the matter charged as libelous charges the commission of a crime, is a true and fair statement, and was published with good motives and for justifiable ends. It is excused when honestly made in belief of its truth and fairness and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of any person in respect of public affairs, made after a fair and impartial investigation. [L. '09, p. 940, § 173.]

Cited in 82 Wash. 535, 538, 539; 85 Wash. 515; 93 Wash. 369; 100 Wash. 661, 664, 666.

JUSTIFICATION AND MITIGATION: See Remington's Digest, Libel, §§ 17—20.

§ 17. Nature and Grounds in General: Haynes v. Spckane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969; Chambers v. Leiser, 43 Wash. 285, 86 Pac. 627, 10 Ann. Cas. 270.

§ 18. Truth as Justification in General: Haynes v. Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969; Leghorn v. Review Pub. Co., 31 Wash. 627, 72 Pac. 485; Quinn v. Review Pub. Co., 55 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077; Eddy v. Cunningham, 69 Wash. 544, 125 Pac. 961; Ecuyer v.

New York Life Ins. Co., 101 Wash. 247, 172 Pac. 359.

§ 19. Facts Constituting Justification: Hall v. Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049.

§ 20. Grounds of Mitigation—Retraction, Apology and Reparation: Coffman v. Spokane Chronicle Pub. Co., 65 Wash. 1, 117 Pac. 596, Ann. Cas. 1913B, 636.

Necessity that justification of libel be as broad as charge. Ann. Cas. 1918C, 1088, 1122, 1126; 21 **L. R. A.** 504.

Truth as defense in criminal prosecution for libel. 21 Ann. Cas. 832; Ann. Cas. 1916A, 429; 21 **L. R. A.** 509; 31 **L. R. A. (N. S.)** 132; 50 **L. R. A. (N. S.)** 1040.

§ 2426. Publication, Defined.

Any method by which matter charged as libelous may be communicated to another shall be deemed a publication thereof. [L. '09, p. 940, § 174.]

Cited in 74 Wash. 97, 99.

Publication of Defamatory Matter: See Remington's Digest, Libel, § 47; State v. Tugwell, 19 Wash. 238, 52 Pac. 1056,

43 **L. R. A.** 717; State v. Sefrit, 82 Wash. 520, 144 Pac. 725; State v. Haffer, 94 Wash. 136, 162 Pac. 45, Ann. Cas. 1917E, 229, **L. R. A.** 1917C, 610.

§ 2427. Liability of Editors and Others.

Every editor or proprietor of a book, newspaper or serial, and every manager of a copartnership or corporation by which any book, newspaper or serial is issued, is chargeable with the publication of any matter contained in any such book, newspaper or serial, but in every prosecution for libel the defendant may show in his defense that the matter complained

of was published without his knowledge or fault and against his wishes by another who had no authority from him to make such publication, and was retracted by him as soon as known with an equal degree of publicity. [L. '09, p. 941, § 175.]

Cited in 100 Wash. 661.

§ 2428. Report of Proceedings Privileged.

No prosecution for libel shall be maintained against a reporter, editor, proprietor, or publisher of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceeding, or of any statement, speech, argument or debate in the course of the same, without proving actual malice in making the report. The editor or proprietor of a book, newspaper or serial shall be proceeded against in the county where such book, newspaper or serial is published. [L. '09, p. 941, § 176.]

Cited in 74 Wash. 97, 98; 82 Wash. 538, 540.

Under this section, the privilege is to be confined strictly to a fair report of the actual proceedings in court, and is no defense to the publication of a charge

that a prosecuting attorney refused to prosecute a criminal the purport of which was not to report proceedings, but to criticise the official: *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725.

§ 2429. Venue.

Every other person publishing a libel in this state may be proceeded against in any county where such libelous matter was published or circulated, but a person shall not be proceeded against for the publication of the same libel against the same person in more than one county. [L. '09, p. 941, § 177.]

Cited in 74 Wash. 98.

This section includes editors, proprietors and publishers of books and papers published without the state and circulated within the state: *State v. Piver*, 74 Wash. 96, 132 Pac. 858, Ann. Cas. 1915A, 695, 49 L. R. A. (N. S.) 941.

Jurisdiction and Venue: See *Remington's Digest*, Libel, § 49; *State v. Piver*, 74 Wash. 96, 132 Pac. 858, Ann. Cas. 1915A, 695, 49 L. R. A. (N. S.) 941.

Venue of criminal prosecution for libel. 9 Ann. Cas. 382; Ann. Cas. 1915A, 697; 49 L. R. A. (N. S.) 941.

§ 2430. Privileged Communications.

Every communication made to a person entitled to or concerned in such communication, by one also concerned in or entitled to make it, or who stood in such relation to the former as to offer a reasonable ground for supposing his motive to be innocent, shall be presumed not to be malicious, and shall be termed a privileged communication. [L. '09, p. 941, § 178.]

Cited in 82 Wash. 536; 100 Wash. 664.

PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN. See *Remington's Digest*, Libel, §§ 9—16. **Nature and Grounds of Privilege in General:** *Stewart v. Major*, 17 Wash. 238, 49 Pac. 503; *McKillop v. Grays Harbor Publishing Co.*, 100 Wash. 657, 171 Pac. 1026.

See, also, *Enright v. Bringgold*, 106 Wash. 233, 179 Pac. 844; *Prins v. Holland-North American Mtg. Co.*, 107 Wash. 206, 181 Pac. 680, 5 A. L. R. 451.

§ 10. Absolute Privilege—Judicial Proceedings: *Abbott v. National Bank of Com.*, 20 Wash. 552, 56 Pac. 376; *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845; *Houghton v. Humphries*, 85 Wash. 50, 147 Pac. 641, L. R. A. 1915E, 1051; *Viss v. Calligan*, 91 Wash. 673, 158 Pac. 1012, Ann. Cas. 1918A, 819.

§ 10-1. — Official Acts, Reports and Records: *Bass v. Matthews*, 69 Wash. 214, 124 Pac. 384.

§ 11. **Qualified Privilege—Reports of Official Proceedings:** McClure v. Review Pub. Co., 38 Wash. 160, 80 Pac. 303.

§ 12. — **Reports of Mercantile Standing by Credit Association:** Woodhouse v. Powles, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. Rep. 1079, 11 Ann. Cas. 54, 8 L. R. A. (N. S.) 783; Denney v. Northwestern Credit Assn., 55 Wash. 331, 104 Pac. 769, 25 L. R. A. (N. S.) 1021.

§ 13. — **Common Interest in Subject Matter:** Kimble v. Kimble, 14 Wash. 369, 44 Pac. 866; Chambers v. Leiser, 42 Wash. 28, 86 Pac. 627; Bleitz v. Carton, 49 Wash. 545, 95 Pac. 1099; Fahey v. Shafer, 98 Wash. 517, 167 Pac. 1118; McKillip v. Grayz Harbor Pub. Co., 100 Wash. 657, 171 Pac. 1026; Ecuyer v. New York Life Ins. Co., 101 Wash. 247, 172 Pac. 359.

§ 14. **Criticism and Comment on Public Matters:** Byrne v. Funk, 38 Wash. 506, 80 Pac. 772, 3 Ann. Cas. 647; Wilson v. Sun Pub. Co., 85 Wash. 503, 148 Pac. 774, Ann. Cas. 1917B, 442.

§ 15. — **Self-defense:** Byrne v. Funk, 38 Wash. 506, 80 Pac. 772, 3 Ann. Cas. 647.

§ 16. **Exceeding Privilege or Right:** Quinn v. Review Pub. Co., 55 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077; Lathrop v. Sundberg, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381; Ecuyer v. New York Life Ins. Co., 101 Wash. 247, 172 Pac. 359.

See, also, Ecuyer v. New York Life Ins. Co., 107 Wash. 411, 181 Pac. 871, 186 Pac. 327.

§ 2431. **Furnishing Libelous Information.**

Every person who shall willfully state, deliver or transmit by any means whatever, to any manager, editor, publisher, reporter or other employee of a publisher of any newspaper, magazine, publication, periodical or serial, any statement concerning any person or corporation, which, if published therein, would be a libel, shall be guilty of a misdemeanor. [L. '09, p. 941, § 179.]

§ 2432. **Threatening to Publish Libel.**

Every person who shall threaten another with the publication of a libel concerning the latter, or his spouse, parent, child, or other member of his family, and every person who offers to prevent the publication of a libel upon another person upon condition of the payment of, or with intent to extort money or other valuable consideration from any person, shall be guilty of a gross misdemeanor. [L. '09, p. 942, § 180.]

§ 2432-1. **Slander of Financial Institutions.**

Any person who shall willfully and maliciously instigate, make, circulate, or transmit to another or others any false statements concerning the moral or financial condition or affecting the solvency or financial standing of any bank, banking institution or trust company doing business in this state, or who shall willfully counsel, aid, procure, or induce another to start, transmit or circulate any such statement or rumor, shall be guilty of a gross misdemeanor. [L. '13, p. 278, § 1.]

§ 2433. **Slander of Woman.**

Every person who, in the presence or hearing of any person other than the female slandered, whether she be present or not, shall maliciously speak of or concerning any female of the age of twelve years or upwards not a common prostitute, any false or defamatory words or language which shall injure or impair the reputation of any such female for virtue or chastity or which shall expose her to hatred, contempt or ridicule, shall be guilty of a misdemeanor. Every slander herein mentioned shall be deemed to be malicious unless justified, and shall be justified when the language charged as slanderous, false or defamatory

is true and fair, and was spoken with good motives and for justifiable ends. [L. '09, p. 942, § 181.]

Cited in 80 Wash. 604; 106 Wash. 236.

Where the slander was not justified, it is presumed that the words were maliciously spoken, in a prosecution under this section: *State v. Paysse*, 80 Wash. 603, 142 Pac. 3.

This section, defining criminal slander and requiring that the words be spoken

in the presence or hearing of a third person, has no application to a civil action for damages: *Enright v. Bringgold*, 106 Wash. 233, 179 Pac. 844.

Prosecution for criminal slander in imputing want of chastity to woman. 48 L. R. A. (N. S.) 618.

§ 2434. Testimony Necessary to Convict.

No conviction shall be had under the provisions of the preceding sections of this act, upon the testimony of the woman slandered unsupported by other evidence. [L. '09, p. 942, § 182.]

Cited in 64 Wash. 133, 137; 80 Wash. 605.

Under this section, corroboration is only necessary of the facts constituting the gravamen of the offense, so that the

testimony of the prosecutrix tending to show that she was entitled to the protection of the statute need not be corroborated: *State v. Paysse*, 80 Wash. 603, 142 Pac. 3.

CHAPTER VI.

CRIMES AGAINST MORALITY, DECENCY, ETC.

§ 2435. Rape, Defined.

Rape is an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upwards not his wife;

(1.) When, through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent; or

(2.) When her resistance is forcibly overcome; or

(3.) When her resistance is prevented by fear of immediate and great bodily harm which she has reasonable cause to believe will be inflicted upon her; or

(4.) When her resistance is prevented by stupor or weakness of mind produced by an intoxicating narcotic or anaesthetic agent administered by or with the privity of the defendant; or

(5.) When she is at the time unconscious of the nature of the act, and this is known to the defendant;

Shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 942, § 183.]

Cited in 69 Wash. 102; 81 Wash. 389; 82 Wash. 608; 83 Wash. 471; 100 Wash. 586.

In General: See *Remington's Digest*, Rape.

Under this section, the "resistance" spoken of is not one of the essential elements of the crime, but is evidence of want of consent, which is one of the essential elements: *State v. Meyerkamp*, 82 Wash. 607, 144 Pac. 942.

Under this section, subdivision 3, a conviction of rape is sustained where the

prosecutrix was taken to a lonely spot by a number of men for the purpose under a prearranged plan of which she had no notice, and submitted without forcible resistance through fear and because she felt it useless to resist: *State v. Miller*, 100 Wash. 586, 171 Pac. 524.

For text treatment of "Rape," see 22 B. C. L. 1169.

Intercourse under marriage with girl below the age of consent as statutory rape. 10 A. L. R. 409.

Intercourse secured by consent through mock marriage as rape. *Ann. Cas.* 1912C, 131.

Emission as element of crime of rape. 11 *Ann. Cas.* 93.

Capacity of woman to commit rape. *Ann. Cas.* 1913D, 862.

§ 2436. Carnal Knowledge of Children.

Every male person who shall carnally know and abuse any female child under the age of eighteen years, not his wife, and every female person who shall have sexual intercourse with any male child under the age of eighteen years, not her husband, shall be punished as follows:

(1.) When such child is under the age of ten years, by imprisonment in the state penitentiary for life;

(2.) When such child is ten and under fifteen years of age, by imprisonment in the state penitentiary for not less than five years;

(3.) When such child is fifteen and under eighteen years of age, by imprisonment in the state penitentiary for not more than ten years, or by imprisonment in the county jail for not more than one year. [L. '19, p. 368, § 1. Cf. L. '09, p. 943, § 184.]

Cited in 59 Wash. 239; 62 Wash. 693, 694; 66 Wash. 293; 69 Wash. 102; 70 Wash. 66; 81 Wash. 388, 390; 86 Wash. 241; 87 Wash. 276; 94 Wash. 386.

Want of Consent of Female—Female Under Age of Consent.—The age of consent in this state, as respects the crime of rape is twelve years, and not sixteen, since the act of 1885-86, page 84, attempting to amend Code of 1881, section 812, by substituting the word "sixteen" for the word "twelve" was void for the reason that its object was not expressed in its title: *State v. Halbert*, 14 Wash. 306, 44 Pac. 538.

The Laws of 1897, page 19, fixes the age of consent in this state at eighteen years: *State v. Hunter*, 18 Wash. 670, 52 Pac. 247.

Under Ballinger's Code, section 7062, defining rape as (1) the carnal knowledge by force of a female over eighteen years of age, and (2) the carnal knowledge of a female child under the age of eighteen years, an information charging the offense by carnally knowing, by force, a female child under the age of eighteen years, states but one offense, since the act constitutes but a single offense whether one or all of the means specified in the statute were employed in its commission: *State v. Adams*, 41 Wash. 552, 83 Pac. 1108.

An information charging that defendant committed the crime of rape by feloniously making an assault upon a female child of the age of fourteen years, and that he did then and there feloniously ravish, carnally know and abuse her does not charge more than one crime, but sufficiently charges the crime under that subdivision of Ballinger's Code, section 7062, which provides that a person shall be guilty of rape who shall

carnally know any female child under the age of eighteen years: *State v. Priest*, 32 Wash. 74, 72 Pac. 1024.

Ballinger's Code, section 7062, defines carnal knowledge of a female under the age of eighteen years as constituting the crime of rape, and an information which conforms to the terms of the statute is sufficient, without conforming to the common-law requirements in charging such an offense: *State v. Phelps*, 22 Wash. 181, 60 Pac. 134.

In a prosecution for statutory rape under this section, evidence is admissible on the part of the defense of the previous general reputation of the prosecutrix as to unchastity, as going to her credibility as a witness, but is not admissible to prove her unchaste condition: *State v. Workman*, 66 Wash. 292, 119 Pac. 751.

Under this section, there can be no conviction for an offense committed on a certain date where for months prior thereto, the parties had continued sexual relations, without any intervening reformation; and it is immaterial that the prosecutrix was chaste except as to the defendant, "previous chaste character" meaning sexual purity: *State v. Dacke*, 59 Wash. 238, 109 Pac. 1050, 30 L. R. A. (N. S.) 173.

The act is a crime whether or not force is used, and the fact that the prosecuting witness testified in the trial that the defendant used force, while the information charged that defendant did "feloniously carnally know and abuse" the prosecutrix, would not support the objection that the defendant was extradited for one crime and tried for another: *State v. Roller*, 30 Wash. 692, 71 Pac. 718.

ATTEMPTS.—Under sections 28 and 303 of the old Penal Code, an attempt to

commit sexual intercourse with a female under the age of consent is punishable, although the act is not accompanied with violence: *State v. Berzaman*, 10 Wash. 277, 38 Pac. 1037.

Assaults With Intent to Rape.—Though the statutes make it rape to have carnal knowledge of a female under the age of consent, there can, in the absence of fraud, be no assault with intent to rape when she consents, since there can be no assault without force or fraud: *Whitcher*

v. State, 2 Wash. 286, 26 Pac. 268 (overruled).

The consent of the female does not constitute a defense upon a charge of assault with intent to rape a female child under the age of consent, and it is not necessary to allege force: *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *State v. Smith*, 19 Wash. 376, 53 Pac. 338.

Admissibility of complaint by infant victim of rape who is incompetent to testify. 2 A. L. B. 1523.

§ 2437. Sexual Intercourse and Carnal Knowledge Defined.

Any sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge. [L. '09, p. 943, § 186 (185).]

Cited in 69 Wash. 276; 70 Wash. 66; 82 Wash. 431.

In a prosecution for rape, under this section evidence of any penetration, however slight, is sufficient proof of consummation; and the fact may be proved by direct or circumstantial evidence: *State v. Gay*, 82 Wash. 423, 144 Pac. 711.

Under this section, evidence of repeated attempts by the accused and pain suffered by a child of twelve is sufficient to make a case for the jury upon the question of consummation of a statutory rape: *State v. Kincaid*, 69 Wash. 273, 124 Pac. 684.

§ 2438. Compelling a Woman to Marry.

Every person who, by force, menace, or duress, shall compel a woman against her will to marry him or to marry any other person, or to be defiled, shall be punished by imprisonment in the state penitentiary for not more than twenty years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 943, § 186.]

§ 2439. Abduction.

Every person who—

(1.) Shall take a female under the age of eighteen years for the purpose of prostitution or sexual intercourse, or without the consent of her father, mother, guardian or other person having legal charge of her person, for the purpose of marriage; or

(2.) Shall inveigle or entice an unmarried female of previously chaste character into a house of ill fame or assignation, or elsewhere, for the purpose of prostitution; or

(3.) Shall take or detain a woman unlawfully against her will, with intent to compel her by force, menace or duress, to marry him or another person, or to be defiled; or

(4.) Being the parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, shall consent to her taking or detention by any person for the purpose of prostitution or sexual intercourse or for any obscene, indecent or immoral purpose;

Shall be guilty of abduction and punished by imprisonment in the state penitentiary for not more than ten years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 944, § 187.]

Cited in 68 Wash. 680; 88 Wash. 161.

Under this section, an information would be sufficient if it alleges a taking "by means of persuasion, entreaty, advice, flattery, promises or other means to the prosecuting attorney unknown": *State v. Richards*, 88 Wash. 160, 152 Pac. 720.

Proof of corpus delicti in prosecution for abduction. 68 L. B. A. 50.

Evidence of specific instances to prove character for chastity in prosecution for abduction. 14 L. B. A. (N. S.) 725; L. B. A. 1916B, 967.

§ 2440. Placing Female in House of Prostitution.

Every person who—

(1.) Shall place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution, with intent that she shall live a life of prostitution, or who shall compel any female to reside with him or with any other person for immoral purposes, or for the purposes of prostitution, or shall compel any such female to reside in a house of prostitution or to live a life of prostitution; or

(2.) Shall ask or receive any compensation, gratuity or reward, or promise thereof, for or on account of placing in a house of prostitution or elsewhere any female for the purpose of causing her to cohabit with any male person or persons not her husband; or

(3.) Shall give, offer, or promise any compensation, gratuity or reward, to procure any female for the purpose of placing her for immoral purposes in any house of prostitution, or elsewhere, against her will; or

(4.) Being the husband of any woman, or the parent, guardian or other person having legal charge of the person of a female under the age of eighteen years, shall connive at, consent to, or permit her being or remaining in any house of prostitution or leading a life of prostitution; or

(5.) Shall live with or accept any earnings of a common prostitute, or entice or solicit any person to go to a house of prostitution for any immoral purpose, or to have sexual intercourse with a common prostitute;

Shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than two thousand dollars. [L. '09, p. 944, § 188.]

Cited in 59 Wash. 692; 69 Wash. 547, 548; 74 Wash. 293, 296; 84 Wash. 438, 439, 602, 603; 89 Wash. 13; 102 Wash. 266, 267; 106 Wash. 630.

Elements of Offense: See Remington's Digest, Prost., § 1; State ex rel. Zenner v. Graham, 34 Wash. 81, 74 Pac. 1058; State v. Zenner, 35 Wash. 249, 77 Pac. 191; State v. Poole, 42 Wash. 192, 84 Pac. 727; State v. Thuna, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768, 140 Am. St. Rep. 902; State v. Stone, 66 Wash. 625, 120 Pac. 76; State v. Columbus, 74 Wash. 290, 133 Pac. 455; State v. Hanes, 84 Wash. 601, 147 Pac. 193; State v. Kelly, 102 Wash. 265, 172 Pac. 1175.

This section, making it unlawful to live with a common prostitute, is constitutional: State v. Craig, 106 Wash. 630, 180 Pac. 896.

Information: See Remington's Digest, Prost., § 2; State v. Zenner, 35 Wash. 249,

77 Pac. 191; State v. Ilomaki, 40 Wash. 629, 82 Pac. 873; State v. Barker, 43 Wash. 69, 86 Pac. 387; State v. Thuna, 59 Wash. 689, 109 Pac. 331, 111 Pac. 768; 140 Am. St. Rep. 902; State v. Columbus, 74 Pac. 290, 133 Pac. 455; State v. Dodd, 84 Wash. 436, 147 Pac. 9; State v. Crane, 88 Wash. 210, 152 Pac. 989.

See, also, State v. Craig, 106 Wash. 630, 180 Pac. 896.

Defenses: See Remington's Digest, Prost., § 2-1; State v. Hanes, 84 Wash. 601, 147 Pac. 193; State v. Stone, 66 Wash. 625, 120 Pac. 76.

Evidence: See Remington's Digest, Prost., § 3; State v. Ilomaki, 40 Wash. 629, 82 Pac. 873; State v. Risaburo, 61 Wash. 162, 112 Pac. 85; State v. Stone, 66 Wash. 625, 120 Pac. 76.

See, also, State v. Craig, 106 Wash. 630, 180 Pac. 896.

§ 2441. Seduction.

Every person who shall seduce and have sexual intercourse with any female of previously chaste character, shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year or by a fine

of not more than one thousand dollars, or by both fine and imprisonment: Provided, that if at any time before judgment upon an information or indictment, a defendant shall marry such female, the court shall order all further proceedings stayed; and if at any time within three years from the date of such marriage the defendant shall wrongfully fail to support or provide for or shall wrongfully desert or abandon such wife, said proceeding shall be revived and continued in the same manner as though no marriage had taken place, and in the trial of such cause the wife shall be competent to testify and may testify against her husband. [L. '09, p. 945, § 189.]

Cited in 80 Wash. 599; 94 Wash. 386; 112 Wash. 682, 698.

Criminal Responsibility: See Remington's Digest, Seduct., §§ 7—14. **Acts Constituting:** State v. Carter, 8 Wash. 272, 36 Pac. 29; State v. Cochran, 10 Wash. 562, 39 Pac. 155.

§ 8. **Promise of Marriage:** State v. O'Hare, 36 Wash. 516, 70 Pac. 39, 104 Am. St. Rep. 970, 68 L. R. A. 107.

Upon a defense of promise of marriage the state may show that the female seduced was incompetent to marry: State v. Storrs, 112 Wash. 675, 192 Pac. 984, 197 Pac. 17.

§ 9. **Defenses:** State v. Tilden, 79 Wash. 472, 140 Pac. 680.

§ 10. — **Indictment and Information:** State v. Rogan, 18 Wash. 43, 50 Pac. 582.

§ 11. — **Evidence:** State v. Jones, 80 Wash. 588, 142 Pac. 35; State v. Kellogg, 91 Wash. 665, 158 Pac. 344.

§ 12. — **Instructions:** State v. Jones, 80 Wash. 588, 142 Pac. 35.

§ 13. — **Questions for Jury:** State v. Jones, 80 Wash. 588, 142 Pac. 35.

§ 14. — **New Trial:** State v. Carter, 8 Wash. 272, 36 Pac. 29.

For text treatment of "Seduction," see 24 R. C. L. 729. .

§ 2442. Indecent Assault.

Every person who shall take any indecent liberties with, or on the person of any female of chaste character, without her consent, or with or on the person of any female under the age of eighteen years, of chaste character, with or without her consent, shall be guilty of a gross misdemeanor. [L. '09, p. 946, § 190.]

Cited in 105 Wash. 476.

Liability of infant for indecent assault. 36 L. R. A. 205.

CRIMES AGAINST CHILDREN, ETC.

§ 2445. Keeper of Concert and Liquor Saloons.

Every person who—

(1.) Shall admit to or allow to remain in any concert saloon, or in any place owned, kept, or managed by him where intoxicating liquors are sold, given away or disposed of—except a restaurant or dining-room, any person under the age of twenty one years; or,

(2.) Shall admit to, or allow to remain in any dance-house, public pool or billiard hall, or in any place of entertainment injurious to health or morals, owned, kept or managed by him, any person under the age of twenty-one years; or,

(3.) Shall suffer or permit any such person to play any game of skill or chance, in any such place, or in any place adjacent thereto, or to be or remain therein, or admit or allow to remain in any reputed house of prostitution or assignation, or in any place where opium or any

preparation thereof, is smoked, or where any narcotic drug is used, any person under the age of twenty-one years; or,

(4.) Shall sell or give, or permit to be sold or given to any person under the age of twenty-one years any intoxicating liquor, cigar, cigarette, cigarette paper or wrapper, or tobacco in any form; or,

(5.) Shall sell, or give, or permit to be sold or given to any person under the age of eighteen years, any revolver, pistol, or toy pistol;

Shall be guilty of a gross misdemeanor.

It shall be no defense to a prosecution for a violation of this section that the person acted, or was believed by the defendant to act, as agent or representative of another.

Any person between the ages of eighteen and twenty-one years who shall by affirmative misrepresentation of age, purchase, or shall have in his or her possession, any cigar, cigarette, cigarette paper or wrapper, or tobacco in any form, shall be guilty of a misdemeanor. [L. '19, p. 42, § 1. Cf. L. '11, p. 649, § 1. Cf. L. '09, p. 947, § 193; L. '09, Ex. Sess., p. 66, § 1.]

Cited in 61 Wash. 674; 98 Wash. 481.

Under this section, the words "where intoxicating liquors are sold," qualify all the preceding terms, and it is not an offense to allow minors in poolrooms in which no intoxicating liquors are sold:

State v. Anderson, 61 Wash. 674, 112 Pac. 931.

Under this section, neither intent nor willfulness is an element of the offense, and belief that the liquor sold was non-intoxicating is no defense: State v. Moser, 98 Wash. 481, 167 Pac. 1101.

§ 2446. Employment of Minors Prohibited.

Every person who shall employ, or cause to be employed, exhibit or have in his custody for exhibition or employment any minor actually or apparently under the age of eighteen years; and every parent, relative, guardian, employer or other person having the care, custody, or control of any such minor, who shall in any way procure or consent to the employment of such minor—

(1.) In begging, receiving alms, or in any mendicant occupation; or,

(2.) In any indecent or immoral exhibition or practice; or,

(3.) In any practice or exhibition dangerous or injurious to life, limb, health or morals; or,

(4.) As a messenger for delivering letters, telegrams, packages or bundles, to any known house of prostitution or assignation;

Shall be guilty of a misdemeanor. [L. '09, p. 948, § 194.]

§ 2447. Employment of Children.

Every person who shall employ, and every parent, guardian or other person having the care, custody or control of such child, who shall permit to be employed, by another, any male child under the age of fourteen years or any female child under the age of sixteen years at any labor whatever, in or in connection with any store, shop, factory, mine or any inside employment not connected with farm or house work, without the written permit thereto of a judge of a superior court of the county wherein such child may live, shall be guilty of a misdemeanor. [L. '09, p. 948, § 195.]

Cited in 63 Wash. 404; 109 Wash. 526, 527.

Unlawful Employment or Services: See Remington's Digest, Mast. & S., § 27; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 Pac. 869, 4 Ann. Cas. 532; Glucina v. Goss Brick Co., 63 Wash. 401,

115 Pac. 843, 42 L. R. A. (N. S.) 624; Bjornsen v. Northern Pac. R. Co., 84 Wash. 220, 146 Pac. 575.

Validity and construction of child labor acts. 9 Ann. Cas. 1138; 15 Ann. Cas. 473; Ann. Cas. 1913E, 339.

ABORTION.

§ 2448. Abortion, Defined.

Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—

(1.) Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or,

(2.) Use, or cause to be used, any instrument or other means;

Shall be guilty of abortion, and punished by imprisonment in the state penitentiary for not more than five years, or in the county jail for not more than one year. [L. '09, p. 948, § 196.]

Cited in 74 Wash. 121; 88 Wash. 296; 90 Wash. 475.

Requisites and Sufficiency of Information: See Remington's Digest, Abortion, § 1; State v. Power, 24 Wash. 34, 63 Pac. 1112, 63 L. R. A. 902; State v. Pryor, 74 Wash. 121, 132 Pac. 874, 46 L. R. A. (N. S.) 1028; State v. Gaul, 88 Wash. 295, 152 Pac. 1029.

Pregnancy is not an issue under this section: State v. Russell, 90 Wash. 474, 156 Pac. 565.

Pregnancy as element of offense of attempt to procure a miscarriage. 10 A. L. R. 314.

Criminal responsibility of one other than subject or actual perpetrator of abortion. 4 A. L. R. 351.

§ 2449. Pregnant Woman Attempting Abortion.

Every pregnant woman who shall take any medicine, drug or substance, or use or submit to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than one thousand dollars. [L. '09, p. 948, § 197.]

Criminal responsibility of one on whom abortion is committed for

conspiring to commit the crime. 5 A. L. R. 788.

§ 2450. Selling Drugs, etc.

Every person who shall manufacture, sell or give away any instrument, drug, medicine, or other substance, knowing or intending that the same may be unlawfully used in procuring the miscarriage of a woman, shall be guilty of a gross misdemeanor. [L. '09, p. 949, § 198.]

§ 2451. Evidence.

In any prosecution for abortion, attempting abortion, or selling drugs unlawfully, no person shall be excused from testifying as a witness on the ground that said testimony would tend to incriminate himself. [L. '09, p. 949, § 199.]

§ 2452. Concealing Birth.

Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor. [L. '09, p. 949, § 200.]

BIGAMY, ADULTERY, ETC.

§ 2453. Bigamy Defined—How Punished—Exceptions.

Every person who, having a husband or wife living, shall marry another person, or continue to cohabit with such second husband or wife in this state, shall be guilty of bigamy and be punished by imprisonment in the state penitentiary for not more than five years: Provided, that this section shall not extend to a person—

(1.) Whose former husband or wife has been absent for five years exclusively then last past, without being known to him or her within that time to be living, and believed to be dead; or,

(2.) Whose former marriage has been pronounced void, annulled or dissolved by a court of competent jurisdiction. [L. '09, p. 949, § 201.]

For text treatment of "Bigamy," see 3 **R. C. L.** 795.

§ 2454. Punishment of Consort.

Every person who shall knowingly enter into a bigamous marriage with another, or after such marriage, continue to cohabit with such other, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars. [L. '09, p. 950, § 202.]

Criminal responsibility of single person who marries one already married. 5 **A. L. R.** 783.

§ 2455. Incest.

Whenever any male and female persons, nearer of kin to each other than second cousins, computing by the rules of the civil law, whether of the half or the whole blood, shall have sexual intercourse together, both shall be guilty of incest and punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 950, § 203.]

Cited in 62 Wash. 687, 688; 86 Wash. 461—464.

Elements of Offenses—Relationship and Knowledge Thereof: See Remington's Digest, Incest, §§ 2, 3; State v. Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001; State v. Bielman, 86 Wash. 460, 150 Pac. 1194; State v. Bielman, 86 Wash. 460, 150 Pac. 1194. **Consent of Parties and Use of Force:** State v. Nugent, 20 Wash. 522, 56 Pac. 25, 72 Am. St. Rep. 133; State v. Hornaday, 67 Wash. 660, 122 Pac. 322.

Indictment or Information—Requisites and Sufficiency: See Remington's Digest, Incest, § 4; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; State v. Nakashima, 62 Wash. 686, 114 Pac. 894, Ann. Cas. 1912D, 220.

Evidence: See Remington's Digest, Incest, §§ 5—7; State v. Wood, 33 Wash. 290, 74 Pac. 380; State v. Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001. **Weight and Sufficiency in General:** State v. McGilvery, 20 Wash. 240, 55 Pac. 115. **Corroboration of Testimony of Female:** State v. Aker, 54 Wash. 342, 103 Pac. 420, 18 Ann. Cas. 972; State v. Hornaday, 67 Wash. 660, 122 Pac. 322.

Trial: See Remington's Digest, Incest, §§ 8, 9; State v. McGilvery, 20 Wash. 240, 55 Pac. 115; State v. Glindemann, 34 Wash. 221, 75 Pac. 800, 101 Am. St. Rep. 1001.

Illegitimacy of party as affecting the crime of incest. 5 **Ann. Cas.** 67; **Ann. Cas.** 1912B, 502.

May girl below the age of consent be guilty of incest. 27 L. B. A. (N. S.) 872.

Proof of corpus delicti in prosecution for incest. 68 L. B. A. 45.

§ 2456. Crime Against Nature.

Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus, or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 950, § 204.]

Cited in 66 Wash. 159.

For text treatment of "Sodomy," see 8 R. C. L. 333.

§ 2457. Adultery.

Whenever any married person shall have sexual intercourse with any person other than his or her lawful spouse, both such persons shall be guilty of adultery and upon conviction thereof shall be punished by imprisonment in the state penitentiary for not more than two years or by a fine of not more than one thousand dollars: Provided, that no prosecution for violation of the provisions of this section shall be commenced except on complaint of the husband or wife made before a committing magistrate, or by filing an affidavit with the prosecuting attorney, nor after one year from the commission of the offense. [L. '17, p. 341, § 1. Cf. L. '09, p. 950, § 205.]

Cited in 51 Wash. 572, 574; 64 Wash. 416; 106 Wash. 336, 339; 112 Wash. 694.

Persons Liable: See Remington's Digest, Adultery, § 1; State v. Oliver, 12 Wash. 547, 41 Pac. 895; State v. Keith, 48 Wash. 77, 92 Pac. 893.

— **Persons Entitled to Prosecute:** See Remington's Digest, Adultery, § 2; State v. La Bounty, 64 Wash. 415, 116 Pac. 1073.

Under this section, no prosecution for adultery shall be commenced except on complaint of the injured spouse, such

spouse, having made the complaint, has no right to dismiss it, or control the prosecution: State v. Astin, 106 Wash. 336, 180 Pac. 394, 4 A. L. R. 1335.

Evidence: See Remington's Digest, Adultery, §§ 4, 5.

§ 4. **Admissibility:** State v. Moss, 73 Wash. 430, 131 Pac. 1132.

§ 5. — **Weight and Sufficiency:** State v. Wheeler, 93 Wash. 538, 161 Pac. 373.

For text treatment of "Adultery," see 1 R. C. L. 630.

§ 2458. Lewdness.

Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person, and every person who shall be guilty of open or gross lewdness, or make any open and indecent or obscene exposure of his person, or of the person of another, shall be guilty of a gross misdemeanor. [L. '09, p. 950, § 206.]

Cited in 82 Wash. 331.

Proof of corpus delicti in lascivious cohabitation and lewdness. 68 L. B. A. 45.

§ 2459. Obscene Literature.

Every person who—

(1.) Shall sell, lend, or give away, or have in his possession with intent to sell, lend, give away or show any obscene or indecent book,

magazine, pamphlet, newspaper, story paper, writing, picture, drawing, photograph, or any article or instrument of indecent or immoral character; or who shall design, copy, draw, photograph, print, utter, publish or otherwise prepare such a book, picture, drawing, paper or other article; or write or print any circular, advertisement or notice of any kind, or give oral information stating when, where, how or of whom such an indecent or obscene article or thing can be purchased or obtained; or,

(2.) Shall sell, lend, give away or have in his possession with intent to sell, lend, give away or show any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, or largely made up of criminal news, police reports, accounts of criminal deeds, or pictures and stories of deeds of bloodshed, lust or crime; or,

(3.) Shall exhibit within the view of any minor any of the books, papers or other things, hereinbefore enumerated; or,

(4.) Shall hire, use or employ, or having custody or control of his person shall permit any minor to sell, give away, or in any manner distribute any article hereinbefore mentioned; or,

(5.) Shall cause to be performed or exhibited, or engage in the performance or exhibition of any obscene, indecent or immoral show, act or performance;

Shall be guilty of a gross misdemeanor. [L. '09, p. 951, § 207.]

Cited in 97 Wash. 357.

Unlawfulness of obscene literature.

24 L. R. A. 110.

What constitutes obscene publication within prohibitory statute. 11 Ann. Cas. 306.

§ 2460. Indecent Articles, etc.

Every person who shall expose for sale, loan or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion; or shall write, print, distribute, or exhibit any card, circular, pamphlet, advertisement or notice of any kind, stating when, where, how, or of whom such article or medicine can be obtained, shall be guilty of a misdemeanor. [L. '09, p. 951, § 208.]

§ 2461. Prohibited Publications.

Every person who shall publish, and every proprietor, manager or editor who shall permit to be published, in any book, newspaper, magazine or other printed publication circulated wholly or in part in this state—

(1.) Any detailed account of the commission or attempted commission of the crime of rape, carnal knowledge, seduction, adultery, sodomy or any other sexual crime, or of the trial of any person charged therewith; or,

(2.) Any detailed account of the execution of any person convicted of crime; or,

(3.) Any detailed statement of any evidence of indecent, obscene or immoral acts offered in any trial or proceeding; or,

(4.) Any interview with, advertisement for, communication from or account of the actions of any public prostitute, except upon a matter concerning public welfare;

Shall be guilty of a misdemeanor. [L. '09, p. 952, § 209.]

Publication of reports of court proceedings as within statute against obscenity. 16 Ann. Cas. 764.

§ 2462. Advertising Cures of Venereal Diseases.

Every person who shall advertise, either in his own name, or in the name of another person, copartnership or pretended copartnership, association, corporation or pretended corporation, in any newspaper, pamphlet, circular, periodical or in any other written or printed paper, and every owner, publisher, editor or manager of any newspaper, pamphlet, circular, periodical or other written or printed paper, who shall publish, or permit to be published or inserted, an advertisement in any newspaper, pamphlet, circular, periodical or other written or printed paper, owned or controlled by him, or of which he is the editor or manager, and every person who shall distribute, circulate, display or cause to be distributed, circulated or displayed, any newspaper, pamphlet, circular, periodical, or other written or printed paper containing any advertisement for the treatment or cure of venereal diseases, the restoration of lost manhood, or of lost vitality or lost vigor, or monthly regulators for women, or the treatment of diseases of the sexual organs, or diseases caused by sexual vice, self-abuse or any disease of like cause, or the sale of any medicine, drug, compound, mixture, appliance, or any means whatever, whereby sexual diseases of men or women may be cured or relieved, shall be guilty of a gross misdemeanor. [L. '21, p. 661, § 1. Cf. L. '09, p. 592, § 210.]

Prohibitory statutes against advertising cure of venereal diseases. Ann. Cas. 1916A, 910.

§ 2462-1. Use of Certain Words Prima Facie Evidence.

Any advertisement in any newspaper, periodical, pamphlet, circular or other written or printed paper, containing the words, "lost manhood," "lost vitality," "lost vigor," "monthly regulators for women," or words synonymous therewith, shall be prima facie evidence of intent to violate this act by the person or persons so advertising, or causing to be advertised, or publishing or permitted to be published, or distributing, circulating and displaying or causing to be distributed, circulated or displayed, any such advertisement. [L. '21, p. 662, § 2.]

§ 2463. Advertising for Divorce Business.

Every person who shall cause to be published in any newspaper, magazine or other publication, or who shall cause or allow to be posted or distributed, in any place frequented by the public, any card or notice offering to procure or obtain, or to directly or indirectly aid in procuring or obtaining any divorce or the dissolution or nullification of any marriage, or offering to appear or act as attorney or counsel in any suit for divorce, alimony, or the dissolution or nullification of any marriage, either in this state or elsewhere, shall be guilty of a misdemeanor. Any advertisement stating or intimating that any person is a specialist

in "the laws of husband and wife" or "domestic relations," or is engaged in the business of procuring divorces, shall be considered a violation of this act. [L. '17, p. 343, § 1. Cf. L. '09, p. 592, § 211.]

Prohibitory statutes against advertising procurement of divorces. *Ann. Cas.* 1916A, 904.

LOTTERIES.

§ 2464. Lotteries, Defined—A Nuisance—Drawing, How Punished.

A lottery is a scheme for the distribution of money or property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether it shall be called a lottery, raffle, gift enterprise, or by any other name, and is hereby declared unlawful and a public nuisance.

Every person who shall contrive, propose or draw a lottery, or shall assist in contriving, proposing or drawing a lottery, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 953, § 212.]

For text treatment of "Lotteries," see 17 *B. C. L.* 1208.

§ 2465. Selling Tickets—Advertising.

Every person who shall sell, give, or in any way whatever furnish or transfer to or for another, a ticket, chance, share or interest, or any paper, certificate or instrument purporting to be or to represent a ticket, chance, share or interest in, or dependent upon the event of, a lottery, to be drawn within or without the state; or who by writing, printing, circular or letter, or in any other way shall advertise or publish the account of a lottery in or out of the state, stating how, when or where the same is to be or has been drawn, or what are the prizes therein, or any of them, or the price of a ticket, or any share or interest therein, or where or how it may be obtained, shall be guilty of a gross misdemeanor. [L. '09, p. 953, § 213.]

The provision in Penal Code, section 139 (Bal. Code, § 7259), permitting lotteries for charitable purposes, although enacted prior to the framing of the con-

stitution, falls within the constitutional prohibition against lotteries, and is therefore invalid: *Seattle v. Chin Let*, 19 Wash. 38, 52 Pac. 324.

§ 2466. Disposal of Property by Lottery—Keeping Office—Letting Building.

Every person who shall offer for sale or distribution in any way any real or personal property, or any interest therein, to be determined by lot or chance, dependent upon the drawing of a lottery in or out of the state; or who shall sell, furnish or procure in any manner a chance or share, or any interest in property offered for sale or distribution in violation of this section, or a ticket or other evidence of any such chance, share or interest; or who shall open, set up, or keep for himself or another, an office or place for registering the number of tickets in a lottery in or out of the state, or for making, receiving, or registering any bets or stakes for the drawing or result of such lottery; or who shall advertise or in any way publish any account of an opening, setting up, or keeping of such an office or place; or who shall knowingly

let, or permit to be used, any building or portion thereof for any of the purposes specified in this subdivision;

Shall be guilty of a gross misdemeanor. [L. '09, p. 953, § 214.]

§ 2467. Insuring Lottery Tickets—Advertising Offers to Insure.

Every person who shall insure, or receive any consideration for insuring, for or against the drawing of a ticket, share or interest in a lottery, or of a number of such ticket, share or interest; or who shall receive any valuable consideration, upon an agreement to pay money or deliver property in the event that a ticket, share or interest, or a number of such a ticket, share or interest in a lottery shall prove fortunate or unfortunate, or shall be drawn or not drawn in a proper way or in a proper order; or who shall promise or agree or offer to pay money or deliver property, or to do or forbear to do any act for the benefit of any person, with or without consideration, upon any accident or contingency dependant upon the drawing thereof, or of any number or ticket therein, or who, by writing, printing, circular or letter, or in any way, shall advertise or publish an offer or proposition in violation of the provisions of this section;

Shall be guilty of a gross misdemeanor. [L. '09, p. 954, § 215.]

§ 2468. Lotteries Out of State—Advertisement by Nonresidents.

The provisions of this subdivision are applicable to lotteries drawn, or to be drawn out of the state, whether authorized or not by the laws of the state or county where they are to be drawn, in the same manner as to those in the state, and every provision of law relating to advertising lotteries or offers to insure lottery tickets, shall be applicable, whenever the advertisement was published, or the letter or circular sent or delivered, through or in the state, though the person causing or procuring the same to be published, sent or delivered was out of the state at the time of so doing. [L. '09, p. 954, § 216.]

GAMBLING.

§ 2469. Conducting Gambling.

Every person who shall open, conduct, carry on or operate, whether as owner, manager, agent, dealer, clerk, or employee, and whether for hire or not, any gambling game or game of chance, played with cards, dice, or any other device, or any scheme or device whereby any money or property or any representative of either, may be bet, wagered or hazarded upon any chance, or any uncertain or contingent event, shall be a common gambler, and shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 955, § 217.]

Cited in 63 Wash. 36, 37; 74 Wash. 563; 94 Wash. 467; 109 Wash. 21.

CRIMINAL RESPONSIBILITY: See Remington's Digest, Gaming, §§ 9—20. **Statutory Provisions:** Foster v. Territory, 1 Wash. 411, 25 Pac. 459; Dietrick, In re, 32 Wash. 471, 73 Pac. 506.

§ 10. Games, Sports and Devices Prohibited: Seattle v. McDonald, 47 Wash.

298, 91 Pac. 952, 17 L. R. A. (N. S.) 49; State v. Preston, 49 Wash. 298, 95 Pac. 82; State v. Shanklin, 51 Wash. 35, 97 Pac. 969; State v. Gaasch, 56 Wash. 381, 105 Pac. 817; State v. Smith, 58 Wash. 235, 108 Pac. 618.

§ 11. Indictment or Information—Requisites and Sufficiency in General: State v. Hoffman, 56 Wash. 622, 106

Pac. 139; State v. Hardwick, 63 Wash. 35, 114 Pac. 873; State v. Robey, 74 Wash. 562, 134 Pac. 174.

§ 12. — **Description of Game, Device or Implements:** Harland v. Territory, 3 W. T. 131, 13 Pac. 453; State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Burns, 54 Wash. 113, 102 Pac. 886; State v. Moser, 94 Wash. 465, 162 Pac. 582.

§ 13. — **Keeping House or Place:** Schilling v. Territory, 2 W. T. 283, 5 Pac. 926; State v. Burns, 54 Wash. 113, 102 Pac. 886; State v. Gaasch, 56 Wash. 381, 105 Pac. 817.

§ 14. — **Ownership and Use of House or Place:** Foster v. Territory, 1 Wash. 411, 25 Pac. 459; State v. Wilson, 9 Wash. 16, 36 Pac. 967.

§ 15. — **Issues, Proof and Variance:** Harland v. Territory, 3 W. T. 131, 13 Pac. 453.

§ 16. **Evidence—Admissibility:** State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Moser, 94 Wash. 465, 162 Pac. 582.

§ 17. — **Weight and Sufficiency:** Everett v. Simmons, 86 Wash. 276, 150 Pac. 414; State v. Moser, 94 Wash. 465, 162 Pac. 582.

§ 18. **Trial—Instructions:** State v. Wilson, 9 Wash. 16, 36 Pac. 967; State v. Fountain, 14 Wash. 236, 44 Pac. 270; Everett v. Simmons, 86 Wash. 276, 150 Pac. 414.

§ 19. — **Verdict:** State v. Smith, 58 Wash. 235, 108 Pac. 618.

A verdict finding the accused guilty as charged in an information for gambling under this section, is not void for indefiniteness or uncertainty, nor insufficient because not enumerating specifically the several acts charged; there being no degrees in the crime charged: State v. Moser, 94 Wash. 465, 162 Pac. 582.

§ 20. **Sentence and Punishment:** Foster v. Territory, 1 Wash. 411, 25 Pac. 459.

For text treatment of "Gaming," see 12 R. C. L. 704.

§ 2470. Gambling.

Every person who shall bet, wager or hazard any money or property, or any representative of either, upon any game, scheme or device, opened, conducted, carried on or operated in violation of the last section, shall be guilty of a misdemeanor. [L. '09, p. 955, § 218.]

Cited in 63 Wash. 37.

§ 2471. Swindling.

Every person who, by color, or aid of any trick or sleight of hand performance, or by any fraud or fraudulent scheme, cards, dice, or device, shall win for himself or for another any money or property, or representative of either, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 955, § 219.]

Cited in 72 Wash. 113.

§ 2472. Possession of Gambling Devices.

Every person who shall have in his possession or shall permit to be placed or kept in any building or boat, or part thereof, owned, leased or occupied by him, any table, slot machine, or any other article, device or apparatus of a kind commonly used for gambling, or operated for the losing or winning of any money or property, or any representative of either, upon any chance or uncertain or contingent event, shall be guilty of a gross misdemeanor. [L. '09, p. 955, § 220.]

§ 2473. Poolselling and Book-making.

Every person, whether acting in his own behalf, or as an agent, servant or employee of another person within or outside of this state, who shall sell any pool, make any book, or receive, record, register, transmit or forward any bet or wager, or any money or property or thing of value designed or intended to be bet, wagered or hazarded, upon the result of any contest or trial of skill, speed or endurance between men or

beasts, whether such contest or trial take place within or outside of this state, or upon the result of any lot, chance, casualty, or uncertain or contingent event whatever, shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 956, § 221.]

See, also, *infra*, § 2721.

What constitutes buying or selling pools within statute against gaming. *Ann. Cas.* 1916B, 100; *Ann. Cas.* 1918A, 179.

What constitutes "book-making" within statute against gaming or gambling. 17 *Ann. Cas.* 1084.

§ 2474. Allowing Building to be Used.

Every person being in possession or control of any tent, building, float or vessel, or part thereof, who shall knowingly permit the same, or any part thereof, to be used for gambling, swindling, poolselling, or book-making, or for betting, wagering or hazarding money or property, or any representative of either, upon any game, scheme or device, or upon the result of any lot, chance, or uncertain or contingent event whatever, shall be guilty of a gross misdemeanor. [L. '09, p. 956, § 222.]

§ 2475. Bucket-shop, Defined.

A bucket-shop is hereby defined to be a shed, tent, tenement, booth, building, float or vessel, or any part thereof, wherein may be made contracts respecting the purchase or sale upon margin or credit of any commodities, securities, or property, or option for the purchase thereof, wherein both parties intend that such contract shall or may be terminated, closed and settled; either;

(1) Upon the basis of the market prices quoted or made on any board of trade or exchange upon which such commodities, securities or property may be dealt in; or,

(2) When the market prices for such commodities, securities or property shall reach a certain figure in any such board of trade or exchange; or,

(3) On the basis of the difference in the market prices at which said commodities, securities or property are, or purport to be, bought and sold. [L. '09, p. 956, § 223.]

Applicability to bucket shops of penal statutes in relation to "games of hazard," "gambling devices," etc.

25 *L. B. A. (N. S.)* 158; 17 *Ann. Cas.* 709.

§ 2476. Maintaining Bucket-shop—Penalty.

Every person, whether in his own behalf, or as agent, servant or employee of another person, within or outside of this state, who shall open, conduct or carry on any bucket-shop, or make or offer to make any contract described in the last section, or with intent to make such a contract, or assist therein, shall receive, exhibit, or display, any statement of market prices of any commodities, securities, or property, shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 957, § 224.]

§ 2477. Written Statement to be Furnished—Presumption.

Every person, whether in his own behalf, or as the servant, agent or employee of another person, within or outside of this state, who shall

buy or sell for another, or execute any order for the purchase or sale of any commodities, securities or property, upon margin or credit, whether for immediate or future delivery, shall, upon written demand therefor, furnish such principal or customer with a written statement containing the names of the persons from whom such property was bought, or to whom it has been sold, as the case may be, the time when, the place where, the amount of, and the price at which the same was either bought or sold; and if such person shall refuse or neglect to furnish such statement within forty-eight hours after such written demand, such refusal shall be prima facie evidence as against him that such purchase or sale was made in violation of section 2476. [L. '09, p. 957, § 225.]

§ 2478. Seizure and Disposition of Gambling Devices.

It shall be the duty of all peace officers to search for and seize all tables, slot machines, or other article, machine, device or apparatus of the kind commonly used for gambling, or operated for the winning or losing of money or property, or any representative of either, upon any chance or uncertain or contingent event, and all property useful in the operation or maintenance of a bucket-shop, and take the same before a magistrate. If in the judgment of such magistrate any of such articles may be useful as evidence in the trial of any case, he may order the same held for such trial or delivered to the prosecuting attorney; otherwise, he shall order the same to be forthwith destroyed. After the final hearing and disposition of any case in which any of said articles may be held or used as evidence, whether such case result in a conviction or acquittal, the magistrate or judge having jurisdiction of such case shall forthwith order all such articles destroyed. [L. '09, p. 957, § 226.]

Validity of statutes authorizing seizure and destruction of gambling

apparatus. 2 **Ann. Cas.** 936; 13 **Ann. Cas.** 454.

§ 2479. Bunco-steering.

Every person who shall entice or induce another, upon any pretense, to go to any place where any gambling game, scheme or device, or any trick, sleight-of-hand performance, fraud or fraudulent scheme, cards, dice or device, is being conducted or operated; or while in such place shall entice or induce another to bet, wager or hazard any money or property, or representative of either, upon any such game, scheme, device, trick, sleight-of-hand performance, fraud or fraudulent scheme, cards, dice, or device, or to execute any obligation for the payment of money, or delivery of property, or to lose, advance, or loan any money or property, or representative of either, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 957, § 227.]

§ 2480. Evidence—Testimony of Player.

No person shall be excused from giving testimony concerning any offense committed by another against any of the provisions of sections 2469 or 2473, inclusive by reason of his having bet or played at the prohibited game or device. [L. '09, p. 957, § 228.]

PAWNBROKERS AND SECOND-HAND DEALERS.

§ 2481. Pawnbrokers and Second-hand Dealers—Duty to Record Transactions.

It shall be the duty of every pawnbroker and second-hand dealer doing business in any city of the first class in this state to maintain in his place of business a book or other permanent record in which shall be legibly written in the English language, at the time of each loan, purchase or sale, a record thereof containing—

- (1) The date of the transaction;
- (2) The name of the person or employee conducting the same;
- (3) The name, age, street and house number, and a general description of the dress, complexion, color of hair, and facial appearance of the person with whom the transaction is had;
- (4) The name and street and house number of the owner of the property bought or received in pledge;
- (5) The street and house number of the place from which the property bought or received in pledge was last removed;
- (6) A description of the property bought or received in pledge, which in the case of watches shall contain the name of the maker and the number of both the works and the case, and in the case of jewelry shall contain a description of all letters and marks inscribed thereon: Provided, that when the article bought or received is furniture, or the contents of any house or room actually inspected on the premises, a general record of the transaction shall be sufficient;
- (7) The price paid or the amount loaned;
- (8) The names and street and house numbers of all persons witnessing the transaction; and
- (9) The number of any pawn ticket issued therefor. [L. '09, p. 959, § 229.]

Cited in 80 Wash. 173.

A contract of pledge providing for a violation of sections 2481—2483, does not render the contract void; since the statute was a regulation of business and did not provide that a contract violating its provisions should be void. *Lane v. Henry*, 80 Wash. 172, 141 Pac. 365.

State or municipal regulation of pawnbrokers. *Ann. Cas.* 1913D, 1281; 32 L. R. A. 117.

Power to regulate traffic in rags, second-hand articles and junk. 32 L. R. A. 116; 24 L. R. A. (N. S.) 1168.

§ 2482. Inspection of Records and Goods.

Such record, and all goods received, shall at all times during the ordinary hours of business be open to the inspection of the prosecuting attorney or of any peace officer. [L. '09, p. 959, § 230.]

Cited in 80 Wash. 173.

§ 2483. Report to Chief of Police.

Every pawnbroker and second-hand dealer doing business in any city of the first and second class shall, before noon of each day, furnish to the chief of police of such city, on such forms as such chief of police may provide therefor, a full, true and correct transcript of the record of all transactions had on the preceding day, and having good cause to believe that any property in his possession has been previously lost or

stolen, he shall forthwith report such fact to the chief of police, together with the name of the owner, if known, and the date when, and the name of the person from whom the same was received by him. [L. '09, p. 960, § 231.]

Cited in 80 Wash. 173.

§ 2484. Retention of Property.

No property bought or received in pledge by any pawnbroker or second-hand dealer shall be removed from his place of business, except when redeemed by the owner thereof, within four days after the receipt thereof shall have been reported to the chief of police as herein provided. [L. '09, p. 960, § 232.]

§ 2485. Penalty.

Every pawnbroker or second-hand dealer, and every clerk, agent or employee of such pawnbroker or second-hand dealer, who shall—

(1.) Fail to make an entry of any material matter in his book or record kept as provided for in section 2483; or,

(2.) Make any false entry therein; or,

(3.) Falsify, obliterate, destroy or remove from his place of business such book or record; or,

(4.) Refuse to allow the prosecuting attorney or any peace officer to inspect the same, or any goods in his possession, during the ordinary hours of business; or,

(5.) Report any material matter falsely to the chief of police; or,

(6.) Having forms provided therefor, shall fail before noon of each day to furnish the chief of police with a full, true and correct transcript of the record of all transactions had on the previous day, it being the intent of this section that Saturday's business may be reported on Monday; or,

(7.) Fail to report forthwith to the chief of police the possession of any property which he may have good cause to believe has been lost or stolen, together with the name of the owner, if known, and the date when, and the name of the person from whom the same was received by him; or,

(8.) Remove, or allow to be removed from his place of business, except upon redemption by the owner thereof, any property received, within four days after the receipt thereof shall have been reported to the chief of police; or,

(9.) Receive any property from any person under the age of twenty-one years, any common drunkard, any habitual user of narcotic drugs, any habitual criminal, any person in an intoxicated condition, any known thief or receiver of stolen property, or any known associate of such thief or receiver of stolen property, whether such person be acting in his own behalf or as the agent of another;

Shall be guilty of a misdemeanor. [L. '09, p. 960, § 233.]

§ 2486. Rates of Interest and Sale of Pledged Property.

All pawnbrokers are authorized to charge and receive interest at the rate of three per cent a month for money loaned on the security of personal property actually received in pledge, and every person who shall

ask or receive a higher rate of interest or discount on any such loan, or on any actual or pretended sale, or redemption of personal property, or who shall sell any property held for redemption within ninety days after the period for redemption shall have expired, shall be guilty of a misdemeanor. [L. '09, p. 961, § 234.]

See *infra*, § 7300, legal rate of interest.

§ 2487. "Pawnbroker" Defined.

Every person engaged, in whole or in part, in the business of loaning money on the security of pledges, deposits or conditional sales of personal property, shall be deemed to be a pawnbroker. [L. '09, p. 961, § 235.]

§ 2488. "Second-hand Dealer" Defined.

Every person engaged in whole or in part in the business of buying or selling second-hand personal property, metal junk, or melted metals, shall be deemed to be a second-hand dealer. [L. '09, p. 961, § 236.]

RIGHTS OF SEPULTURE.

§ 2489. Rights of Sepulture—Dissection, When Permitted.

The right to dissect the dead body of a human being shall be limited to cases specially provided by statute or by the direction or will of the deceased; cases where a coroner is authorized to hold an inquest upon the body, and then only as he may authorize dissection; and cases where the husband, wife or next of kin charged by law with the duty of burial shall authorize dissection for the purpose of ascertaining the cause of death, and then only to the extent so authorized. Every person who shall make, cause or procure to be made any dissection of the body of a human being, except as hereinbefore provided, shall be guilty of a gross misdemeanor. [L. '09, p. 962, § 237.]

See, also, *infra*, § 10029.

§ 2490. Burial or Cremating.

Except in cases of dissection provided for in the last section, and where a dead body shall rightfully be carried through or removed from the state for the purpose of burial elsewhere, every dead body of a human being lying within this state, and the remains of any dissected body, after dissection, shall be decently buried, or cremated within a reasonable time after death. [L. '09, p. 962, § 238.]

See *infra*, § 6038, burial without permit.

§ 2491. Opening Grave—Stealing Body—Receiving Same.

Every person who shall remove the dead body of a human being, or any part thereof, from a grave, vault, or other place where the same has been buried or deposited awaiting burial or cremation, without authority of law, with intent to sell the same, or for the purpose of securing a reward for its return, or for dissection, or from malice or wantonness, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars, or by both.

Every person who shall purchase or receive, except for burial or cremation, any such dead body, or any part thereof, knowing that the same has been removed contrary to the foregoing provisions, shall be punished by imprisonment in the state penitentiary for not more than three years, or by a fine of not more than one thousand dollars, or by both.

Every person who shall open a grave or any other place of interment, temporary or otherwise, or a building where such dead body is deposited while awaiting burial or cremation, with intent to remove said body or any part thereof, for the purpose of selling or demanding money for the same, for dissection, from malice or wantonness, or with intent to sell or remove the coffin or of any part thereof, or anything attached thereto, or any vestment, or other article interred, or intended to be interred with the body, shall be punished by imprisonment in the state penitentiary for not more than three years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 962, § 239.]

§ 2492. Interfering With Dead Body or Funeral.

Every person who shall arrest or attach the dead body of a human being upon a debt or demand, or shall detain or claim to detain it for any debt or demand, or upon any pretended lien or charge; or who, without authority of law, shall obstruct or detain a person engaged in carrying or accompanying the dead body of a human being to a place of burial or cremation shall be guilty of a misdemeanor. [L. '09, p. 963, § 240.]

§ 2493. Opening Road Through Cemetery.

Every person who shall make or open any road, or construct any railway, turnpike, canal, or other public easement over, through, in, or upon, such part of any inclosure as may be used for the burial of the dead, without authority of law or the consent of the owner thereof, shall be guilty of a misdemeanor. [L. '09, p. 963, § 241.]

SABBATH-BREAKING.

§ 2494. Sabbath-breaking, Defined.

Every person who, on the first day of the week, shall promote any noisy or boisterous sport or amusement, disturbing the peace of the day; or who shall conduct or carry on, or perform or employ any labor about any trade or manufacture, except livery-stables, garages and works of necessity or charity conducted in an orderly manner so as not to interfere with the repose and religious liberty of the community; or who shall open any drinking saloon, or sell, offer or expose for sale, any personal property, shall be guilty of a misdemeanor: Provided, that meals, without intoxicating liquors, may be served on the premises or elsewhere by caterers, and prepared tobacco, milk, fruit, confectionery, newspapers, magazines, medical and surgical appliances may be sold in a quiet and orderly manner. In works of necessity or charity is included whatever is needful during the day for the good order or health or comfort of a community; but keeping open a barber-shop, shaving or cutting hair shall not be deemed a work of necessity or charity, and nothing in this section shall be construed to permit the sale of uncooked meats, groceries, clothing, boots or shoes. [L. '09, p. 963, § 242.]

Cited in 60 Wash. 278; 80 Wash. 104, 105, 107.

Constitutionality of Sunday laws generally. 12 Ann. Cas. 1096; Ann. Cas. 1913E, 935; 22 L. R. A. 721.

Validity of classification in Sunday law. 14 L. R. A. (N. S.) 1259; 32 L. R. A. (N. S.) 1190.

§ 2495. Obstructing View of Saloon.

Every person being the owner or manager of or an employee in any drinking saloon who shall obstruct the view of the inside thereof from the outside by means of any screen, shade or other devices on any day shall be guilty of a misdemeanor. [L. '09, p. 964, § 243.]

§ 2496. Observance of Other Day.

It shall be a sufficient defense to a prosecution for performing work or labor on the first day of the week that the defendant uniformly keeps another day of the week as holy time and that the act complained of was done in such manner as [will] not disturb others in the observance of the Sabbath. [L. '09, p. 964, § 244.]

§ 2497. Service of Process on the Sabbath Prohibited.

Every person who shall serve any legal process on the Sabbath day, except in case of a breach, or apprehended breach, of the peace, or when sued out for the apprehension of a person charged with a crime, or where such service is expressly authorized by statute, shall be guilty of a misdemeanor. [L. '09, p. 964, § 245.]

§ 2498. Preventing Religious Act.

Every person who by threats or violence shall willfully prevent another person from performing any lawful act enjoined upon or recommended to him by the religion which he professes, shall be guilty of a misdemeanor. [L. '09, p. 965, § 246.]

§ 2499. Disturbing Religious Meeting.

Every person who shall willfully disturb, interrupt, or disquiet any assemblage of people met for religious worship—

(1.) By noisy, rude or indecent behavior, profane discourse, either within the place where such meeting is held, or so near it as to disturb the order and solemnity of the meeting; or,

(2.) By exhibiting shows or plays, or promoting any racing of animals, or gaming of any description, or engaging in any boisterous or noisy amusement; or,

(3.) By disturbing in any manner, without authority of law within one mile thereof, free passage along a highway to the place of such meeting, or by maliciously cutting or otherwise injuring or disturbing a harness, conveyance, tent or other property belonging to any person in attendance upon such meeting;

Shall be guilty of a misdemeanor. [L. '09, p. 965, § 247.]

Cited in 108 Wash. 207.

See, also, *infra*, § 2547.

"Place of worship" or "meeting for divine worship" within statute against disturbance. 19 Ann. Cas.

448; 30 L. R. A. (N. S.) 829; 45 L. R. A. (N. S.) 108.

Intent as element of offense of disturbing meeting. Ann. Cas. 1914B, 741.

CHAPTER VII.

CRIMES AGAINST PUBLIC HEALTH AND SAFETY.

§ 2500. Public Nuisance.

A public nuisance is a crime against the order and economy of the state. Every place

(1.) Wherein any gambling, swindling game or device, book-making, pool-selling, or bucket-shop or any agency therefor shall be conducted, or any article, apparatus or device useful therefor shall be kept; or,

(2.) Wherein any fighting between men or animals or birds shall be conducted; or,

(3.) Wherein any intoxicating liquors are kept for unlawful use, sale or distribution; or,

(4.) Where vagrants resort; and

Every act unlawfully done and every omission to perform a duty, which act or omission

(1.) Shall annoy, injure or endanger the safety, health, comfort, or repose of any considerable number of persons; or,

(2.) Shall offend public decency; or,

(3.) Shall unlawfully interfere with, befoul, obstruct, or tend to obstruct, or render dangerous for passage, a lake, navigable river, bay, stream, canal or basin, or a public park, square, street, alley or highway; or,

(4.) Shall in any way render a considerable number of persons insecure in life or the use of property;

Shall be a public nuisance. [L. '09, p. 965, § 248.]

CRIMINAL PROSECUTIONS: See Remington's Digest, Nuis., §§ 29—33. **Persons Entitled to Prosecute:** Jones v. St. Paul etc. R. Co., 16 Wash. 25, 47 Pac. 226.

§ 30. Jurisdiction: State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

§ 31. Indictment or Information: State v. Brown, 7 Wash. 10, 35 Pac. 132; State v. Paggett, 8 Wash. 579, 36 Pac. 487; State v. Schaffer, 31 Wash. 305, 71 Pac. 1088.

§ 31-1. — Issues, Proof and Variance: State v. Schaefer, 45 Wash. 9, 87 Pac. 949.

§ 32. Evidence: State v. Paggett, 8 Wash. 579, 36 Pac. 487; State v. Horlacher, 16 Wash. 325, 47 Pac. 748; State v. Terry, 99 Wash. 1, 168 Pac. 513.

§ 33. Order for Abatement of Nuisance on Conviction and Property Affected: State v. Paggett, 8 Wash. 579, 36 Pac. 487.

Criminal liability of municipal corporation for maintaining or failing to abate nuisance. 1 **Ann. Cas.** 964; **Ann. Cas.** 1913D, 303; 39 **L. R. A. (N. S.)** 411.

Criminal responsibility of public officers for nuisance. 2 **L. R. A.** 1916F, 582.

Criminal liability of corporation for nuisance. **Ann. Cas.** 1916C, 463.

Indictment of street railway company for maintaining public nuisance because of overcrowding of cars. 6 **A. L. R.** 134.

§ 2501. Unequal Damage.

An act which affects a considerable number of persons in any of the ways specified in section 2500, is not less a public nuisance because the extent of the damages is unequal. [L. '09, p. 966, § 249.]

§ 2502. Maintaining or Permitting Nuisance.

Every person who shall commit or maintain a public nuisance, for which no special punishment is prescribed; or who shall willfully omit or

refuse to perform any legal duty relating to the removal of such nuisance; and every person who shall let, or permit to be used, any building or boat, or portion thereof, knowing that it is intended to be, or is being used, for committing or maintaining any such nuisance, shall be guilty of a misdemeanor. [L. '09, p. 966, § 250.]

Criminal liability for maintenance of nuisance by servant, agent or partner. 41 L. R. A. 655.

Criminal liability of owner of premises in possession of tenant for nuisance existing thereon. 14 Ann. Cas. 210.

§ 2503. Abatement of Nuisance.

Any court or magistrate before whom there may be pending any proceeding for a violation of section 2502, shall, in addition to any fine or other punishment which it may impose for such violation, order such nuisance abated, and all property unlawfully used in the maintenance thereof destroyed by the sheriff at the cost of the defendant. [L. '09, p. 966, § 251.]

Summary destruction of private property in abating nuisance. 1 Ann. Cas. 345.

§ 2504. Keeping Explosives Unlawfully.

Every person who shall make or keep any explosive or combustible substance in any city or village, or carry it through the streets thereof in a quantity, or manner prohibited by law, or by ordinance of such municipality; and every person who, by careless, negligent or unauthorized use or management of any such explosive or combustible substance, shall injure or cause injury to the person or property of another, shall be guilty of a misdemeanor. [L. '09, p. 966, § 252.]

See, also, supra, § 2403.

Storing of explosives in highway as a nuisance. 11 A. L. R. 719.

§ 2505. Possession of Uninspected Oils and Effacing Brands from Oil Barrels.

Every person who shall sell, or offer for sale, or have in his possession with intent to sell, or who shall knowingly use for illuminating purposes, any oil, or other petroleum product, which shall not have been tested and approved by the state oil inspector, or who shall sell or dispose of any empty oil barrel, cask or package without thoroughly removing and effacing all inspection brands thereon, shall be guilty of a misdemeanor. [L. '09, p. 967, § 253.]

§ 2506. Transporting Explosives.

Any person who shall put up for sale, or who shall deliver to any warehouseman, dock, depot, or common carrier, any package, cask or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder or other explosive or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty of a misdemeanor. [L. '09, p. 967, § 254.]

§ 2507. Person Omitting to Label Drugs, or Labeling Them Wrongly.

Every person who, in putting up any drug, medicine, or food, or preparation used in medical practice, or making up any prescription, or

filling any order for drugs, medicines, food or preparation shall put any untrue label, stamp or other designation of contents upon any box, bottle or other package containing a drug, medicine, food or preparation used in medical practice, or substitute or dispense a different article for or in lieu of any article prescribed, ordered, or demanded, or put up a greater or less quantity of any ingredient specified in any such prescription, order or demand than that prescribed, ordered, or demanded, or otherwise deviate from the terms of the prescription, order, or demand by substituting one drug for another, shall be guilty of a misdemeanor: Provided, however, that, except in the case of physician's prescriptions, nothing herein contained shall be deemed or construed to prevent or impair or in any manner affect the right of an apothecary, druggist, pharmacist or other person to recommend the purchase of an article other than that ordered, required or demanded, but of a similar nature, or to sell such other articles in place or in lieu of an article ordered, required or demanded, with the knowledge and consent of the purchaser. [L. '09, p. 967, § 255.]

Cited in 94 Wash. 122, 124.

In a prosecution for manslaughter through the selling of unbranded poison, in violation of this section, it is not pre-

judicial error to instruct that one violating the act would be guilty of a misdemeanor: State v. Takano, 94 Wash. 119, 162 Pac. 35.

SELLING POISON WITH LABEL, AND RECORDING THE SAME.

§ 2508. Selling Poison Without Labeling and Recording the Sale.

It shall be unlawful for any person to sell at retail or furnish any of the poisons named in the schedules hereinafter set forth, without affixing or causing to be affixed to the bottle, box, vessel or package, a label containing the name of the article and the word "poison" distinctly shown, with the name and place of business of the seller, all printed in red ink, together with the name of such poison printed or written thereon in plain, legible characters, which schedules are as follows, to wit:

SCHEDULE "A."

Arsenic, cyanide or potassium, hydrocyanic acid, cocaine, morphine, strychnia and all other poisonous vegetable alkaloids and their salts, oil of bitter almonds, containing hydrocyanic acid, opium and its preparations, except paregoric and such others as contain less than two grains of opium to the ounce.

SCHEDULE "B."

Aconite, belladonna, cantharides, colchicum, conium, cotton root, digitalis, ergot, hellebore, henbane, phytolacca, strophanthus, oil of tansy, veratrum viride and their pharmaceutical preparations, arsenical solutions, carbolic acid, chloral hydrate, chloroform, corrosive sublimate, creosote, croton oil, mineral acids, oxalic acid, paris green, salts of lead, salts of zinc, white hellebore or any drug, chemical or preparation which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life in quantities of sixty grains or less. Every person who shall dispose of or sell at retail or furnish any poisons included under schedule A shall, before delivering the same, make or cause to be made an entry in a book kept for that purpose, stating the date of sale, the name and address of the purchaser, the name and the quantity of the

poison, the purpose for which it is represented by the purchaser to be required and the name of the dispenser, such book to be always open for inspection by the proper authorities, and to be preserved for at least five years after the last entry. He shall not deliver any of said poisons to any minor, intoxicated person, or person known to be of unsound mind, or to any person without satisfying himself that the purchaser is aware of its poisonous character and that the said poison is to be used for a legitimate purpose.

The foregoing portions of this section shall not apply to the dispensing of medicines, or poisons on physicians' prescriptions. Wholesale dealers in drugs, medicines, pharmaceutical preparations or chemicals shall affix or cause to be affixed to every bottle, box, parcel or outer inclosure of an original package containing any of the articles enumerated under said schedule A, a suitable brand in red ink with the word "poison" upon it. Every person who shall violate any of the provisions of this section shall be guilty of a misdemeanor. [L. '09, p. 968, § 256.]

See *infra*, § 6144, sale of adulterated articles prohibited.

See *infra*, § 10139, sale of adulterated drugs.

See *infra*, § 10140, sale of poisons without recording.

Cited in 94 Wash. 122.

An information charging the accused with producing death through the sale of "wood alcohol" to be used as a beverage is sufficient without charging that it is a poison or that the accused knew it would produce death if drunk; especially in view of this section: *State v. Takano*, 94 Wash. 119, 162 Pac. 35.

Construction of statute regulating sale of poisons by druggist. 20 Ann. Cas. 491.

Constitutionality, construction and effect of statute prohibiting or regulating sale of poisons. 30 L. R. A. (N. S.) 519.

§ 2509. Regulating the Sale of Narcotic Drugs.

It shall be unlawful for any person to sell, furnish or dispose of any opium, morphine, alkaloid cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, except upon the signed prescription of a physician duly licensed under the laws of this state, which prescription shall be retained by the person dispensing the same, shall be filled but once, and of which no copy shall be taken by any person. The person dispensing the same shall at the time thereof indorse on the back of such prescription the name and street and house number of the person to whom dispensed; and the proprietor or manager of the store where dispensed shall keep all such prescriptions in a permanent file, separate from all other prescriptions, in his place of business for the period of two years after the same shall have been dispensed, and shall at any time allow the same to be inspected, and copies thereof to be made by any peace officer, the prosecuting attorney of the county where sold, or any authorized inspector of drugs: Provided, that nothing herein contained shall prohibit any manufacturer or licensed druggist from selling or delivering any of the drugs named to a person known to be a licensed physician or licensed druggist, nor prohibit a physician from dispensing the same in good faith to his patients, nor prohibit the sale of patent or proprietary medicines containing opium or morphine, in combination or compound with other active elements wherein the dose of opium is less than one-quarter grain, or the dose of morphine is less than one-twentieth grain. Every

person who shall violate any of the provisions of this section shall be guilty of a gross misdemeanor. [L. '09, p. 969, § 257.]

Federal Narcotic Act. 13 A. L. R. 858; Ann. Cas. 1917D, 856.

§ 2510. Fraudulent Prescription by Physician.

Every physician who shall sell or give to or prescribe for any person any opium, morphine, alkaloid cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, or any intoxicating liquor, except to a patient believed in good faith to require the same for medicinal use, and in quantities proportioned to the needs of such patient, shall be guilty of a gross misdemeanor. [L. '09, p. 970, § 258.]

See, *infra*, § 10018, practicing without a license.

See, *infra*, § 10019, false personation by, a felony.

§ 2511. Presenting Fraudulent Prescription.

Every person who shall falsely make, forge or alter, or, knowing the same to have been falsely made, forged or altered, shall present to any druggist a physician's prescription with intent by means thereof to procure from such druggist any opium, morphine, alkaloid cocaine, or alpha or beta eucaine, or any derivative, mixture or preparation of any of them, or any intoxicating liquor, shall be guilty of a misdemeanor. [L. '09, p. 970, § 259.]

§ 2516. Willfully Poisoning Food.

Every person who shall willfully mingle poison in any food, drink or medicine intended or prepared for the use of a human being, and every person who shall willfully poison any spring, well or reservoir of water, shall be punished by imprisonment in the state penitentiary for not less than five years, or by a fine of not less than one thousand dollars. [L. '09, p. 972, § 264.]

§ 2517. Dangerous Weapons—Evidence.

Every person who shall manufacture, sell or dispose of or have in his possession any instrument or weapon of the kind usually known as slung shot, sand club, or metal knuckles; shall furtively carry, or conceal any dagger, dirk, knife, pistol, or other dangerous weapon; or who shall use any contrivance or device for suppressing the noise of any firearm, shall be guilty of a gross misdemeanor. [L. '09, p. 972, § 265.]

What constitutes "deadly weapon." Ann. Cas. 1912A, 1328; Ann. Cas. 1916E, 308.

§ 2517-1. Aliens—Firearms Without License Prohibited.

It shall be unlawful for any person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States, to carry or have in his possession at any time any shotgun, rifle or other firearm, without first having obtained a license from the state auditor, and said license is not to be issued by said state auditor except upon the certificate of the consul domiciled in the state of Washington and representing the country of such alien, that he is a responsible person and upon the payment for said license of the sum of fifteen dollars (\$15); nothing in this section contained shall be construed to allow aliens to hunt or fish in this state without first having obtained a regular

hunting or fishing license. Any person violating the provisions of this section shall be guilty of a misdemeanor. [L. '11, p. 303, § 1.]

§ 2518. Setting Spring-gun.

Every person who shall set a so-called trap, spring pistol, rifle, or other deadly weapon, shall be punished as follows:

(1.) If no injury result therefrom to any human being, by imprisonment in the county jail for not more than one year or by a fine of not more than one thousand dollars, or by both.

(2.) If injuries not fatal result therefrom to any human being, by imprisonment in the state penitentiary for not more than twenty years.

(3.) If the death of a human being results therefrom, by imprisonment in the state penitentiary for not more than twenty years. [L. '09, p. 973, § 266.]

§ 2519. Obstruction of Extinguishment of Fire.

Every person who, with intent to prevent or obstruct the extinguishment of any fire, shall cut or remove any bell rope, wire or other apparatus for communicating an alarm of fire, or cut, injure or destroy any engine, hose, or other fire apparatus, or otherwise prevent or obstruct the extinguishment of any fire, shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars. [L. '09, p. 973, § 267.]

§ 2520. Obstructing Firemen.

Every person who at the burning of any building shall be guilty of any disobedience to the lawful orders of a public officer or fireman or of resistance to or interference with the lawful efforts of any fireman, or company of firemen to extinguish the same, or of disorderly conduct likely to interfere with the extinguishment thereof, or who shall forbid, prevent or dissuade others from assisting to extinguish such fire, shall be guilty of a misdemeanor. [L. '09, p. 973, § 268.]

§ 2521. Smoking, Where Prohibited.

Every person who shall light a pipe, cigar or cigarette in, or who shall enter with a lighted pipe, cigar or cigarette, any mill or other building on which is posted in a conspicuous place over and near each principal entrance a notice in plain, legible characters, stating that no smoking is allowed in such building, shall be guilty of a misdemeanor. [L. '09, p. 974, § 269.]

§ 2522. Setting Prohibited Fire.

Every person who, within a county where there is a deputy fire warden, shall burn any wood or brush between the 1st day of June and the 1st day of October in each year, without first obtaining a permit thereto from such deputy fire warden, or who, in setting, guarding or extinguishing any fire in such wood or brush, shall willfully or negligently fail to observe any precaution prescribed by such deputy fire warden, shall be guilty of a misdemeanor: Provided that nothing herein contained shall prevent any person from burning any logs, stumps, drift or brush heaps in small quan-

tities isolated from other inflammable material under personal supervision and such other safeguard as shall prevent such fires from spreading. [L. '09, p. 974, § 270.]

See on this subject "Forests and Forest Fires."

§ 2523. Negligent Fires.

Every person who shall willfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor. [L. '09, p. 974, § 271.]

§ 2524. Operating Dangerous Engine.

Every person who shall operate or permit to be operated in dangerous proximity to any brush, grass or other inflammable material, any engine or boiler which is not equipped with a modern spark-arrester, in good condition, shall be guilty of a misdemeanor. [L. '09, p. 974, § 272.]

§ 2525. Door of Public Buildings to Swing Outward.

The doors of all theaters, opera houses, school buildings, churches, public halls, or places used for public entertainments, exhibitions or meetings, which are used exclusively or in part for admission to or egress from the same, or any part thereof, shall be so hung and arranged as to open outwardly, and during any exhibition, entertainment or meeting, shall be kept unlocked and unfastened, and in such condition that in case of danger or necessity, immediate escape from such building shall not be prevented or delayed; and every agent or lessee of any such building who shall rent the same or allow it to be used for any of the aforesaid public purposes without having the doors thereof hung and arranged as hereinbefore provided, shall, for each violation of any provision of this section, be guilty of a misdemeanor. [L. '09, p. 974, § 273.]

§ 2526. Engineer Who cannot Read.

Every person who, as an officer of a corporation or otherwise, shall knowingly employ as an engineer or engine driver, to run a locomotive or train on any railway, any person who cannot read time tables and ordinary handwriting; and every person who, being unable to read time tables and ordinary handwriting, shall act as an engineer or run a locomotive or train on any railway, shall be guilty of a gross misdemeanor. [L. '09, p. 975, § 274.]

§ 2527. Intoxication of Employees.

Every person who, being employed upon any railway, as engineer, motorman, gripman, conductor, switch-tender, fireman, bridge-tender, flagman or signalman, or having charge of stations, starting, regulating or running trains upon a railway, or being employed as captain, engineer or other officer of a vessel propelled by steam, or being the driver of any animal or vehicle upon any public highway, street, or other public place, shall be intoxicated while engaged in the discharge of any duties, shall be guilty of a gross misdemeanor. [L. '15, p. 492, § 2. Cf. L. '09, p. 975, § 275.]

§ 2528. Failure to Ring Bell.

Every engineer driving a locomotive on any railway who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded at least eighty rods from any place where such railway crosses a traveled road or street on the same level (except in cities), or to continue the ringing of such bell or sounding of such whistle until such locomotive shall have crossed such road or street, shall be guilty of misdemeanor. [L. '09, p. 975, § 276.]

Cited in 91 Wash. 391.

Failing to sound the bell or whistle continuously until a crossing is reached, as required by this section, is negligence

as a matter of law: *McKinney v. Port Townsend & Puget S. B. Co.*, 91 Wash. 387, 158 Pac. 107.

§ 2529. Other Violations of Duty.

Every engineer, motorman, gripman, conductor, brakeman, switch-tender, train-dispatcher or other officer, agent or servant of any railway company, who shall be guilty of any willful violation or omission of his duty as such officer, agent, or servant, by which human life or safety shall be endangered, for which no punishment is specially prescribed, shall be guilty of a misdemeanor. [L. '09, p. 976, § 277.]

§ 2530. Obstructing and Delaying Train.

Every person who shall willfully obstruct, hinder or delay the passage of any car lawfully operated upon any railway, shall be guilty of a misdemeanor. [L. '09, p. 96, § 278.]

§ 2532. Liability of Person Handling Steamboat or Steam Boiler.

Every person who shall apply, or cause to be applied to a steam boiler a higher pressure of steam than is allowed by law, or by an inspector, officer or person authorized to limit the same; every captain or other person having charge of the machinery or boiler in a steamboat used for the conveyance of passengers on the waters of this state, who, from ignorance or gross neglect, or for the purpose of increasing the speed of such boat, shall create or cause to be created an undue or unsafe pressure of steam; and every engineer or other person having charge of a steam boiler, steam engine or other apparatus for generating or employing steam, who shall willfully or from ignorance or gross neglect, create or allow to be created such an undue quantity of steam as to burst the boiler, engine or apparatus, or cause any other accident, whereby human life is endangered, shall be guilty of a gross misdemeanor. [L. '09, p. 977, § 280.]

§ 2533. Endangering Life by Refusal to Labor.

Every person who shall willfully and maliciously, either alone or in combination with others, break a contract of service or employment, knowing or having reasonable cause to believe that the consequence of his so doing will be to endanger human life or cause grievous bodily injury, or to expose valuable property to destruction or serious injury, shall be guilty of a misdemeanor. [L. '09, p. 977, § 281.]

§ 2534. Disturbance on Highway.

Every person who shall ride or drive any horse upon a public highway, in a manner likely to endanger the safety or life of another, or on such

highway shall create or participate in any noise, disturbance or other demonstration calculated or intended to frighten, intimidate or disturb any person, shall be guilty of a misdemeanor. [L. '09, p. 977, § 282.]

See *infra*, §§ 2718, 2719, unlawful use of bridges.

See *infra*, § 2720, throwing glass on highway.

§ 2535. Dangerous Exhibitions.

Every proprietor, lessee or occupant of any place of amusement, or any plat of ground or building, who shall allow it to be used for the exhibition of skill in throwing any sharp instrument or in shooting any bow gun, pistol or firearm of any description, at or toward any human being, shall be guilty of a misdemeanor. [L. '09, p. 977, § 283.]

§ 2537. Deposit of Unwholesome Substance.

Every person who shall deposit, leave or keep, on or near a highway or route of public travel, on land or water, any unwholesome substance; or who shall establish, maintain or carry on, upon or near a highway or route of public travel, on land or water, any business, trade or manufacture which is noisome or detrimental to the public health; or who shall deposit or cast into any lake, creek or river, wholly or partly in this state, the offal from or the dead body of any animal, shall be guilty of a gross misdemeanor. [L. '09, p. 978, § 285.]

See, also, *infra*, § 9913.

§ 2538. Allowing Vicious Animal at Large.

Every person having the care or custody of any animal known to possess any vicious or dangerous tendencies, who shall allow the same to escape or run at large in any place or manner liable to endanger the safety of any person, shall be guilty of a misdemeanor; and any person may lawfully kill such animal when reasonably necessary to protect his own or the public safety. [L. '09, p. 978, § 286.]

§ 2539. Exposing Contagious Disease.

Every person who shall willfully expose himself to another, or any animal affected with any contagious or infectious disease, in any public place or thoroughfare, except upon his or its necessary removal in a manner not dangerous to the public health; and every person so affected who shall expose any other person thereto without his knowledge, shall be guilty of a misdemeanor. [L. '09, p. 978, § 287.]

See *infra*, § 6112, regulations as to tuberculosis in cities.

§ 2540. Diseased Animals.

Every owner or person having charge thereof, who shall import or drive into this state, or who shall turn out or suffer to run at large upon any highway or uninclosed lands, or upon any lands adjoining the inclosed lands kept by any person for pasture; or who shall keep or allow to be kept in any barn with other animals, or water or allow to be watered at any public drinking fountain or watering place, any animal having any contagious or infectious disease; or who shall sell, let or dispose of any such animal knowing it to be so diseased, without first apprising the purchaser or person taking it of the existence of such disease, shall be guilty of a misdemeanor. [L. '09, p. 978, § 288.]

§ 2541. Diseased Animals—Disposal of Carcasses.

Every person owning or having in charge any animal that has died or been killed on account of disease, shall immediately bury the carcass thereof at least three feet underground, or cause the same to be consumed by fire. No person shall sell or offer to sell or give away the carcass of any animal which died or was killed on account of disease, or convey the same along any public road or land not his own. Every violation of any provision of this section shall be a misdemeanor. [L. '09, p. 979, § 289.]

§ 2542. Polluting Water Supply.

Every person who shall deposit or suffer to be deposited in any spring, well, stream, river or lake, the water of which is or may be used for drinking purposes, or on any property owned, leased or otherwise controlled by any municipal corporation, corporation or person as a watershed or drainage basin for a public or private water system, any matter or thing whatever, dangerous or deleterious to health, or any matter or thing which may or could pollute the waters of such spring, well, stream, river, lake or water system, shall be guilty of a gross misdemeanor. [L. '09, p. 979, § 290.]

§ 2543. Furnishing Impure Water.

Every owner, agent, manager, operator or other person having charge of any waterworks furnishing water for public or private use, who shall knowingly permit any act or omit any duty or precaution by reason whereof the purity or healthfulness of the water supplied shall become impaired, shall be guilty of a gross misdemeanor. [L. '09, p. 979, § 291.]

§ 2544. Practicing Medicine Without a License.

Every person who shall practice medicine or surgery or dentistry without having obtained and filed in the office of the county clerk where he resides, a license as required by law, shall be guilty of a gross misdemeanor. [L. '09, p. 980, § 292.]

See *infra*, §§ 10018, 10029, practicing medicine without a license.

See *infra*, § 10035, practicing dentistry without a license.

See *infra*, §§ 10041, 10051, practicing veterinary without a license.

§ 2545. Unlicensed Pilotage.

Every person not duly licensed thereto, who shall pilot or offer to pilot any vessel into, within or out of the waters of Juan de Fuca Strait or Puget Sound, shall be guilty of a misdemeanor: Provided, that nothing herein shall prohibit a master of a vessel acting as his own pilot, nor compel a master or owner of any vessel to take out a pilot license for that purpose. [L. '09, p. 980, § 293.]

See *infra*, §§ 9873-9875, piloting without a license.

CHAPTER VIII.**CRIMES AGAINST THE PUBLIC PEACE.****§ 2546. Armed Association.**

It shall not be lawful for any body of men other than the National Guard or troops of the United States, to associate themselves together as a military company with arms, without the consent of the governor; but members of social and benevolent associations are not prohibited from

wearing swords. Every person who shall associate with others in violation of this section shall be guilty of a misdemeanor. [L. '09, p. 980, § 294.]

§ 2547. Disturbing Meeting.

Every person who, without [authority] of law, shall willfully disturb any assembly or meeting not unlawful in its character, shall be guilty of a misdemeanor. [L. '09, p. 980, § 295.]

See *supra*, § 2499, disturbing religious meeting.

See *infra*, § 5055, disturbing school.

Cited in 108 Wash. 207.

§ 2548. Riot, Defined.

Whenever three or more persons, having assembled for any purpose, shall disturb the public peace by using force or violence to any other person, or to property, or shall threaten or attempt to commit such disturbance, or to do any unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they shall be guilty of a riot. [L. '09, p. 980, § 296.]

§ 2549. Riot—Penalty.

Every person who shall be guilty of riot or of participating therein, by being present at, or by instigation, permitting or aiding the same shall be punished as follows:

(1.) If the purpose of the assembly or the acts done therein, or intended by the persons engaged, shall be to resist the enforcement of a statute of this state or of the United States, or to obstruct any public officer of this state or the United States in serving or executing any process or other mandate of a court, or in the performance of any other duty, or if at the time of the riot the offender shall carry a firearm or any other dangerous weapon, or shall be disguised, by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars.

(2.) If the offender shall direct, advise, encourage or solicit other persons present or participating in a riot or assembly to acts of force or violence, by imprisonment in the state penitentiary for not more than two years, or by a fine of not more than one thousand dollars.

(3.) In every other case, by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars. [L. '09, p. 981, § 297.]

§ 2550. Unlawful Assembly.

Whenever three or more persons shall assemble with intent—

(1.) To commit any unlawful act by force; or,

(2.) To carry out any purpose in such manner as to disturb the public peace; or,

(3.) Being assembled, shall attempt or threaten any act tending toward a breach of the peace, or an injury to persons or property, or any unlawful act—such an assembly is unlawful, and every person participating therein by his presence, aid or instigation, shall be guilty of a gross misdemeanor. [L. '09, p. 981, § 298.]

§ 2551. Remaining After Warning.

Every person who shall remain present at the place of an unlawful meeting after having been warned to disperse by a magistrate or public officer, unless as a public officer or at the request of such officer he is assisting in dispersing the same, or in protecting persons or property or in arresting offenders, shall be guilty of a misdemeanor. [L. '09, p. 981, § 299.]

§ 2552. Destruction of Property.

Whenever any of the persons so unlawfully assembled, shall pull down or destroy any dwelling-house or other building, or any shop, steamboat or vessel, he shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than one thousand dollars. [L. '09, p. 982, § 300.]

§ 2553. Disguised and Masked Persons.

Any assemblage of three or more persons, disguised by having their faces painted, discolored, colored or concealed, shall be unlawful; and every person so disguised present thereat, shall be guilty of a gross misdemeanor; but nothing herein shall be construed as prohibiting any peaceful assemblage for a masquerade or fancy dress ball or entertainment. [L. '09, p. 982, § 301.]

§ 2554. Owner of Premises Allowing Masqueraders.

Every person, being the owner, lessee or occupant of any building, boat, or part thereof, who shall knowingly permit therein any unlawful assemblage of masked persons, shall be guilty of a gross misdemeanor. [L. '09, p. 982, § 302.]

§ 2555. Combination to Resist Process.

Every person who shall enter into a combination with another to resist the execution of any legal process or other mandate of a court of competent jurisdiction, under circumstances not amounting to a riot, shall be guilty of a gross misdemeanor. [L. '09, p. 982, § 303.]

PRIZEFIGHTING.**§ 2556. Prizefighting—Aiding, Betting or Stake-holding.**

Every person who shall engage in, instigate, aid, encourage, or do any act to further an encounter or fight with or without weapons, between two or more persons, or a fight commonly called a ring or prizefight, or an encounter commonly called a sparring match, with or without gloves, or who shall send a challenge or acceptance of a challenge for such an encounter or fight; or who shall carry or deliver such a challenge or acceptance, or shall train or assist any person in training or preparing for such an encounter or fight; or who shall bet, stake or wager money or other property upon the result of such encounter or fight; or hold or undertake to hold any money or other property so staked or wagered, to be delivered to, or for the benefit of the winner thereof, shall be guilty of a gross misdemeanor: Provided, that nothing in this section shall be so con-

strued as to interfere with members of private clubs sparring or fencing for exercise among themselves. [L. '09, p. 982, § 304.]

§ 2557. Apprehension of Persons About to Fight.

Whenever it shall be made to appear to any magistrate that there are reasonable grounds to apprehend that an offense specified in section 2556 is about to be committed within his jurisdiction, or by any person therein, he shall issue his warrant for the arrest of the person or persons so about to offend, and if upon any such person being brought before him it shall appear that there is reasonable ground to believe that he is about to commit such an offense he shall require him to give bond to the state, approved by him, in a sum not exceeding one thousand dollars, with or without sureties, conditioned that such person shall not within one year thereof commit such an offense. On failure to furnish such bond such person shall be committed to the county jail. [L. '09, p. 983, § 305.]

§ 2558. Forcible Entry and Detainer.

Every person who shall unlawfully use, or encourage or assist another in unlawfully using, any force or violence in entering upon or detaining any lands or other possessions of another; and every person who, having removed or been removed therefrom pursuant to the order or direction of any court, tribunal or officer, shall afterward return to settle or reside unlawfully upon or take possession of, such lands or possessions, shall be guilty of a misdemeanor. [L. '09, p. 983, § 306.]

§ 2559. Aiming or Discharging Firearms.

Every person who shall aim any gun, pistol, revolver or other firearm, whether loaded or not, at or toward any human being, or who shall willfully discharge any firearm, air-gun or other weapon, or throw any deadly missile in a public place, or in any place where any person might be endangered thereby, although no injury result, shall be guilty of a misdemeanor. [L. '09, p. 984, § 307.]

§ 2560. Use of Firearms by Minor.

No minor under the age of fourteen years shall handle or have in his possession or under his control, except while accompanied by or under the immediate charge of his parent or guardian, any firearm of any kind for hunting or target practice or for other purposes. Every person violating any of the foregoing provisions, or aiding or knowingly permitting any such minor to violate the same, shall be guilty of a misdemeanor. [L. '09, p. 984, § 308.]

§ 2561. Offenses in Public Conveyances.

Every person who shall willfully use profane, offensive, or indecent language or engage in any quarrel in any public conveyance, or interfere with or annoy any passenger therein, or, having refused to pay the proper fare, shall fail to leave any such conveyance upon demand, or, with intent to avoid the payment of fare shall ride upon any car or engine not commonly used for the carriage of passengers, shall be guilty of a misdemeanor. [L. '09, p. 984, § 309.]

§ 2562. Criminal Anarchy, Defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocating of such doctrine either by word of mouth or writing is a felony. [L. '09, p. 984, § 310.]

§ 2563. Advocacy of Criminal Anarchy.

Every person who—

(1.) By word of mouth or writing shall advocate, advise or teach the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

(2.) Shall print, publish, edit, issue or knowingly circulate, sell, distribute or publicly display any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

(3.) Shall openly, willfully and deliberately justify by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

(4.) Shall organize or help to organize or become a member of or voluntarily assemble with any society, group or assembly of persons formed to teach or advocate such doctrine,

Shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 984, § 311.]

Cited in 104 Wash. 523, 524; 108 Wash. 207.

An information sufficiently charges criminal anarchy where it alleges in concise language the violation of this section, subdivisions 1 and 4, by advocating the overthrow of organized government by unlawful means, to wit, the organization

of the Industrial Workers of the World whose purpose was the anarchistic overthrow of the government, and that defendant was a member of and had voluntarily assembled with the organization for such purpose: State v. Lowery, 104 Wash. 520, 177 Pac. 355.

§ 2563-1. Criminal Syndicalism, Defined.

Whoever shall

(1.) Advocate, advise, teach or justify crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or,

(2.) Print, publish, edit, issue or knowingly sell, circulate, distribute or display any book, pamphlet, paper, handbill, document, or written or printed matter of any form, advocating, advising, teaching or justifying crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change, or,

(3.) Organize or help to organize, give aid to, be a member of or voluntarily assemble with any group of persons formed to advocate, advise or teach crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change,

Shall be guilty of a felony. [L. '19, p. 518, § 1. Cf. L. '19, pp. 2, 3, §§ 1-4.]

Validity of legislation directed against
social or industrial propaganda

deemed to be of a dangerous
tendency. 1 A. L. R. 336.

§ 2563-2. Use of Property for Promoting Syndicalism.

Any owner, lessee, agent, occupant or person in control of any property who shall knowingly permit the use thereof by any person or persons engaged in doing any of the acts or things made unlawful by the preceding section, shall be guilty of a gross misdemeanor. [L. '19, p. 519, § 2.]

§ 2563-3. Sabotage, Defined.

Whoever, with intent that his act shall, or with reason to believe that it may, injure, interfere with, or obstruct any agricultural, stock-raising, lumbering, mining, quarrying, fishing, manufacturing, transportation, mercantile or building enterprise wherein persons are employed for wage, shall willfully injure or destroy, or attempt or threaten to injure or destroy, any property whatsoever, or shall willfully derange, or attempt or threaten to derange, any mechanism or appliance, shall be guilty of a felony. [L. '19, p. 517, § 1.]

§ 2563-4. Interference With Owner's Control.

Whoever, with intent to supplant, nullify or impair the owner's management or control of any enterprise described in the preceding section, shall unlawfully take or retain, or attempt or threaten unlawfully to take or retain, possession or control of any property or instrumentality used in such enterprise, shall be guilty of a felony. [L. '19, p. 517, § 2.]

§ 2563-5. Advocacy of Sabotage.

Whoever shall

(1.) Advocate, advise or teach the necessity, duty, propriety or expediency of doing or practicing any of the acts made unlawful by the two preceding sections, or,

(2.) Print, publish, edit, issue or knowingly sell, circulate, distribute or display any book, pamphlet, paper, handbill, document or written or printed matter of any form, advocating, advising or teaching such necessity, duty, propriety or expediency, or,

(3.) By word of mouth or writing justify any act or conduct with intent to advocate, advise or teach such necessity, duty, propriety or expediency, or,

(4.) Organize or help to organize, give aid to, be a member of or voluntarily assemble with, any group of persons formed to advocate, advise or teach such necessity, duty, propriety or expediency,

Shall be guilty of a felony. [L. '19, p. 517, § 3.]

§ 2563-6. Act Cumulative.

This act shall not be construed to repeal or amend any existing penal statute. [L. '19, p. 518, § 4.]

§ 2563-7. Displaying Emblems of Seditious and Anarchistic Groups.

No flag, banner, standard, insignia, badge, emblem, sign or other device of, or suggestive of, any organized or unorganized group of persons who, by their laws, rules, declarations, doctrines, creeds, purposes, practices or efforts, espouse, propose or advocate any theory, principle or form of government antagonistic to, or subversive of, the constitution, its mandates, or laws of the United States or of this state, shall be displayed in this state. [L. '19, p. 555, § 1.]

Validity of statutory or other regulation forbidding display of red flag or other symbol tending to incite

disorder. *Ann. Cas.* 1916D, 849; *L. R. A.* 1915B, 706.

§ 2563-8. Unlawful Possession of Such Emblems.

The ownership or possession of any article or thing, the display of which is forbidden by this act, shall be unlawful. [L. '19, p. 555, § 2.]

§ 2563-9. Penalties.

Any person who violates this act shall be guilty of a felony. An officer, trustee, director, agent or employee of a corporation or association who participates in the doing, or assists or acts for the corporation or association in the doing, of anything prohibited by this act, shall be guilty of a felony. [L. '19, p. 555, § 3.]

§ 2563-10. Searches and Seizures.

Every article or thing owned or kept in violation of this act is hereby declared to be pernicious and dangerous to the public welfare and subject to be searched for, seized, forfeited and destroyed. [L. '19, p. 555, § 4.]

§ 2563-11. Application of Act.

Nothing in this act shall apply to the ownership, possession or display of flags, banners, standards, insignia, badges or emblems of any nation having accredited representatives in the United States or in its territories or possessions; nor shall this act apply to historical museums of recognized standing. [L. '19, p. 555, § 5.]

§ 2564. Publishing Matter Inciting Breach of Peace.

Every person who shall willfully print, publish, edit, issue, or knowingly circulate, sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor. [L. '09, p. 985, § 312.]

Cited in 71 Wash. 186.

This section providing punishment for any person who edits printed matter which shall "tend to encourage disrespect for

law" is not objectionable as uncertain in defining the nature of the crime: *Stato v. Fox*, 71 Wash. 185, 127 Pac. 1111.

§ 2565. Liability of Editors and Others.

Every editor or proprietor of a book, newspaper or serial and every manager of a partnership or incorporated association by which a book, newspaper or serial is issued, is chargeable with the publication of any matter contained in such book, newspaper or serial. But in every prosecution therefor, the defendant may show in his defense that the matter complained of was published without his knowledge or fault and against his wishes by another who had no authority from him to make the publication, and was retracted by him as soon as known. [L. '09, p. 985, § 313.]

§ 2566. Assemblages of Anarchists.

Whenever two or more persons assemble for the purpose of advocating or teaching the doctrines of criminal anarchy, as defined in section 2562, such an assembly is unlawful, and every person voluntarily participating therein by his presence, aid or instigation, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or both. [L. '09, p. 986, § 314.]

§ 2567. Permitting Premises to be Used for Assemblages of Anarchists.

Every owner, agent, superintendent, janitor, caretaker or occupant of any place, building or room, who shall willfully and knowingly permit therein any assemblage of persons prohibited by section 2566, or who, after notification that the premises are so used, shall permit such use to be continued, shall be guilty of a gross misdemeanor. [L. '09, p. 986, § 315.]

§ 2568. Witness' Privilege.

No person shall be excused from giving evidence upon an investigation or prosecution for any of the offenses specified in sections 2563 or 2566, upon the ground that the evidence might tend to criminate himself. [L. '09, p. 986, § 316.]

CHAPTER IX.**CRIMES AGAINST PROPERTY.****CRIMES AGAINST STATE PROPERTY.****§ 2569. Misappropriation and Falsification of Accounts by Public Officer.**

Every public officer, and every other person receiving money on behalf or for or on account of the people of the state or of any department of the state government or of any bureau or fund created by law in which the people are directly or indirectly interested, or for or on account of any county, city, town or any school, diking, drainage or irrigation district, who—

(1.) Shall appropriate to his own use or the use of any person not entitled thereto, without authority of law, any money so received by him as such officer or otherwise; or,

(2.) Shall knowingly keep any false account, or make any false entry or erasure in any account, of or relating to any money so received by him; or,

(3.) Shall fraudulently alter, falsify, conceal, destroy or obliterate any such account; or,

(4.) Shall willfully omit or refuse to pay over to the state, its officer or agent authorized by law to receive the same, or to such county, city, town or such school, diking, drainage or irrigation district or to the proper officer or authority empowered to demand and receive the same, any money received by him as such officer when it is a duty imposed upon him by law to pay over and account for the same, shall be punished by imprisonment in the state penitentiary for not more than fifteen years. [L. '09, p. 986, § 317.]

§ 2570. Other Violations by Officers.

Every officer or other person mentioned in section 2569, who shall willfully disobey any provision of law regulating his official conduct in cases other than those specified in said section, shall be guilty of a gross misdemeanor. [L. '09, p. 987, § 318.]

§ 2571. Misappropriation, etc., by Treasurer.

Every state, county, city or town treasurer who shall willfully misappropriate any moneys, funds or securities received by or deposited with him as such treasurer, or who shall be guilty of any other malfeasance or willful neglect of duty in his office, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than five thousand dollars. [L. '09, p. 987, § 319.]

See § 2569, misappropriation by public officer.

See *infra*, § 11027, embezzlement by state treasurer.

ARSON.

§ 2572. Arson—First Degree.

Every person who shall willfully—

(1.) Burn or set on fire in the night-time the dwelling-house of another, or any building in which there shall be at the time a human being; or,

(2.) Set any fire manifestly dangerous to any human life, shall be guilty of arson in the first degree and be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 987, § 320.]

Occupancy of Building.—Under section 823 of the code of 1881, as amended by Laws of 1885-86, page 77, it is unnecessary, in charging the crime of arson, to allege that the dwelling-house set fire to was used and occupied as a place of abode by any person or persons: *McClaine v. Territory*, 1 Wash. 345, 25 Pac. 453; *State v. Biles*, 6 Wash. 186, 33 Pac. 347; *State v. Meyers*, 9 Wash. 8, 36 Pac. 1051.

The Laws of 1895, page 173, defining the crimes of arson and attempted arson, and providing a punishment for each, does not violate article II, section 19 of the

constitution, which provides that "no bill shall embrace more than one subject," since arson and attempted arson are sufficiently connected to permit legislation with reference thereto to be embodied in one act: *State v. Hall*, 24 Wash. 255, 64 Pac. 153.

For text treatment of Arson, see 2 B. O. L. 495.

Burning as element of offense of arson. 1 A. L. R. 1163.

Unfinished dwelling as "dwelling-house" within the law of arson. 15 Ann. Cas. 547.

§ 2573. Arson—Second Degree.

Every person who, under circumstances not amounting to arson in the first degree, shall willfully burn or set on fire any building, or any structure or erection appurtenant to or adjoining any building, or any wharf,

dock, threshing-machine, threshing-engine, bridge or trestle, or any hay, grain, crop or timber, whether cut or standing, or any lumber, shingle or other timber products, shall be guilty of arson in the second degree, and shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars. [L. '09, p. 988, § 321.]

§ 2574. Contiguous Fires.

Whenever any building or structure which may be the subject of arson in either the first or second degree shall be so situated as to be manifestly endangered by any fire and shall subsequently be set on fire thereby, any person participating in setting such fire shall be deemed to have participated in setting such building or structure on fire. [L. '09, p. 988, § 322.]

§ 2575. "Set on Fire" Defined.

A building, structure or any property mentioned in section 2573 shall be deemed "set on fire," whenever any part thereof or anything therein shall be scorched, charred or burned. [L. '09, p. 988, § 323.]

§ 2576. Ownership of Building.

To constitute arson it shall not be necessary that another person than the defendant should have had ownership in the building or structure set on fire. [L. '09, p. 988, § 324.]

§ 2577. Preparation is Attempt.

Any willful preparation made by any person with a view to setting fire to any building or structure shall be deemed to be an attempt to commit the crime of arson, and shall be punished as such. [L. '09, p. 988, § 325.]

Acts constituting attempt to commit arson. 8 Ann. Cas. 630; 4 L. R. A. (N. S.) 417; 41 L. R. A. (N. S.) 439.

Procuring or providing instrumentalities for commission of arson as an attempt to commit the same. 6 L. R. A. (N. S.) 804.

BURGLARY.

§ 2578. Burglary—First Degree.

Every person who, with intent to commit some crime therein, shall enter in the night-time, the dwelling-house of another in which there shall be at the time a human being—

- (1.) Being armed with a dangerous weapon; or
- (2.) Arming himself therein with such weapon; or
- (3.) Being assisted by a confederate actually present; or
- (4.) Who, while engaged in the night-time in effecting such entrance, or in committing any crime in such building or in escaping therefrom, shall assault any person; or

(5.) Who, with intent to commit some crime therein, shall break and enter any bank, postoffice, railway express or railway mail-car, shall be guilty of burglary in the first degree and shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 989, § 326.]

Cited in 61 Wash. 414.

The amendment of statute relating to burglary so as to include additional structures as subject to burglary did not repeal the former statute: *State v. Wilson*, 9 Wash. 218, 37 Pac. 424.

Nature and Elements of Offenses: See Remington's Digest, Burg., § 1; *State v. Wilson*, 9 Wash. 218, 37 Pac. 424; *State v. Boysen*, 30 Wash. 338, 70 Pac. 740; *State v. Petit*, 32 Wash. 129, 92 Pac. 1021; *State v. Beeman*, 51 Wash. 557, 99 Pac. 756.

Requisites and Sufficiency of Information: See Remington's Digest, Burg., §§ 3—10.

§ 3. **In General:** *State v. Lewis*, 42 Wash. 672, 85 Pac. 668.

§ 4. — **Intent:** *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452.

§ 5. — **Description of Building:** *State v. Miller*, 3 Wash. 131, 28 Pac. 375; *State v. Johnson*, 4 Wash. 593, 30 Pac. 672; *State v. Sufferin*, 6 Wash. 107, 32 Pac. 1021; *State v. Burton*, 27 Wash. 528, 67 Pac. 1097.

§ 6. **Occupancy of Building:** *State v. Johnson*, 4 Wash. 593, 30 Pac. 672; *State v. Randall*, 36 Wash. 438, 78 Pac. 998.

§ 7. — **Description and Ownership of Property in Building or Stolen from**

Building: *State v. Nelson*, 36 Wash. 126, 78 Pac. 790, 104 Am. St. Rep. 945, 68 L. R. A. 283.

§ 8. — **Time:** *State v. Miller*, 3 Wash. 131, 28 Pac. 375.

§ 9. — **Entry:** *State v. Sufferin*, 6 Wash. 107, 32 Pac. 1021; *State v. Wilson*, 9 Wash. 218, 37 Pac. 424; *Linbeck v. State*, 1 Wash. 336, 25 Pac. 452; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969.

§ 10. — **Attempts:** *State v. Garbe*, 34 Wash. 395, 75 Pac. 993.

Issues, Proof and Variance: See Remington's Digest, Burg., §§ 11, 12; *State v. Morgan*, 21 Wash. 355, 58 Pac. 215; *State v. Cox*, 39 Wash. 345, 81 Pac. 848; *State v. Anderson*, 5 Wash. 350, 31 Pac. 969; *State v. Wilson*, 9 Wash. 218, 37 Pac. 424.

For text treatment of "Burglary," see 4 R. O. L. 414.

Constructive breaking within statutory or common-law burglary or house-breaking. 15 Ann. Cas. 1023.

Breaking out of building as burglary. Ann. Cas. 1916B, 537; L. R. A. 1915D, 972.

Unauthorized entry of premises by employee of owner as burglarious entry. Ann. Cas. 1916E, 534.

§ 2579. Burglary—Second Degree.

Every person who, with intent to commit some crime therein shall, under circumstances not amounting to burglary in the first degree, enter the dwelling-house of another or break and enter, or, having committed a crime therein, shall break out of, any building or part thereof, or a room or other structure wherein any property is kept for use, sale or deposit, shall be guilty of burglary in the second degree and shall be punished by imprisonment in the state penitentiary for not more than fifteen years. [L. '09, p. 989, § 327.]

Cited in 61 Wash. 414.

Under this section it is not essential to burglary in the second degree that it was

committed in the night-time: *State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

§ 2580. Presumption of Intent.

Every person who shall unlawfully break and enter or unlawfully enter any building or structure enumerated in sections 2578 and 2579 shall be deemed to have broken and entered or entered the same with intent to commit a crime therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent. [L. '09, p. 989, § 328.]

Cited in 82 Wash. 48.

Weight and Sufficiency of Evidence—In General: See Remington's Digest, Burg., § 19; *State v. Anderson*, 5 Wash. 350,

31 Pac. 969; *State v. Corcoran*, 82 Wash. 44, 143 Pac. 453, Ann. Cas. 1916E, 531. L. R. A. 1915D, 1015.

§ 2581. Crime in Building—Punished Separately.

Every person who, in the commission of a burglary shall commit any other crime, shall be punished therefor as well as for the burglary, and may be prosecuted for each crime separately. [L. '09, p. 990, § 329.]

§ 2582. Making or Having Burglar Tools.

Every person who shall make or mend or cause to be made or mended, or have in his possession in the day or night-time, any engine, machine, tool, false key, pick lock, bit, nippers or implement adapted, designed or commonly used for the commission of burglary, larceny or other crime, under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime, or knowing that the same is intended to be so used, shall be guilty of a gross misdemeanor. The possession thereof except by a mechanic, artificer or tradesman at and in his established shop or place of business, open to public view, shall be prima facie evidence that such possession was had with intent to use or employ or allow the same to be used or employed in the commission of a crime. [L. '09, p. 990, § 330.]

Possession of Burglars' Tools: See Remington's Digest, Burg., § 2; *Stato v. Garba*, 34 Wash. 395, 75 Pac. 993.

What are burglars' tools within statute forbidding possession of such tools. 50 L. R. A. (N. S.) 825.

Procuring or providing instrumentalities for commission of burglary as attempt to commit crime. 6 L. R. A. (N. S.) 804.

FORGERY.**§ 2583. Forgery—First Degree.**

Every person who, with intent to defraud, shall forge any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, or any request for the payment of money or delivery of property or any assurance of money or property, or any writing or instrument for the identification of any person, or any public record or paper on file in any public office, or any certified or authenticated copy of such record or paper, or any entry in any public or private record of account, or any judgment, decree, order, mandate, return, writ, or process of any court, tribunal, judge, justice of the peace, commissioner or magistrate, or the official return or report of, or a license issued by, any public officer, or any pleading, demurrer, motion, affidavit, appearance, notice, cost-bill, statement of facts, bill of exceptions or proposed statement of facts, or bill of exceptions in any action or proceeding whether pending or not, or the draft of any bill or resolution that has been presented to either house of the legislature of this state, whether engrossed or not, or the great seal of this state, the seal of any public officer, court, notary public or corporation, or any public seal authorized or recognized by the laws of this or any other state or government, or any impression of any such seal; or shall forge or counterfeit any coin or money of any state or government, or any bank or treasury bill, any

note or postage, or revenue stamp; or who, without authority shall make or engrave any plate in the form or similitude of any writing, instrument, seal, coin, money, stamp or thing which may be the subject of forgery, shall be guilty of forgery in the first degree, and shall be punished by imprisonment in the state penitentiary for not more than twenty years. [L. '09, p. 990, § 331.]

Cited in 72 Wash. 394, 395; 75 Wash. 287; 77 Wash. 443; 102 Wash. 565.

Elements of Offenses: See Remington's Digest, Forg., §§ 1—3.

§ 1. In General: State v. Barkuloo, 18 Wash. 52, 50 Pac. 577; State v. Pilling, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080; State v. McBride, 72 Wash. 390, 130 Pac. 486.

§ 2. — Nature of Instrument: State v. Heaton, 17 Wash. 310, 49 Pac. 493; State v. Harding, 20 Wash. 556, 56 Pac. 399, 929.

§ 3. Uttering or Publishing Forged Instrument: State v. Barkuloo, 18 Wash. 52, 50 Pac. 577; State v. Harding, 20 Wash. 556, 56 Pac. 399, 929.

Indictment or Information: See Remington's Digest, Forg., §§ 4, 5.

§ 4. Requisites and Sufficiency in General: State v. Newton, 29 Wash. 373, 70 Pac. 31; State v. Smith, 77 Wash. 441, 137 Pac. 1008; State v. McBride, 72 Wash. 390, 130 Pac. 486; State v. Thomas, 102 Wash. 564, 172 Pac. 650.

See, also, State v. McGuff, 104 Wash. 501, 177 Pac. 316.

§ 5. — Description of or Setting Forth Instrument: White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Wright, 9 Wash. 96, 37 Pac. 313.

Issues, Evidence and Trial: See Remington's Digest, Forg., §§ 6—9.

§ 6. — Issues, Proof and Variance: White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Andrews, 71 Wash. 181, 127 Pac. 1102.

§ 7. Admissibility of Evidence: Crane v. Dexter Horton & Co., 5 Wash. 479, 32 Pac. 223; State v. Newton, 29 Wash. 373, 70 Pac. 31; State v. Cottrell, 56 Wash. 543, 106 Pac. 179; State v. Hatfield, 65 Wash. 550, 118 Pac. 735, Ann. Cas. 1913B, 895; State v. McBride, 72 Wash. 390, 130 Pac. 486.

§ 7-1. Weight and Sufficiency of Evidence: State v. Pilling, 53 Wash. 464, 102

Pac. 230, 132 Am. St. Rep. 1080; State v. Cottrell, 56 Wash. 543, 106 Pac. 179; State v. Hatfield, 65 Wash. 550, 118 Pac. 735, Ann. Cas. 1913B, 895; State v. Peeples, 71 Wash. 451, 129 Pac. 108; State v. Peeples, 65 Wash. 673, 118 Pac. 906.

See, also, State v. Petridge, 106 Wash. 445, 180 Pac. 150.

§ 8. Trial—Instructions: White v. Territory, 1 Wash. 279, 24 Pac. 447; State v. Pilling, 53 Wash. 464, 102 Pac. 230, 132 Am. St. Rep. 1080; State v. McBride, 72 Wash. 390, 130 Pac. 486; State v. Hatfield, 65 Wash. 550, 118 Pac. 735, Ann. Cas. 1913B, 895; State v. Peeples, 65 Wash. 673, 118 Pac. 906; State v. Elliott, 69 Wash. 62, 124 Pac. 212.

§ 9. Sentence and Punishment: State v. Harding, 20 Wash. 556, 56 Pac. 399, 929; State v. Newton, 29 Wash. 373, 70 Pac. 31.

Under section 2281, *supra*, providing that, where no minimum term of imprisonment is prescribed by law, the court shall fix the same at not more than five years, the court may fix a minimum term of fifteen years for forgery in the first degree, under this section, providing a maximum term of twenty years without fixing any minimum term: Blystone, *In re*, 75 Wash. 286, 134 Pac. 827.

For text treatment of "Forgery," see 12 **R. C. L.** 138.

Meaning of term "in the similitude of" in statute relating to forgery. 18 **Ann. Cas.** 795.

Forgery by use of fictitious or assumed name. 9 **A. L. R.** 407; 18 **Ann. Cas.** 482.

Procuring signature by fraud as forgery. 14 **A. L. R.** 316; 17 **Ann. Cas.** 705.

Alteration of figures on check as forgery. **Ann. Cas.** 1912D, 240.

Partner signing firm name as liable for forgery. **Ann. Cas.** 1912B, 702.

§ 2584. False Certificate to Certain Instruments.

Every officer authorized to take a proof or acknowledgment of an instrument which by law may be recorded, who shall willfully certify falsely that the execution of such instrument was acknowledged by any party thereto, or that the execution thereof, was proved, shall be guilty of forgery in the first degree. [L. '09, p. 991, § 332.]

§ 2585. Forgery—Second Degree.

Every person who, with intent to injure or defraud shall—

- (1.) Make any false entry in any public or private record or account; or
- (2.) Fail to make a true entry of any material matter in any public or private record or account; or
- (3.) Forge any letter or written communication or copy or purported copy thereof, or send or deliver, or connive at the sending or delivery of any false or fictitious telegraph message or copy or purported copy thereof, whereby or wherein the sentiments, opinions, conduct, character, purpose, property, interests or rights of any person shall be misrepresented or may be injuriously affected, or, knowing any such letter, communication or message or any copy or purported copy thereof to be false, shall utter or publish the same or any copy or purported copy thereof as true, shall be guilty of forgery in the second degree, and shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars. [L. '09, p. 991, § 333.]

§ 2586. Falsely Indicating Person as Corporate Officer.

The false making or forging of any instrument or writing purporting to have been issued by or in behalf of a corporation or association, state or government and bearing the pretended signature of any person therein falsely indicated as an agent or officer of such corporation, association, state or government, is forgery in the same degree as if that person were in truth such officer or agent of such corporation, association, state or government. [L. '09, p. 992, § 334.]

§ 2587. Uttering Forged Instruments, Coins, etc., Forgery.

Every person who, knowing the same to be forged or altered, and with intent to defraud, shall utter, offer, dispose of or put off as true, or have in his possession with intent so to utter, offer, dispose of or put off any forged writing, instrument or other thing, the false making, forging or altering of which is punishable as forgery, shall be guilty of forgery in the same degree as if he had forged the same. [L. '09, p. 992, § 335.]

Cited in 72 Wash. 395; 92 Wash. 69.

§ 2588. True Writing Signed by Wrongdoer's Name.

Whenever the false making or uttering of any instrument of writing is forgery in any degree, every person who, with intent to defraud shall offer, dispose of or put off such an instrument or writing subscribed or indorsed in his own name or that of any other person, whether such signature be genuine or fictitious, under the pretense that such subscription or indorsement is the act of another person of the same name, or that of a person not in existence, shall be forgery in the same degree. [L. '09, p. 992, § 336.]

§ 2589. Misconduct in Signing a Petition.

Every person who shall willfully sign the name of another person or of a fictitious person, or for any consideration, gratuity, or reward shall sign his own name to or withdraw his name from any referendum

or other petition circulated in pursuance of any law of this state or any municipal ordinance; or in signing his name to such petition shall willfully subscribe to any false statement concerning his age, citizenship, residence or other qualifications to sign the same; or knowing that any such petition contains any such false or wrongful signature or statement, shall file the same, or put the same off with intent that it should be filed, as a true and genuine petition, shall be guilty of a misdemeanor. [L. '09, p. 993, § 337.]

§ 2590. Definitions.

Within the provisions of this subdivision relating to forgery, a "written instrument," or a "writing," shall include an instrument partly written and partly printed or wholly printed with a written signature thereto, or any signature or writing purporting to be a signature of or intended to bind an individual, partnership, corporation or association or an officer thereof.

The words "forge," "forgery," "forged" and "forging," shall include false making, "counterfeiting" and the alteration, erasure or obliteration of a genuine instrument in whole or in part, the false making or counterfeiting of the signature of a party or witness, real or fictitious, and the placing or connecting together with intent to defraud, of different parts or the whole of several genuine instruments.

A plate is in the "form and similitude," of the genuine instrument forged, if the finished parts of the engraving thereupon shall resemble or conform to the similar parts of the genuine instrument. [L. '09, p. 993, § 338.]

COUNTERFEITING—FRAUDULENT PRACTICES.

§ 2591. Possession of Counterfeit Coin.

Every person who shall have in his possession a counterfeit of any gold or silver coin, whether of the United States or any foreign country or government, knowing the same to be counterfeit, with intent to sell, utter, use, circulate or export the same as true or as false, or to cause the same to be so uttered or used, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 994, § 339.]

§ 2592. Advertising Counterfeit Money.

Every person who, with intent to defraud, shall print, circulate or distribute a letter, circular, card, pamphlet, handbill or any other written or printed matter offering or purporting to offer for sale, exchange or as a gift, counterfeit coin or paper money, or giving or purporting to give information where counterfeit coin or paper money can be procured, shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than five thousand dollars. [L. '09, p. 994, § 340.]

§ 2593. False Certificate of Registration of Animals—False Representation as to Breed.

Every person who, by color or aid of any false pretense, representation, token or writing shall obtain from any club, association, society or

company for the improvement of the breed of cattle, horses, sheep, swine, fowls or other domestic animals or birds, a certificate of registration of any animal or bird in a herdbook, or other register of any such association, society or company, or a transfer of any such registration, and every person who shall knowingly represent an animal or bird for breeding purposes to be of a greater degree of any particular strain of blood than such animal actually possesses, shall be guilty of a gross misdemeanor. [L. '09, p. 994, § 341.]

§ 2594. Removing Lawful Brands.

Every person who shall willfully deface, obliterate, remove or alter any mark or brand placed by or with the authority of the owner thereof on any shingle bolt, log or stick of timber, or on any horse, mare, gelding, mule, cow, steer, bull, sheep, goat or hog, shall be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 994, § 342.]

§ 2595. Imitating Lawful Brand.

Every person who, in any county, shall place upon any property, any brand or mark in the likeness or similitude of another brand or mark filed with the county auditor of such county by the owner thereof as a brand or mark for the designation or identification of a like kind of property, shall—

(1.) If done with intent to confuse or commingle such property with, or to appropriate to his own use, the property of such other owner, be guilty of a felony, and be punished by imprisonment in the state penitentiary for not more than five years, or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment; or

(2.) If done without such intent, shall be guilty of a misdemeanor. [L. '09, p. 995, § 343.]

§ 2596. Counterfeiting Trademark, Brand, etc.

Every person who shall use or display or have in his possession with intent to use or display, the genuine label, trademark, term, design, device, or form of advertisement of any person, corporation, association or union, lawfully filed for record in the office of the secretary of state, or the exclusive right to use which is guaranteed to any person, corporation, association or union, by the laws of the United States, without the written authority of such person, corporation, association or union, or who shall willfully forge or counterfeit or use or display or have in his possession with intent to use or display any representation, likeness, similitude, copy or imitation of any genuine label, trademark, term, design, device, or form of advertisement, so filed or protected, or any die, plate, stamp or other device for manufacturing the same, shall be guilty of a gross misdemeanor. [L. '09, p. 995, § 344.]

See *infra*, §§ 8386, 8387, counterfeiting marks and brands on logs.

See *infra*, §§ 11537–11540, 11547, counterfeiting and unlawful use of trademarks, etc.

§ 2597. Displaying Goods With False Trademark.

Every person who shall knowingly sell, display or advertise, or have in his possession with intent to sell, any goods, wares, merchandise, mixture, preparation or compound having affixed thereto any label, trademark, term, design, device, or form of advertisement lawfully filed for record in the office of the secretary of state by any person, corporation, association or union, or the exclusive right to the use of which is guaranteed to such person, corporation, association or union under the laws of the United States, which label, trademark, term, design, device or form of advertisement shall have been used or affixed thereto without the written authority of such person, corporation, association or union, or having affixed thereto any forged or counterfeit representation, likeness, similitude, copy or imitation thereof, shall be guilty of a misdemeanor. [L. '09, p. 996, § 345.]

§ 2598. When Deemed Affixed.

A label, trademark, term, design, device or form of advertisement shall be deemed to be affixed to any goods, wares, merchandise, mixture, preparation or compound whenever it is in any manner placed in or upon either the article itself, or the box, bale, barrel, bottle, case, cask or other vessel or package, or the cover, wrapper, stopper, brand, label or other thing in, by or with which the goods are packed, inclosed or otherwise prepared for sale or distribution. [L. '09, p. 996, § 346.]

§ 2599. Fraudulent Registration of Trademark.

Every person who shall for himself, or on behalf of any other person, corporation, association or union, procure the filing of any label, trademark, term, design, device or form of advertisement, with the secretary of state by any fraudulent means, shall be guilty of a misdemeanor. [L. '09, p. 996, § 347.]

§ 2600. Form and Similitude, Defined.

A plate, label, trademark, term, design, device or form of advertisement is in the form and similitude of the genuine instrument imitated if the finished parts of the engraving thereupon shall resemble or conform to the similar parts of the genuine instrument. [L. '09, p. 996, § 348.]

§ 2601. Larceny.

Every person who, with intent to deprive or defraud the owner thereof—

- (1) Shall take, lead or drive away the property of another; or
- (2) Shall obtain from the owner or another the possession of or title to any property, real or personal, by color or aid of any order for the payment or delivery of property or money or any check or draft, knowing that the maker or drawer of such order, check or draft was not authorized or entitled to make or draw the same, or by color or aid of any fraudulent or false representation, personation or pretense or by any false token or writing or by any trick, device, bunco game or fortune-telling; or
- (3) Having any property in his possession custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, executor, administrator, guardian or officer of any person, estate, association or cor-

poration or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; or

(4) Having received any property by reason of a mistake, shall with knowledge of such mistake secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto; and

(5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this act—

Steals such property and shall be guilty of larceny. [L. '15, p. 493, § 3. Cf. L. '09, p. 997, § 349.]

Cited in 62 Wash. 584; 63 Wash. 619; 65 Wash. 354; 72 Wash. 114; 74 Wash. 512, 518; 76 Wash. 467, 471; 77 Wash. 79, 85; 84 Wash. 483, 484, 607, 612; 89 Wash. 265, 463; 94 Wash. 94, 213, 216, 314; 96 Wash. 553, 556; 99 Wash. 435, 662; 101 Wash. 294; 105 Wash. 424; 106 Wash. 223; 108 Wash. 285; 109 Wash. 29; 113 Wash. 396.

LARCENY.—Elements of Offense: See Remington's Digest, Larc., §§ 2—5.

§ 2. Property Subject of Larceny: State v. Smith, 9 Wash. 248, 37 Pac. 290; State v. White, 12 Wash. 417, 41 Pac. 182; State v. Klinkenberg, 76 Wash. 466, 136 Pac. 692, Ann. Cas. 1915D, 468, 49 L. R. A. (N. S.) 965; State v. Johnson, 80 Wash. 522, 141 Pac. 1040.

See, also, State v. Eberhardt, 106 Wash. 222, 179 Pac. 853.

Whiskey, although outlawed and unlawfully held by one whose possession the law did not protect, may be the subject of larceny: State v. Donovan, 108 Wash. 276, 183 Pac. 127.

§ 3. Taking—Fraud, Trick or Device: State v. Smith, 9 Wash. 248, 37 Pac. 290; State v. White, 12 Wash. 417, 41 Pac. 182; State v. Skilbrick, 25 Wash. 555, 66 Pac. 53, 87 Am. St. Rep. 784; State v. Ferrato, 72 Wash. 112, 129 Pac. 598; State v. Wheeler, 101 Wash. 293, 172 Pac. 225.

An information for the larceny of whiskey charging that defendant obtained it by the "trick and device" of appearing as a police officer, and so having obtained it, did feloniously take and appropriate it to his own use, sufficiently charges the act of taking and appropriation as one continuous transaction, and is therefore not confined to larceny by embezzlement by a public officer as defined by this section, subdivision 3: State v. Donovan, 108 Wash. 276, 183 Pac. 127.

§ 4. — Conversion by Agent: Brandenstein v. Way, 17 Wash. 293, 49 Pac. 511.

§ 5. Persons Liable: State v. Payne, 6 Wash. 563, 34 Pac. 317; State v. Duncan, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888.

Under this section, defining larceny as the taking of property with intent to deprive or defraud the owner thereof, and section 2303, defining an owner as any person who has a general or special property, in the whole or any part thereof, or the lawful possession thereof, either actual or constructive, a trustee in bankruptcy, in possession of property claimed and later decided to be exempt, is entitled to maintain his possession until the referee's finding is reversed; and hence has probable cause for instituting a prosecution for larceny thereof against the owner who took the same in an unlawful way: Prentiss v. Bogart, 84 Wash. 481, 147 Pac. 39.

INDICTMENT AND INFORMATION: See Remington's Digest, Larc., §§ 6—13.

§ 6. Requisites and Sufficiency in General: Territory v. Heywood, 2 W. T. 180, 2 Pac. 189; State v. Brookhouse, 10 Wash. 87, 38 Pac. 862; State v. Bliss, 27 Wash. 463, 68 Pac. 87; State v. Smith, 31 Wash. 245, 71 Pac. 767; State v. Klein, 38 Wash. 475, 80 Pac. 770; State v. Butts, 42 Wash. 455, 85 Pac. 33; State v. Pettviel, 99 Wash. 434, 169 Pac. 977.

See, also, State v. Vane, 105 Wash. 421, 178 Pac. 456; State v. Donovan, 108 Wash. 276, 183 Pac. 127.

Under this section, defining the crime of larceny as capable of being committed in one of the several ways stated disjunctively in the first subdivision of the section, and section 2260, abrogating the common-law distinction between principals and accessories before the fact,

an information charging larceny by hiring two men to commit the theft of two steers, and that the men actually committed it, and that defendant purchased and received the steers from them, is not duplicitous in charging inconsistent offenses, and it is not error to refuse to require an election: *State v. Klein*, 94 Wash. 212, 162 Pac. 52.

§ 7. **Description of Property:** *State v. Brookhouse*, 10 Wash. 87, 38 Pac. 862; *State v. Barkuloo*, 18 Wash. 144, 51 Pac. 350; *State v. Burns*, 19 Wash. 52, 52 Pac. 316; *State v. Palmer*, 20 Wash. 207, 54 Pac. 1121; *State v. Shuck*, 38 Wash. 270, 80 Pac. 444; *State v. McIntyre*, 53 Wash. 178, 101 Pac. 710.

§ 8. **Value of Property:** *McCarty v. State*, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152; *State v. Holmes*, 9 Wash. 528, 37 Pac. 283; *State v. Hanshew*, 3 Wash. 12, 27 Pac. 1029; *State v. Brew*, 4 Wash. 95, 29 Pac. 762, 31 Am. St. Rep. 904; *State v. Blanchard*, 11 Wash. 116, 39 Pac. 377; *State v. Young*, 13 Wash. 584, 43 Pac. 881; *State v. Kyle*, 14 Wash. 550, 45 Pac. 147.

§ 9. **Ownership of Property:** *State v. Coss*, 12 Wash. 673, 42 Pac. 127; *State v. Eddy*, 46 Wash. 494, 90 Pac. 641.

§ 10. **Secreting, Withholding or Appropriation of Property:** *State v. Kasper*, 5 Wash. 174, 31 Pac. 636.

11. **Larceny from House:** *State v. Sufferin*, 6 Wash. 107, 32 Pac. 1021.

§ 13. **Time for Taking:** *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523.

Issues, Proof and Variance: See *Remington's Digest, Larc.*, § 12; *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461; *State v. Burns*, 19 Wash. 52, 52 Pac. 316; *State v. Phillips*, 27 Wash. 364, 67 Pac. 608; *State v. Johnson*, 36 Wash. 294, 78 Pac. 903; *State v. Wilson*, 42 Wash. 56, 84 Pac. 409, 7 Ann. Cas. 418; *State v. Smith*, 60 Wash. 399, 111 Pac. 342; *State v. Hatch*, 63 Wash. 617, 116 Pac. 286; *State v. Garland*, 65 Wash. 666, 118 Pac. 907; *State v. Libby*, 89 Wash. 27, 153 Pac. 1058, 155 Pac. 746.

See, also, *State v. Vane*, 105 Wash. 421, 178 Pac. 456.

EVIDENCE — ADMISSIBILITY — See *Remington's Digest, Larc.*, §§ 15—24. **In General:** *State v. Humason*, 5 Wash. 419, 32 Pac. 111; *State v. Munson*, 7 Wash. 239, 34 Pac. 932; *State v. Hatch*, 63 Wash. 617, 116 Pac. 286.

§ 16. — **Other Offenses:** *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Gottfreedson*, 24 Wash. 398, 64 Pac. 523; *State v. Strodemier*, 40 Wash. 608, 82 Pac. 915.

§ 17. **Identity of Property:** *State v. Murphy*, 15 Wash. 98, 45 Pac. 729.

See, also, *State v. Swager*, 110 Wash. 431, 188 Pac. 504.

§ 18. — **Ownership of Property:** *State v. Kasper*, 5 Wash. 174, 31 Pac. 636; *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Keech*, 103 Wash. 533, 175 Pac. 176.

§ 19. — **Possession or Custody of Property:** *State v. Eubank*, 33 Wash. 293, 74 Pac. 378.

§ 20. — **Situation and Place of Taking of Property:** *State v. Concannon*, 25 Wash. 327, 65 Pac. 534; *State v. Johnson*, 36 Wash. 294, 78 Pac. 903.

§ 21. — **Acts of Accused:** *State v. Humason*, 5 Wash. 499, 32 Pac. 111.

§ 22. — **Admissions and Declarations of Accused:** *State v. Coss*, 12 Wash. 673, 42 Pac. 127; *State v. Washing*, 36 Wash. 485, 78 Pac. 1019.

§ 23. — **Possession by Accused of Property Stolen:** *State v. Burns*, 19 Wash. 52, 52 Pac. 316; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378.

§ 24. — **Matters of Defense:** *State v. Strodemier*, 40 Wash. 608, 82 Pac. 915.
See, also, *State v. Cadwell*, 105 Wash. 689, 179 Pac. 87.

Weight and Sufficiency of Evidence: See *Remington's Digest, Larc.*, §§ 25—30.

§ 25. **In General:** *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Gray*, 61 Wash. 549, 112 Pac. 641.

See, also, *State v. Schimmels*, 105 Wash. 151, 177 Pac. 685; *State v. Braniff*, 105 Wash. 327, 177 Pac. 801.

§ 25-1. — **Corpus Delicti:** *State v. Lewis*, 65 Wash. 485, 118 Pac. 626; *State v. Scott*, 86 Wash. 296, 150 Pac. 423, L. R. A. 1916B, 844.

§ 25-2. — **Value of Property:** *State v. Lewis*, 65 Wash. 485, 118 Pac. 626.

§ 26. — **Nonconsent of Owner or Custodian:** *State v. Wong Quong*, 27 Wash. 93, 67 Pac. 355.

See, also, *State v. Swager*, 110 Wash. 431, 188 Pac. 504.

§ 27. — **Money and Bank Notes:** *State v. Phillips*, 27 Wash. 364, 67 Pac. 608; *State v. Jones*, 53 Wash. 142, 101 Pac. 708; *State v. Scott*, 86 Wash. 296, 150 Pac. 423, L. R. A. 1916B, 844.

§ 28. — **Taking and Asportation of Property in General:** *State v. Reis*, 9 Wash. 329, 37 Pac. 452; *State v. Concannon*, 25 Wash. 327, 65 Pac. 534; *State v. Wong Quong*, 27 Wash. 93, 67 Pac. 355; *State v. Johnson*, 36 Wash. 294, 78 Pac. 903; *State v. Grune*, 72 Wash. 448, 130 Pac. 751; *State v. Libby*, 89 Wash. 27, 153 Pac. 1058, 155 Pac. 746; *State v. Klein*, 94 Wash. 212, 162 Pac. 52; *State v. Turfey*, 100 Wash. 5, 170 Pac. 335; *State v. Keech*, 103 Wash. 533, 175 Pac. 176.

See, also, *State v. Braniff*, 105 Wash. 327, 177 Pac. 801; *State v. Swager*, 110 Wash. 431, 188 Pac. 504.

§ 29. — **Effect of Possession of Property Stolen:** *State v. Payne*, 6 Wash. 563, 34 Pac. 217; *State v. Scott*, 86 Wash. 296, 150 Pac. 423, L. R. A. 1916B, 844.

§ 30. — **Presumptions Arising from Possession:** *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Wilson*, 42 Wash. 56, 84 Pac. 409, 7 Ann. Cas. 418; *State v. McIntyre*, 53 Wash. 178, 101 Pac. 710.

TRIAL, SENTENCE AND PUNISHMENT: See *Remington's Digest*, Larc., §§ 32—40.

§ 32. **Conduct of Trial in General:** *State v. Eubank*, 33 Wash. 293, 74 Pac. 378.

§ 33. **Questions for Jury:** *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378.

§ 34. **Instructions—In General:** *State v. Payne*, 6 Wash. 563, 34 Pac. 317; *State v. Harras*, 25 Wash. 416, 65 Pac. 744; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Neis*, 68 Wash. 599, 123 Pac. 1022.

See, also, *State v. Donovan*, 108 Wash. 276, 183 Pac. 127.

§ 35. — **Nature and Value of Property:** *State v. Phillips*, 37 Wash. 364, 67 Pac. 608; *State v. Washing*, 36 Wash. 485, 78 Pac. 1019.

See, also, *State v. Swager*, 110 Wash. 431, 188 Pac. 504.

§ 36. — **Ownership and Possession or Custody of Property:** *Territory v. Heywood*, 2 W. T. 180, 2 Pac. 189; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378.

§ 37. — **Taking and Asportation of Property in General:** *State v. Brookhouse*, 10 Wash. 87, 38 Pac. 862.

§ 38. — **Conversion, Withholding or Appropriation of Property:** *State v. Skilbrick*, 25 Wash. 555, 66 Pac. 53, 87 Am. St. Rep. 784.

§ 39. — **Effect of Possession of Property Stolen, and of Explanations Thereof:** *State v. Humason*, 5 Wash. 499, 32 Pac. 111; *State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888; *State v. Harras*, 25 Wash. 416, 65 Pac. 744; *State v. Bliss*, 27 Wash. 463, 68 Pac. 57; *State v. Eubank*, 33 Wash. 293, 74 Pac. 378; *State v. Williams*, 62 Wash. 286, 113 Pac. 780.

§ 40. **Sentence and Punishment:** *State v. Bliss*, 27 Wash. 463, 68 Pac. 87.

Embezzlement—Elements of Offense: See *Remington's Digest*, Embez., §§ 1—7.

§ 1. **Nature of Property:** *State v. Raby*, 31 Wash. 111, 71 Pac. 771.

§ 2. — **Capacity or Character in Which Property is Received or Held:** *State v. Covert*, 14 Wash. 652, 45 Pac. 304; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386.

§ 3. **Embezzlement by Particular Classes of Persons—Agents:** *State v. Maines*, 26 Wash. 160, 66 Pac. 431; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778; *State v. Ward*, 96 Wash. 550, 165 Pac. 794; *State v. Campbell*, 99 Wash. 502, 169 Pac. 968.

§ 3-1. — **Bailees:** *State v. Jakubowski*, 77 Wash. 78, 137 Pac. 448.

§ 4. — **Public Officers or Employees:** *State v. Isensee*, 12 Wash. 254, 40 Pac. 895; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. Downing*, 15 Wash. 413, 46 Pac. 646; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524; *State v. Leonard*, 56 Wash. 83, 105 Pac. 163, 21 Ann. Cas. 69; *State v. Snow*, 65 Wash. 353, 118 Pac. 209, 37 L. R. A. (N. S.) 305.

§ 5. **Defenses:** *State v. Boggs*, 16 Wash. 143, 47 Pac. 417; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386; *State v. Russell*, 84 Wash. 607, 147 Pac. 194; *State v. Campbell*, 99 Wash. 502, 169 Pac. 968.

§ 6. **Jurisdiction—Locality of Offense:** *State v. Whiteman*, 9 Wash. 402, 37 Pac. 659.

§ 7. **Venue:** *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386.

Indictment or Information: See *Remington's Digest*, Embez., §§ 8—12.

§ 8. **Requisites and Sufficiency in General:** *State v. Isensee*, 12 Wash. 254, 40 Pac. 985; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. McCauley*, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; *State v. Boggs*, 16 Wash. 143, 47 Pac. 417; *State v. Hoshor*, 26 Wash. 643, 67 Pac. 386; *State v. Dix*, 33 Wash. 405, 74 Pac. 570.

§ 10. — **Capacity or Character in Which Property was Received or Held:** *Terry v. State*, 1 Wash. 277, 24 Pac. 447; *State v. Turner*, 10 Wash. 94, 38 Pac. 964.

§ 11. — **Conversion or Appropriation of Property:** *State v. Mayberry*, 9 Wash. 193, 37 Pac. 284; *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Whiteman*, 9 Wash. 402, 37 Pac. 659; *State v. Whitworth*, 30 Wash. 47, 70 Pac. 254; *State v. Bogardus*, 36 Wash. 297, 78 Pac. 942.

§ 12. — **Conversion by Public Officers:** *State v. Isensee*, 12 Wash. 254, 40 Pac. 985; *State v. Downing*, 15 Wash. 413, 46 Pac. 646; *State v. Raby*, 31 Wash. 111, 71 Pac. 771.

— **Issues, Proof and Variance:** See Remington's Digest, Embez., § 13; State Hoshor, 26 Wash. 643, 67 Pac. 386; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Boone, 65 Wash. 331, 118 Pac. 46.

Admissibility of Evidence: See Remington's Digest, Embez., §§ 14—17.

§ 14. **In General:** State v. Hopkins, 13 Wash. 5, 42 Pac. 627; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Nilson, 56 Wash. 289, 105 Pac. 829; State v. Knowles, 94 Wash. 351, 162 Pac. 518.

See, also, State v. Beaton, 106 Wash. 423, 180 Pac. 146; State v. Morris, 109 Wash. 490, 187 Pac. 350.

§ 15. — **Intent:** State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Nilson, 56 Wash. 289, 105 Pac. 829; State v. Ward, 96 Wash. 550, 165 Pac. 794.

§ 17. — **Incriminating Circumstances:** State v. Pittam, 32 Wash. 137, 72 Pac. 1042; State v. Downer, 68 Wash. 672, 123 Pac. 1073, 43 L. R. A. (N. S.) 774.

Weight and Sufficiency of Evidence: See Remington's Digest, Embez., § 18; State v. Boggs, 16 Wash. 143, 47 Pac. 417; State v. McCauley, 17 Wash. 88, 49 Pac. 221, 51 Pac. 382; State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Bogardus, 36 Wash. 297, 78 Pac. 942; State v. Buchanan, 43 Wash. 406, 86 Pac. 650; State v. Leonard, 56 Wash. 83, 105 Pac. 163, 21 Ann. Cas. 69; State v. Nilson, 56 Wash. 289, 105 Pac. 829; State v. Downer, 68 Wash. 672, 123 Pac. 1073, 43 L. R. A. (N. S.) 774; State v. Jakubowski, 77 Wash. 78, 137 Pac. 448; State v. Hatupin, 99 Wash. 468, 169 Pac. 966; State v. Campbell, 99 Wash. 502, 169 Pac. 968.

Trial: See Remington's Digest, Embez., §§ 19—22. **Questions for Jury:** State v. Lewis, 31 Wash. 75, 71 Pac. 778.

§ 20. — **Instructions:** State v. Krug, 12 Wash. 288, 41 Pac. 126; State v. Downing, 15 Wash. 413, 46 Pac. 646; State v. Boggs, 16 Wash. 143, 47 Pac. 417; State v. Lewis, 31 Wash. 75, 71 Pac. 778; State v. Leonard, 56 Wash. 83, 105 Pac. 163, 21 Ann. Cas. 69; State v. Jakubowski, 77 Wash. 78, 137 Pac. 448; State v. Ward, 96 Wash. 550, 165 Pac. 794.

See, also, State v. Morris, 109 Wash. 490, 187 Pac. 350.

§ 21. — **Verdict:** State v. Weydeman, 3 Wash. 399, 28 Pac. 749.

§ 22. **Appeal and Error:** State v. Whiteman, 9 Wash. 402, 37 Pac. 659.

For text treatment of "Larceny," see 17 B. C. L. 1.

Intent to convert property to one's own use or to the use of third person as element of larceny. 12 A. L. R. 804.

Outlawed liquors as subject of larceny. 11 A. L. R. 1032.

Larceny by appropriating money or proceeds of paper mistakenly delivered in excess of the amount due or intended. 14 A. L. R. 894.

Criminal responsibility of woman for stealing from husband. 4 A. L. R. 282.

Effect of participation of spouse of owner in, or consent to, taking of property. 14 A. L. R. 1271.

False Pretenses: See Remington's Digest, False Pret., § 1.

Nature of Pretense: State v. Knowlton, 11 Wash. 512, 39 Pac. 966; State v. Reiff, 14 Wash. 664, 45 Pac. 318; State v. Mendenhall, 24 Wash. 12, 63 Pac. 1109; State v. Phelps, 41 Wash. 470, 84 Pac. 24; State v. Lynn, 89 Wash. 463, 154 Pac. 798.

A prosecution for attempted larceny by false pretenses in a telephone order for goods does not fail because the attempt was unsuccessful: State v. Peterson, 109 Wash. 25, 186 Pac. 264, 8 A. L. R. 652.

Under an information charging the larceny of fifty bushels of wheat during a certain month, and this section making it larceny to knowingly buy or receive stolen property, it is competent to show that the accused offered one B. and his associates one dollar and a half a sack for all wheat they would take from cars and put in his barn, and thereafter, on three different occasions during said month, he paid B. and his associates for wheat stolen by them and put in his barn; and the prosecution need not elect between the different deliveries; since it was all part of one continuous transaction: State v. Ray, 62 Wash. 582, 114 Pac. 439.

Under this section, subdivision 2, an information is sufficient if, rejecting additional matter as surplusage, enough remains to charge the offense in the language of the statute, in the absence of any motion to strike or make more definite, even though it did not describe any trick, fraud or device: State v. Ferrato, 72 Wash. 112, 129 Pac. 898.

False Pretenses as to Particular Subject Matters: See Remington's Digest, False Pret., § 2; State v. Reiff, 14 Wash. 644, 45 Pac. 318; State v. Swan, 55 Wash. 97, 104 Pac. 145, 133 Am. St. Rep. 1024, 19 Ann. Cas. 1120, 24 L. R. A. (N. S.) 575.

§ 2601-1. Taking Motor Vehicle Without Permission.

Every person who shall without the permission of the owner or person entitled to the possession thereof intentionally take or drive away any automobile or motor vehicle, whether propelled by steam, electricity or internal combustion engine, the property of another, shall be deemed guilty of a felony, and every person voluntarily riding in or upon said automobile or motor vehicle with knowledge of the fact that the same was unlawfully taken shall be equally guilty with the person taking or driving said automobile or motor vehicle and shall be deemed guilty of a felony. [L. '19, p. 131, § 1. Cf. L. '15, p. 459, § 1.]

§ 2601-2. Unlawful Issuance of Bank Checks or Drafts.

Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud. [L. '15, p. 460, § 1.]

See, also, *supra*, § 2601.

§ 2601-3. Motor Serial Number—Purchase, Sale or Possession, When Altered.

Whoever knowingly buys, sells, receives, disposes of, conceals, or has in his possession any motor vehicle or motor boat from which the manufacturer's serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed for the purpose of concealment or mispresenting the identity of the said motor vehicle or motor boat shall be guilty of a gross misdemeanor. [L. '17, p. 218, § 1.]

§ 2601-4. Possession Prima Facie Evidence of Guilt.

In any prosecution under the provisions of section 2601-3 evidence that any person has, or at the time of his arrest charged with the violation of said section 2601-3 had in his possession any motor vehicle or motor boat from which the manufacturer's serial number or numbers or other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed shall constitute prima facie proof of the guilt of such person. [L. '17, p. 218, § 2.]

§ 2602. Commission or Part Ownership No Defense.

It shall be no defense to a prosecution for larceny that the accused was entitled to a commission out of the money or property appropriated, as compensation for collecting or receiving the same for or on behalf of the owner thereof, or that the money or property appropriated was partly the property of another and partly the property of the accused; but it

shall not be larceny for any bailee, factor, pledgee, servant, attorney, agent, employee, or trustee, executor, administrator, guardian, officer or other person to retain his reasonable collection fee or charges. [L. '09, p. 998, § 350.]

Cited in 84 Wash. 612; 106 Wash. 225; 113 Wash. 398.

Copartnership property is not the subject of larceny by one partner by reason of this section, which has no application, since partnership property is not the property of another; and penal statutes

must be construed to reach no further than their words: State v. Eberhart, 106 Wash. 222, 179 Pac. 853.

It is not error to refuse an instruction under this section where it had no application: State v. Cook, 113 Wash. 391, 194 Pac. 401.

§ 2603. Sale of Mortgaged Property—When Larceny.

Every person who shall sell or mortgage any personal property which is at the time mortgaged or upon which any lien has been or may lawfully be filed, without informing the purchaser or mortgagee thereof, before the payment of the purchase price or money loaned, of the several amounts of all such mortgages and liens, shall be deemed to have made a false representation within the meaning of section 2601, subdivision 2. [L. '09, p. 998, § 351.]

See *infra*, §§ 2629, 3789, removal of mortgaged property.

§ 2604. Contractor Failing to Pay for Labor or Material.

Every person having entered into a contract to supply any labor or materials for the value or price of which any lien might lawfully be filed upon the property of another, who shall receive the full price or consideration thereof, or the amount of any account stated thereon, shall be deemed within the meaning of section 2601, subdivision 3, to receive the same as the agent of the party with whom such contract was made, his successor or assign, for the purpose of paying all claims for labor and materials supplied. [L. '09, p. 998, § 352.]

§ 2605. Grand Larceny—Penalty.

Every person who shall steal or unlawfully obtain, appropriate, bring into this state, buy, sell, receive, conceal or withhold in any manner specified in section 2601—

(1.) Property of any value by taking the same from the person of another or from the body of a corpse; or

(2.) Property of any value by taking the same from any building that is on fire or by taking the same after it has been removed from a building in consequence of an alarm of fire; or

(3.) A record of a court or officer, or a writing, instrument or record kept, filed or deposited according to law with or in the keeping of any public officer or officers; or

(4.) From any range or pasture, any horse, mare, gelding, foal or filly, ass or mule, one or more head of neat cattle or any sheep; or

(5.) Property of the value of more than twenty-five dollars, in any manner whatever,

Shall be guilty of grand larceny and be punished by imprisonment in the state penitentiary for not more than fifteen years.

Every other larceny shall be petit larceny and shall be a gross misdemeanor. [L. '09, p. 998, § 353.]

Cited in 62 Wash. 584; 63 Wash. 619; 65 Wash. 354; 77 Wash. 438; 83 Wash. 660; 84 Wash. 483; 89 Wash. 28; 108 Wash. 285; 110 Wash. 436.

Where the purchase of stolen property on three different occasions was pursuant to one offer and all part of one transaction, it amounts to grand larceny, under this section, if the total value was over \$25, notwithstanding there might have been a conviction of petty larceny for

any one of the three acts: *State v. Ray*, 62 Wash. 582, 114 Pac. 439.

Upon a prosecution, under this section, subdivision 4, for the larceny of one head of neat cattle by unlawfully taking it from a range or pasture, the jury should be instructed that it was essential to prove that the animal was taken or driven away from a range or pasture: *State v. Crossen*, 77 Wash. 438, 137 Pac. 1030.

§ 2606. Value—How Ascertained.

The value of all instruments not having a market value, whether issued or delivered or not, by which any claim, privilege, right, obligation or authority or any right or title to property, real or personal, is, or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, shall be deemed to be the amount of money due thereon or secured to be paid thereby and unpaid, or which in any contingency might be collected thereon or thereby, or the value of the property transferred or affected or the title to which is shown thereby, or the sum which might be recovered for the want thereof, as the case may be. In every other case not otherwise regulated by statute, "value" shall be deemed to mean market value. [L. '09, p. 999, § 354.]

§ 2607. Stealing Railway Tickets.

If any person in the employ of a railway or steamboat company shall fraudulently neglect to cancel or to return to the proper officer or agent of such company, any ticket, coupon or pass, with intent to permit the same to be used in fraud of any railway or steamboat company, or if any person shall steal or fraudulently stamp, print, sign, sell, or put into circulation any such ticket, coupon or pass, he shall be guilty of larceny. [L. '09, p. 1000, § 355.]

§ 2608. Claim of Title—When Ground of Defense.

In any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable. [L. '09, p. 1000, § 356.]

Cited in 77 Wash. 439; 94 Wash. 95, 98.

In a prosecution for the larceny of "one head of neat cattle," from a range or pasture, in which the defense was that the accused had bought a calf of an Indian, and drove in and butchered the animal in question supposing it was the one he had bought, it is error to refuse to instruct as to the defense of this section: *State v. Crossen*, 77 Wash. 438, 137 Pac. 1030.

Upon a prosecution of a broker for larceny by embezzlement in withholding, as agent of the purchaser, part of the purchase price which he had deducted as his commission, in which there was conflicting evidence as to defendant's misrepresentations and as to the fact of agency, the defendant is entitled to an instruction to the jury in accordance with this section: *State v. Rolette*, 94 Wash. 94, 161 Pac. 1042.

§ 2609. Restoration of Stolen Property—Duty of Officers.

The officer arresting any person charged as principal or accessory in any robbery or larceny shall use reasonable diligence to secure the

property alleged to have been stolen, and after seizure shall be answerable therefor while it remains in his hands, and shall annex a schedule thereof to his return of the warrant.

Whenever the prosecuting attorney shall require such property for use as evidence upon the examination or trial, such officer, upon his demand, shall deliver it to him, and take his receipt therefor, after which such prosecuting attorney shall be answerable for the same. [L. '09, p. 1000, § 357.]

EXTORTION OR OPPRESSION.

§ 2610. Extortion.

Every person, who, under circumstances not amounting to robbery, shall extort or gain any money, property or advantage, or shall induce or compel another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intended to affect any cause of action or defense, or any property, by means of force or any threat, either—

- (1.) To accuse any person of a crime; or
- (2.) To do any injury to any person or to any property; or
- (3.) To publish or connive at publishing any libel; or
- (4.) To expose or impute to any person any deformity or disgrace; or
- (5.) To expose any secret,

Shall be guilty of extortion and shall be punished by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 1000, § 358.]

Cited in 67 Wash. 89; 99 Wash. 155, 156.

This section defining extortion as a crime against the person, creates a cause of action in favor of the person injured, although the statute is a general criminal statute: *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977.

Under this section, one may be guilty of extorting a check, although it had no actual cash value from the fact that it would not have been cashed; as the claim which might have been made thereon imported value: *State v. Barr*, 67 Wash. 87, 120 Pac. 509.

Under the common law, it was not an indictable offense to extort money by threatening to institute a criminal prosecution against the party defrauded, since the threat is not of personal violence or such as to overcome a firm and prudent

man: *State v. Nethercutt*, 48 Wash. 105, 92 Pac. 938.

The defendants are guilty of extortion by threats, where they accused the prosecuting witness of adultery and demanded the payment of money as satisfaction, which he at first refused, although they later enforced their demands by violence: *State v. Barr*, 67 Wash. 87, 120 Pac. 509.

This section creates a right of action in favor of the person injured: *Bertschinger v. Campbell*, 99 Wash. 142, 168 Pac. 977.

Failure of Proof of Extortion: See *State v. Wainwright*, 50 Wash. 225, 97 Pac. 51.

Criminal liability where demand for payment of debt is made in connection with threat of prosecution. *Ann. Cas.* 1917E, 246.

Public officer receiving fee before due as extortion: 15 *Ann. Cas.* 1117.

§ 2611. Oppression Under Color of Office.

Every officer, or person pretending to be such, who unlawfully and maliciously, under pretense or color of official authority, shall—

- (1.) Arrest another or detain him against his will; or
- (2.) Seize or levy upon another's property; or
- (3.) Dispossess another of any lands or tenements; or

(4.) Do any act whereby another person shall be injured in his person, property or rights, commits oppression, shall be guilty of a gross misdemeanor.

(5.) No officer or person having the custody and control of the body or liberty of any person under arrest, shall refuse permission to such arrested person to communicate with his friends or with an attorney, nor subject any person under arrest to any form of personal violence, intimidation, indignity or threats for the purpose of extorting from such person incriminating statements or a confession. Any person violating the provisions of this section shall be guilty of a misdemeanor. [L. '09, p. 1001, § 359.]

Cited in 68 Wash. 245.

A confession is inadmissible as one obtained by duress, where it appears that the prosecuting attorney threatened the accused with a series of prosecutions which would culminate in cumulative sentences, unless he confessed, he was

subjected to solitary confinement in a dark cell, and testified that he was subjected to severe personal violence, and was denied communication with an attorney or any person; especially in view of this section: State v. Miller, 68 Wash. 239, 122 Pac. 1066.

§ 2612. Extortion by Public Officer.

Every public officer who shall ask or receive, or agree to receive a fee or other compensation for his official service, either—

(1.) In excess of the fee or compensation allowed to him by statute therefor; or

(2.) Where no fee or compensation is allowed to him by statute therefor, commits extortion, and is guilty of a misdemeanor. [L. '09, p. 1001, § 360.]

§ 2613. Blackmail.

Every person who, with intent thereby to extort or gain any money or other property or to compel or induce another to make, subscribe, execute, alter or destroy any valuable security or instrument or writing affecting or intending to affect any cause of action or defense, or any property, or to influence the action of any public officer, or to do or abet or procure any illegal or wrongful act, shall threaten directly or indirectly—

(1.) To accuse any person of a crime; or

(2.) To do any injury to any person or to any property; or

(3.) To publish or connive at publishing any libel; or

(4.) To expose or impute to any person any deformity or disgrace; or

(5.) To expose any secret,

Shall be punished by imprisonment in the state penitentiary for not more than five years or by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 1002, § 361.]

Indictment and Information: See Remington's Digest, Threats, § 1; State v. Richards, 97 Wash. 587, 167 Pac. 47.

§ 2614. Coercion.

Every person who, with intent to compel another to do or abstain from doing any act which such other person has a right to do, or abstain from doing, shall wrongfully and unlawfully—

(1.) Use violence or inflict injury upon such other person or any of his family, or upon his property, or threaten such violence or injury; or

(2.) Deprive such person of any tool, implement or clothing, or hinder him in the use thereof; or

(3.) Attempt to intimidate such person by threats or force,

Shall be guilty of a misdemeanor. [L. '09, p. 1002, § 362.]

Cited in 97 Wash. 588; 104 Wash. 298.

FRAUDS.

§ 2615. Falsely Personating Another.

Every person who shall falsely personate another, and in such assumed character, shall—

(1.) Marry or pretend to marry or sustain the marriage relation toward another; or

(2.) Become bail or surety for a party in an action or special proceeding civil or criminal, before a court or officer authorized to take such bail or surety; or

(3.) Confess a judgment; or

(4.) Subscribe, verify, publish, acknowledge or approve a written instrument which by law may be recorded, with intent that the same may be delivered or issued as true; or

(5.) Appear for arraignment, trial or judgment in any criminal proceeding; or

(6.) Do any other act in the course of any action or proceeding wherein, if it were done by the person falsely personated such person might in any event become liable to an action or special proceeding, civil or criminal, or to pay a sum of money, or to incur a charge, forfeiture, or penalty, or whereby any benefit might accrue to the offender or to any other person,

Shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 1003, § 363.]

§ 2616. Personating an Officer.

Every person who shall falsely personate a public officer, civil or military, or a policeman, or a private individual having special authority by law to perform an act affecting the rights or interests of another, or who, without authority shall assume any uniform or badge by which such an officer or person is lawfully distinguished, and in such assumed character shall do any act purporting to be official, whereby another is injured or defrauded, shall be guilty of a gross misdemeanor. [L. '09, p. 1003, § 364.]

Criminal responsibility of one aiding and abetting the offense of false personation. 5 A. L. R. 784.

§ 2617. Use of False Permit, License or Diploma.

Every person who shall conduct any business or perform any act under color of, or file for record with any public officer, any false or fraudulent permit, license, diploma or writing, or any permit, license, diploma or writing not lawfully belonging to such person, or who shall

obtain any permit, license, diploma or writing by color or aid of any false representation, pretense, personation, token or writing, shall be guilty of a gross misdemeanor. [L. '09, p. 1003, § 365.]

§ 2618. Concealing Foreign Matter in Merchandise.

Every person who, with intent to defraud, shall place or conceal any foreign substance in any barrel, bag, bale, box or other package containing any article of merchandise, shall be guilty of a gross misdemeanor. [L. '09, p. 1004, § 366.]

§ 2619. Obtaining Signature by False Pretense.

Every person who, with intent to cheat or defraud another, shall designedly by color or aid of any false token or writing or other false pretense, representation or presentation, obtain the signature of any person to a written instrument, shall be punished by imprisonment in the state penitentiary for not more than five years or in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment. [L. '09, p. 1004, § 367.]

§ 2620. False Representation Concerning Credit.

Every person who, with intent thereby to obtain credit or financial rating, shall willfully make any false statement in writing of his assets or liabilities to any person with whom he may be either actually or prospectively engaged in any business transaction or to any commercial agency or other person engaged in the business of collecting or disseminating information concerning financial or commercial ratings, shall be guilty of a misdemeanor. [L. '09, p. 1004, § 368.]

False statement in writing concerning financial ability in order to obtain credit.
Ann. Cas. 1916C, 1161.

§ 2621. False Representation Concerning Title.

Every person who shall maliciously or fraudulently execute or file for record any instrument, or put forward any claim, by which the right or title of another to any real property is, or purports to be transferred, encumbered or clouded, shall be guilty of a gross misdemeanor. [L. '09, p. 1004, § 369.]

§ 2622. Published False Statement to Affect Market Price.

Every person who, with intent to affect the market price of any security or property shall put off, circulate or publish any false or misleading writing, statement or intelligence, shall be guilty of a gross misdemeanor. [L. '09, p. 1005, § 370.]

§ 2622-1. False Advertising.

Any person, firm, corporation or association who, with intent to sell or in any wise dispose of merchandise, securities, service, or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, makes, publishes, disseminates, circulates, or places before

the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, or letter, or in any other way, an advertisement of any sort regarding merchandise, securities, service, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall be guilty of a misdemeanor: Provided, that the provisions of this act shall not apply to any owner, publisher, agent, or employee of a newspaper for the publication of such advertisement published in good faith and without knowledge of the falsity thereof. [L. '13, p. 91, § 1.]

Cited in 95 Wash. 2.

An advertisement that the market value of a piano "was \$400, now \$200," when not a violation of this section: *State v. Massey*, 95 Wash. 1, 163 Pac. 7.

False, fraudulent, immoral or other objectionable advertising. *Ann. Cas.* 1916A, 900, 931; *Ann. Cas.* 1917C, 458.

§ 2623. Obtaining Employment by False Letter or Certificate.

Every person who shall obtain employment or appointment to any office or place of trust, by color or aid of any false or forged letter or certificate of recommendation, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 371.]

§ 2624. Fraud by Employment Agent.

Every employment agent or broker who, with intent to influence the action of any person thereby, shall misstate or misrepresent verbally, or in any writing or advertisement, any material matter relating to the demand for labor, the conditions under which any labor or service is to be performed, the duration thereof or the wages to be paid therefor, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 372.]

§ 2625. Frauds on Innkeeper.

Every person who shall obtain any food, lodging or accommodation at any hotel, restaurant, boarding-house or lodging-house without paying therefor, with intent to defraud the proprietor or manager thereof, or who shall obtain credit at a hotel, restaurant, boarding-house or lodging-house by color or aid of any false pretenses, representation, token or writing, or who after obtaining board, lodging or accommodation at a hotel, restaurant, boarding-house or lodging-house shall abscond or surreptitiously remove his baggage therefrom without paying for such food, lodging or accommodation, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 373.]

§ 2626. Improper Use of Insignia.

Every person who shall willfully wear the badge, button, insignia or rosette of any military order or of any secret order or society, or any similitude thereof; or who shall use any such badge, button, insignia or rosette to obtain aid or assistance, or any other benefit or advantage, unless he shall be entitled to so wear or use the same under the constitution, by-laws, rules and regulations of such order or society, shall be guilty of a misdemeanor. [L. '09, p. 1005, § 374.]

Validity of statute making it offense to wear badge by person not mem-

ber of society. 21 *Ann. Cas.* 1037; 24 *L. R. A. (N. S.)* 795.

§ 2627. Fraudulently Presenting Claim to Public Officer.

Every person who, with the intent to defraud, shall knowingly present for audit, allowance or payment to any officer or board of the state or of any county, city, town or school district, authorized to audit, allow or pay bills, claims or charges, any false or fraudulent claim, account, writing or voucher or any bill, account or demand containing false or fraudulent charges, items or claims, shall be guilty of a gross misdemeanor. [L. '09, p. 1005, § 375.]

§ 2628. Fraud by Bailee of Animal.

Every person who shall obtain from another the possession or use of any horse or other draft animal or any vehicle or automobile, without paying therefor, with intent to defraud the owner thereof, or who shall obtain the possession or use thereof by color or aid of any false or fraudulent representation, pretense, token or writing, or shall obtain credit for such use by color or aid of any false or fraudulent representation, pretense, token, or writing; or who having hired property, shall recklessly, willfully, wantonly or by gross negligence injure or destroy or cause, suffer, allow or permit the same, or any part thereof, to be injured or destroyed; or who, having hired any horse or other draft animal upon an understanding or agreement that the same shall be ridden or driven a specified distance or to a specified place, shall willfully and fraudulently ride or drive or cause, permit or allow the same to be ridden or driven a longer distance, or to a different place, shall be guilty of a misdemeanor. [L. '09, p. 1006, § 376.]

§ 2629. Destruction or Removal of Mortgaged Property.

Every person being in possession thereof, who shall remove, conceal or destroy or connive at or consent to the removal, concealment or destruction of any personal property or any part thereof, upon which a mortgage, lien, conditional sales contract or lease exists, in such a manner as to hinder, delay or defraud the holder of such mortgage, lien or conditional sales contracts, or such lessor, or who, with intent to hinder, delay or defraud the holder of such mortgage, lien or conditional sales contract, or such lessor, shall sell, remove, conceal or destroy or connive at or consent to the removal, concealment or destruction of such property, shall be guilty of a gross misdemeanor.

In any prosecution under this section any allegation containing a description of the mortgage, lien, conditional sales contract or lease by reference to the date thereof and names of the parties thereto, shall be sufficiently definite and certain. [L. '09, p. 1006, § 377.]

See supra, § 2603, sale of mortgaged property.

See infra, § 3789, removal of mortgaged personalty.

Cited in 98 Wash. 186.

In an information for removing and secreting personal property held under a conditional bill of sale, it is not neces-

sary to allege the character of the company or partnership named as vendor or vendee, in view of this section: State v. Brummett, 98 Wash. 182, 167 Pac. 120.

§ 2629-1. Removal of Timber from Land Delinquent for Taxes.

It shall be unlawful for any person, firm or corporation to remove any timber from timbered lands, no portion of which is occupied for farm-

ing purposes by the owners thereof, upon which taxes are delinquent until the taxes thereon have been paid. [L. '13, p. 346, § 1.]

§ 2629-2. Penalty.

Any person violating the provisions of this act shall be guilty of a gross misdemeanor and punished accordingly. [L. '13, p. 346, § 2.]

"This act" refers to this and the preceding section.

§ 2630. Mock Auctions.

Every person who shall obtain any money or property from another or shall obtain the signature of another to any writing the false making of which would be forgery, by color or aid of any false or fraudulent sale of property or pretended sale of property by auction, or by any of the practices known as mock auction, shall be punished by imprisonment in the state penitentiary for not more than five years or in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both fine and imprisonment.

Every person who shall buy or sell or pretend to buy or sell any goods, wares or merchandise, exposed to sale by auction, if an actual sale, purchase and change or ownership therein does not thereupon take place, shall be guilty of a misdemeanor. [L. '09, p. 1007, § 378.]

§ 2631. Fraudulent Removal of Property.

Every person who, with intent to defraud a prior or subsequent purchaser thereof, or prevent any of his property being made liable for the payment of any of his debts, or levied upon by an execution or warrant of attachment, shall remove any of his property, or secrete, assign, convey or otherwise dispose of the same, or with intent to defraud a creditor shall remove, secrete, assign, convey or otherwise dispose of any of his books or accounts, vouchers or writings in any way relating to his business affairs, or destroy, obliterate, alter or erase any of such books of account, accounts, vouchers or writing or any entry, memorandum or minute therein contained, shall be guilty of a gross misdemeanor. [L. '09, p. 1007, § 379.]

§ 2632. Knowingly Receiving Fraudulent Conveyance.

Every person who shall receive any property or conveyance thereof from another, knowing that the same is transferred or delivered to him in violation of, or with the intent to violate section 2631, shall be guilty of a misdemeanor. [L. '09, p. 1008, § 380.]

§ 2633. Fraud in Assignment for Benefit of Creditors.

Every person who, having made, or being about to make, a general assignment of his property to pay his debts, shall by color or aid of any false or fraudulent representation, pretense, token or writing induce any creditor to participate in the benefits of such assignments, or to give any release or discharge of his claim or any part thereof, or shall connive at the payment in whole or in part of any false, fraudulent or fictitious claim, shall be guilty of a gross misdemeanor. [L. '09, p. 1008, § 381.]

§ 2634. Willful Destruction of Vessel.

Every person who shall wreck, burn, sink, scuttle or otherwise injure or destroy a vessel or its cargo, or willfully permit the same to be done, with the intent to prejudice or defraud an insurer or any other person, or who shall fit out a vessel, or shall load any cargo on board thereof with intent to permit or cause the same to be wrecked, sunk or otherwise injured or destroyed, and thereby defraud or prejudice an insurer or other person, shall be punished by imprisonment in the state penitentiary for not more than twenty years. [L. '09, p. 1008, § 382.]

§ 2635. Making False Manifest, Invoice, etc.

Every person who shall prepare, make or subscribe a false or fraudulent manifest, invoice, bill of lading, ship's register, or protest, with intent to defraud another, shall be punished by imprisonment in the state penitentiary for not more than five years or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 1009, § 383.]

§ 2636. Fraudulent Destruction of Insured Property.

Every person who, with intent to defraud or prejudice the insurer thereof, shall willfully injure or destroy any property not specified or included hereinbefore in this subdivision, which is insured at the time against loss or damage by fire or other causality [casualty] shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 1009, § 384.]

"This subdivision" in this section refers to §§ 2634 to 2635, inclusive.

§ 2637. Using False Weights and Measures.

Every person who shall injure or defraud another by using, with knowledge that the same is false, a false weight, measure or other apparatus for determining the quantity of any commodity or article of merchandise, or by knowingly misrepresenting the quantity thereof bought or sold; or who shall retain in his possession any weight or measure, knowing it to be false, unless it appears beyond a reasonable doubt that it was so retained without intent to use it or permit it to be used in violation of the foregoing provisions of this section, shall be guilty of a gross misdemeanor. [L. '09, p. 1009, § 385.]

See, also, "Weights and Measures."

See *infra*, § 8377, weights of lumber and shingles.

Knowledge or intent as element of offense of using or giving false weight or measure. *L. R. A.* 1917D, 1129.

Liability of principal or master for act of agent or servant in giving

false weight or measure. *Ann. Cas.* 1914B, 1077.

Criminal liability of corporation for use of false weights and measures. *Ann. Cas.* 1916C, 465.

§ 2638. Fraud in Stock Subscription.

Every person who shall sign the name of a fictitious person to any subscription for or any agreement to take stock in any corporation existing or proposed, and every person who shall sign to any such subscription or agreement the name of any person, knowing that such person does

not intend in good faith to comply with the terms thereof, or upon any understanding or agreement that the terms of such subscription or agreement are not to be complied with or enforced, shall be guilty of a gross misdemeanor. [L. '09, p. 1009, § 386.]

§ 2639. Fraudulent Issue of Stock, Scrip, etc.

Every officer, agent or other person in the service of a joint stock company or corporation, domestic or foreign, who, willfully and knowingly with intent to defraud, shall—

(1.) Sell, pledge or issue or cause to be sold, pledged or issued, or sign or execute or cause to be signed or executed, with intent to sell, pledge or issue, or cause to be sold, pledged or issued, any certificate or instrument purporting to be a certificate or evidence of ownership of any share or shares of such company or corporation, or any conveyance or encumbrance of real or personal property, contract, bond, or evidence of debt, or writing purporting to be a conveyance or encumbrance of real or personal property, contract, bond or evidence of debt of such company or corporation, without being first duly authorized by such company or corporation, or contrary to the charter or laws under which such company or corporation exists, or in excess of the power of such company or corporation, or of the limit imposed by law or otherwise upon its power to create or issue stock or evidence of debt; or,

(2.) Reissue, sell, pledge or dispose of, or cause to be reissued, sold, pledged or disposed of, any surrendered or canceled certificate or other evidence of the transfer of ownership of any such share or shares:

Shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both. [L. '09, p. 1010, § 387.]

§ 2640. Insolvent Bank Receiving Deposit.

Every owner, officer, stockholder, agent or employee of any person, firm, corporation or association engaged, wholly or in part, in the business of banking or receiving money or negotiable paper or securities on deposit or in trust, who shall accept or receive, with or without interest, any deposit, or who shall consent thereto or connive thereat, when he knows or has good reason to believe that such person, firm, corporation or association is unsafe or insolvent, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than ten thousand dollars. [L. '09, p. 1010, § 388.]

See *infra*, § 3379, this and the next two sections made applicable to mutual savings banks.

Cited in 60 Wash. 385; 65 Wash. 252; 82 Wash. 673, 674.

Criminal Responsibility and Admissibility of Evidence: See Remington's Digest, Banks, § 9; State v. Oleson, 35 Wash. 149, 76 Pac. 686; State v. Dix, 33 Wash. 405, 74 Pac. 570; State v. Youngbluth, 60 Wash. 383, 111 Pac. 240; State v. Welty, 65 Wash. 244, 118 Pac. 9; State v. Furth, 82 Wash. 665, 144 Pac. 907.

Validity of statute making it a crime to receive deposit in insolvent bank. 20 Ann. Cas. 1323; 22 L. R. A. (N. S.) 266.

Intent as element of offense of receiving deposit in insolvent bank. Ann. Cas. 1917B, 1081; 31 L. R. A. 124.

Criminal liability as dependent on officer of bank receiving deposit in person. *Ann. Cas.* 1912B, 316; 26 *L. R. A. (N. S.)* 1072.

Criminal liability of officer of insolvent bank for receiving deposit consisting of check on same bank. *Ann. Cas.* 1916E, 592.

§ 2641. Corporation Doing Business Without License.

Every corporation, whether domestic or foreign, and every person representing or pretending to represent such corporation as an officer, agent or employee thereof, who shall transact, solicit or advertise for any business in this state, before such corporation shall have obtained from the officer lawfully authorized to issue the same, a certificate that such corporation is authorized to transact business in this state, shall be guilty of a gross misdemeanor. [L. '09, p. 1011, § 389.]

See note to last section.

See *infra*, § 3855, failure to file charter and appointment of agent.

See *infra*, § 3861, foreign corporation doing business without registration.

§ 2642. False Report of Corporation.

Every director, officer or agent of any corporation or joint stock association, and every person engaged in organizing or promoting any enterprise, who shall knowingly make or publish or concur in making or publishing any written prospectus, report, exhibit or statement of its affairs or pecuniary condition, containing any material statement that is false or exaggerated, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars. [L. '09, p. 1011, § 390.]

See note to section 2640.

§ 2643. Warehouseman or Carrier Refusing to Issue Receipt.

Every person or corporation, and every officer, agent and employee thereof, receiving any goods, wares or merchandise, for sale or on commission, for storage, carriage or forwarding, who, having an opportunity to inspect the same, shall fail or refuse to deliver to the owner thereof a receipt duly signed, bearing the date of issuance, describing the goods, wares or merchandise received and the quantity, quality and condition thereof, and specifying the terms and conditions upon which they are received, shall be guilty of a misdemeanor. [L. '09, p. 1011, § 391.]

See *infra*, § 11562, issuing unlawfully.

§ 2644. Fictitious Bill of Lading and Receipt.

Every person or corporation engaged wholly or in part in the business of a common carrier or warehouseman, and every officer, agent or employee thereof, who shall issue any bill of lading, receipt or other voucher by which it shall appear that any goods, wares or merchandise have been received by such carrier or warehouseman, unless the same have been so received and shall be at the time actually under his control, or who shall issue any bill of lading, receipt or voucher containing any false statement concerning any material matter, shall be guilty of a gross misdemeanor. But no person shall be convicted under this section for the reason that the contents of any barrel, box, case, cask or other closed

vessel or package mentioned in the bill of lading, receipt or voucher did not correspond with the description thereof in such instrument, if such description corresponds substantially with the mark on the outside of such barrel, box, case, cask, vessel or package, unless it appears that the defendant knew that such marks were untrue. [L. '09, p. 1012, § 392.]

§ 2645. Warehouseman Fraudulently Mixing Goods.

Every person mentioned in section 2644, who shall fraudulently mix or tamper with any goods, wares or merchandise under his control, shall be guilty of a gross misdemeanor. [L. '09, p. 1012, § 393.]

§ 2646. Duplicate Receipt.

Every person mentioned in section 2644, who shall issue any second or duplicate receipt or voucher of the kind specified in said section, while a former receipt or voucher for the goods, wares or merchandise specified in such second receipt is outstanding and uncanceled, without writing across the face of the same the word "Duplicate," in a plain and legible manner, shall be guilty of a misdemeanor. [L. '09, p. 1012, § 394.]

§ 2647. Bill of Lading or Receipt must be Canceled on Redelivery of Property.

Each person mentioned in section 2644, who shall deliver to another any goods, wares or merchandise for which a bill of lading, receipt or voucher has been issued, unless such bill of lading, receipt or voucher is surrendered and canceled or a lawful and sufficient bond or undertaking is given therefor at the time of such delivery, or unless, in case of a partial delivery, a memorandum thereof is indorsed upon such bill of lading, receipt or voucher, shall be guilty of a misdemeanor. [L. '09, p. 1013, § 395.]

§ 2648. Regulating Sale of Passage Tickets.

It shall be the duty of every person or corporation engaged wholly or in part in the business of carrying passengers for hire, to provide every agent authorized to sell its passage tickets in this state, with a certificate of his authority, attested by its seal and the signature of its manager, secretary or general passenger agent, which shall contain a designation of the place of business at which such authority shall be exercised.

Every person and every corporation or association, and every officer, agent or employee thereof who shall sell, exchange or transfer, or have in his possession with intent to sell, exchange or transfer, or maintain, conduct or operate any office or place of business for the sale, exchange or transfer of any passage ticket or pass or part thereof, or any other evidence of a right to travel upon any railroad or boat, whether the same be owned or operated within or without the limits of this state, in any place except his place of business, or within such place of business without having rightfully in his possession and posted in a conspicuous place therein the certificate of authority hereinabove provided for, shall be guilty of a misdemeanor. [L. '09, p. 1013, § 396.]

See *infra*, §§ 10497-10501, sale of railroad tickets.

§ 2649. Redemption of Unused Passage Ticket.

Every person or corporation engaged wholly or in part in the business of carrying passengers for hire in this state, and every authorized ticket agent thereof, to whom there shall be presented by the holder thereof, within one year after its expiration, any passage ticket or part thereof, or other evidence of right to travel, wholly or in part upon the railroad or boat of such person or corporation, which shall be wholly or partially unused, who shall fail to redeem the same within three days after presentation, upon the following terms, to wit:

(1.) When wholly unused, for the price paid therefor; and

(2.) When partially unused, for the price paid therefor, less the regular toll or charge for the passage had;

Shall be punished by a fine of not more than five hundred dollars, and in addition thereto shall forfeit to the holder of such ticket or part thereof or other evidence of a right to travel, three times the redeemable value thereof. [L. '09, p. 1013, § 397.]

See *infra*, §§ 10502, 10503, redemption of unsold railroad tickets.

§ 2650. Malicious Mischief—Injury to Railway.

Every person who, in such manner as might, if not discovered, endanger the safety of any engine, motor, car or train, or any person thereon, shall in any manner interfere or tamper with or obstruct any switch, frog, rail, roadbed, sleeper, viaduct, bridge, trestle, culvert, embankment, structure or appliance pertaining to or connected with any railway, or any train, engine, motor, or car on such railway; and every person who shall discharge any firearm or throw any dangerous missile at any train, engine, motor or car on any railway, shall be punished by imprisonment in the state penitentiary for not more than twenty-five years. [L. '09, p. 1014, § 398.]

§ 2651. Attempt to Commit Train Robbery.

Every person who, with intent to commit any robbery, burglary or larceny, shall go upon or board any train, motor, car or engine; mask, extinguish or alter any light or other signal; exhibit or compel any other person to exhibit any false light or signal; or stop any such train, car or engine or slacken the speed thereof or compel or attempt to compel any other person in charge or control thereof to stop such train, car or engine or slacken the speed thereof, shall be punished by imprisonment in the state penitentiary for not less than five years. [L. '09, p. 1014, § 399.]

§ 2652. Endangering Life and Property by Explosives.

Every person who shall maliciously place any explosive substance or material in, upon, under, against or near any building, car, vessel, railroad track or structure, in such manner or under such circumstances as to destroy or injure the same if exploded, shall be guilty of a felony, and if the circumstances and surroundings are such that the safety of any person might be endangered by the explosion thereof, shall be punished by imprisonment in the state penitentiary for not more than twenty

years; and in every other case by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 1015, § 400.]

See *supra*, § 2403, killing by explosives unlawfully kept.

See *supra*, § 2504, keeping explosives unlawfully.

See *supra*, § 2506, transporting explosives.

§ 2653. Damaging Building, etc., by Explosion.

Every person who shall maliciously, by the explosion of gunpowder or any other explosive substance or material, destroy or damage any building, car, vessel, railroad track or structure, shall be punished as follows:

(1.) If thereby the life or safety of a human being is endangered, by imprisonment in the state penitentiary for not more than twenty years.

(2.) In every other case by imprisonment in the state penitentiary for not more than five years. [L. '09, p. 1015, § 401.]

§ 2654. False Signals for Vessels, etc.

Every person who, in such manner as might, if not discovered, endanger a vessel, railway engine, motor, train or car, shall show, mask, extinguish, alter or remove any light or signal, or exhibit any false light or signal, shall be punished by imprisonment in the state penitentiary for not more than ten years. [L. '09, p. 1015, § 402.]

§ 2655. Injury to United States Light.

Every person who shall willfully break, injure, deface or destroy any lighthouse station, post, platform, step, lamp or other structure pertaining to such lighthouse station, or shall extinguish or tamper with any light erected by the United States upon or along the navigable waters of this state to aid in the navigation thereof, in case no punishment is provided therefor by the laws of the United States, shall be punished as follows:

(1.) Whenever such act may endanger the safety of any vessel navigating such waters, or jeopardize the safety of any person or property in or upon such vessel, by imprisonment in the state penitentiary for not more than ten years.

(2.) In all other cases by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both. [L. '09, p. 1015, § 403.]

§ 2656. Injuring Public Utilities.

Every person who shall willfully or maliciously remove, damage or destroy:

(1.) A highway or a private way laid out by authority of law, or a bridge upon such public or private road, or willfully or maliciously cause to be placed thereon any substance or thing dangerous to any person or animal traveling thereon or which might injure or puncture the tire of any vehicle; or,

(2.) A pile or other material fixed in the ground and used for securing any bank or dam of any river or other water, or any dike, dock, quay, jetty or lock; or,

(3.) A buoy or beacon lawfully placed in any waters within this state; or,

(4.) A tree, rock, post or other monument erected or marked for the purpose of designating a point on the boundary of the state, of a county, city, town or of a farm, tract or lot of land, or any mark or inscription thereon; or,

(5.) A mile-board, mile-stone or guide-post erected upon a highway, or any inscription thereon; or,

(6.) A telegraph, telephone or electric transmission line or any part thereof, or any appurtenance thereto, or apparatus connected with the operation thereof; or,

(7.) A fence, gate, cattle-guard, bridge, water-tank, mile-post, car, engine, motor or other useful structure on the line of any railway; or,

(8.) A pipe or main for conducting gas, water or oil, or any works erected for the purpose of supplying buildings therewith, or any appurtenance or appendage thereto; or,

(9.) A sewer or drain, or a pipe or main connected therewith or forming a part thereof; or,

(10.) A ditch or flume lawfully erected for carrying water or draining land; or,

(11.) Any engine, hose, hose-cart, truck, ladder, extinguisher or other apparatus used by any fire company or fire department, or any rope, wire, bell, signal, instrument or apparatus for the communication of alarms of fire or police calls; or,

(12.) Any public building, or building used for educational, scientific, charitable or religious purpose, or any useful or ornamental thing therein; or,

(13.) Any work of literature or art or copy thereof, object of curiosity or scientific interest, statue, picture or engraving, displayed, kept or erected in any public building, street, park or other public place or in any collection, exhibition, museum, fair, gallery or library, or in any building devoted to educational, scientific, charitable or religious purposes; or,

(14.) A monument erected in any cemetery, street, park or other public place; or,

(15.) A sign or notice erected or posted by any officer under lawful authority, or by the owner or occupant of the premises where posted; or,

(16.) A legal notice or other legal paper posted in compliance with the requirement of any statute of this state, or under the direction or order of a court; and,

Every person—

(17.) Who shall moor any vessel, scow, barge, raft or boom to any bridge or to any buoy or beacon lawfully in any waters within this state; or,

(18.) Who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line; or,

(19.) Who shall erect or maintain any unlawful structure in any stream or river;

Shall be guilty of a misdemeanor. [L. '09, p. 1016, § 404.]

See *infra*, §§ 8074-8077, injury to public lands.

See *infra*, § 8236, mutilation of library, etc.

Cited in 76 Wash. 472, 474.

kog, 76 Wash. 372, 136 Pac. 694, 50
L. R. A. (N. S.) 1216.

Elements of Offense: See Remington's
Digest, Tel. & Tel., § 4; State v. Nords-

Larceny of gas, electricity or water.
6 Ann. Cas. 739; L. R. A. 1918C, 580.

§ 2657. Unlawful Interference With Gas, Electric, Steam or Water Appliance.

Every person who, with intent to injure or defraud, shall—

(1.) Break or deface the seal of any gas, electric, steam or water meter; or,

(2.) Obstruct, alter, injure or prevent the action of any meter or other instrument used to measure or register the quantity of gas, electricity, steam or water supplied to a consumer thereof; or,

(3.) Make any connections by means of a wire, pipe, conduit or otherwise with any wire, main or pipe used for the delivery of gas, electricity, steam or water to a consumer thereof, in such manner as to take gas, electricity, steam or water from said wire, main or pipe without its passage through the meter or other instrument provided for registering the amount or quantity consumed; or use any gas, electricity, steam or water so obtained; or,

(4.) Make any connection or reconnection with such wire, main or pipe, or turn on or off, or in any manner interfere with any valve, stop-cock or other appliances connected therewith; or,

(5.) Prevent by the erection of any device or construction, or by any other means, free access to any meter or other instrument for registering or measuring the amount of gas, electricity, steam or water consumed, or interfere with, obstruct or prevent, by any means, the reading or inspection of such meter or instrument, by the person, company or corporation owning the same; or,

(6.) Take or use any water from any irrigation flume, ditch or lateral, without the consent of the owners thereof, or open, close or interfere with any gate connected therewith;

Shall be guilty of a misdemeanor. [L. '09, p. 1018, § 405.]

See, also, "Irrigation."

§ 2658. Interfering With Dam, Reservoir, etc.

Every person who shall willfully or maliciously displace, remove, injure or destroy any pier, boom, or dam lawfully erected or maintained upon, in or across any water in this state, or any dam or reservoir lawfully maintained for impounding water; or hoist any gate in or about such dam or reservoir, shall be guilty of a gross misdemeanor. [L. '09, p. 1018, § 406.]

§ 2659. Injury to Property.

Every person who shall willfully—

(1.) Cut down, destroy or injure any wood, timber, grain, grass or crop, standing or growing, or which has been cut down and is lying upon the lands of another, or of the state; or,

(2.) Cut down, girdle or otherwise injure a fruit, shade or ornamental tree standing on the land of another or of the state, or in any road or street; or,

(3.) Dig, take or carry away without lawful authority or consent, from any lot or land in any city, or town, or from any lands included within the limits of a street or avenue in such city or town, any earth, soil or stone; or,

(4.) Enter without the consent of the owner or occupant, any orchard, garden or vineyard, with intent to take, injure or destroy anything there grown or growing; or,

(5.) Cut down, destroy or in any way injure any shrub, tree, vine or garden produce grown or growing within any such orchard, garden or vineyard, or any framework or erection therein; or,

(6.) Damage or deface any building or part thereof, or throw any stone or other missile at any building or part thereof; or,

(7.) Destroy or damage, with intent to prevent or delay the use thereof, any engine, machine, tool or implement intended for use in trade or husbandry; or,

(8.) Untie, unfasten or liberate, without authority, the horse or team of another; or lead, ride or drive away, without authority, the horse, team, automobile or other vehicle of another from the place where left by the owner or person in charge thereof; or,

(9.) Kill, maim or disfigure any animal belonging to another, or expose any poisons or noxious substance with intent that it should be taken by such animal; or,

(10.) Take, carry away, interfere with or disturb any oysters or other shell-fish of another in any river, bay, or other water of this state, or remove, pull up or destroy any stake or buoy used for designating any oyster-bed; or,

(11.) Intrude or place any hovel, shanty or building upon or within the limits of any lot or piece of land within any city or town, without the consent of the owner, or within the boundaries of any street in such city or town; or,

(12.) Kill, wound or trap any animal or bird within the limits of any cemetery, park or pleasure ground, or remove therefrom or destroy the young of any such animal or the egg of any such bird; or,

(13.) Injure, destroy or tamper with any rope, line, cable or chain with which any vessel, scow, boom, beacon or buoy shall be anchored or moored, or the steering-gear, bell gear, engine, machinery, lights or other equipment of any vessel; or,

(14.) Place upon or affix to any real property or any rock, tree, wall, fence or other structure thereupon, without the consent of the owner thereof, any word, character or device designed to advertise any article, business, profession, exhibition, matter or event; or,

(15.) Suffer any animal to go upon the inclosed right of way of any railway company, or leave open any gate or bars so that an animal might stray upon such right of way;

Shall be guilty of a misdemeanor. [L. '09, p. 1019, § 407.]

See *infra*, §§ 3190, 3199, 3203, 3206, injury or cruelty to animals.

See *infra*, § 3551, mutilation of monuments in cemeteries.

See *infra*, § 5057, mutilating school property.

See *infra*, § 6440, injury to trees in highway.

See *infra*, § 8236, mutilation of library.

Cited in 88 Wash. 683.

§ 2660. Tampering With Papers.

Every person who shall willfully or maliciously destroy, alter, erase, obliterate or conceal any letter, telegraph message, book or record of account, or any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is, or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, shall be guilty of a gross misdemeanor. [L. '09, p. 1020, § 408.]

§ 2661. Falsifying Accounts.

Every person who shall willfully or maliciously make any false entry, or fail to make an entry of any material matter, in any book or record of account, shall be guilty of a gross misdemeanor. [L. '09, p. 1020, § 409.]

§ 2662. Divulging Telegram.

Every person who shall wrongfully obtain or attempt to obtain, any knowledge of a telegraphic message, by connivance with the clerk, operator, messenger or other employee of a telegraph company, and every clerk, operator, messenger or other employee of such company who shall willfully divulge to any but the person for whom it was intended, any telegraphic message or dispatch intrusted to him for transmission, or delivery, or the nature or contents thereof, or shall willfully refuse, neglect or delay duly to transmit or deliver the same, shall be guilty of a misdemeanor. [L. '09, p. 1021, § 410.]

§ 2663. Opening Sealed Letter.

Every person who shall willfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor. [L. '09, p. 1021, § 411.]

§ 2664. Trespass on Railway Track.

Every person who, without permission from the person or corporation owning or operating the same, shall enter, or take any animal or vehicle upon any railway, bridge or trestle, or ride, operate or propel a handcar, velocipede, track bicycle or tricycle on or along the track of any railway, shall be guilty of a misdemeanor. [L. '09, p. 1021, § 412.]

§ 2664-1. Trespass on Double Track.

It shall be unlawful for any person to go upon or be upon that portion of any railroad right of way upon which is constructed and operated

more than one main line track or upon which is constructed and operated an electric interurban line of one or more tracks where the electricity is transmitted by a third rail. [L. '13, p. 394, § 1.]

§ 2664-2. Exceptions.

The foregoing section shall not be construed to include that part of any right of way embraced in any highway crossing or any lawful private crossing; and shall not be construed to prohibit officers or employees of any such railroad or public officers from going or being upon any portion of the right of way in the performance of their duties. [L. '13, p. 395, § 2.]

§ 2664-3. Crossing Warnings.

The Public Service Commission of Washington shall require any company operating such a railroad as is described in section 2664-1, to erect and maintain upon such part of its line, at every point where a highway crosses such line, a sign or a warning, in form to be prescribed by such commission. [L. '13, p. 395, § 3.]

§ 2664-4. Penalty.

Any person violating the provisions of section 2664-1, shall be guilty of a misdemeanor. [L. '13, p. 395, § 4.]

§ 2665. Trespass upon Land of Another—Warning.

Every person who shall go upon the land of another with the intent to vex or annoy the owner, or occupant thereof, or to commit any unlawful act, or shall enter upon the inclosed land of another for the purpose of hunting or fishing without having first obtained the permission of the owner or occupant of said land, or shall enter upon any land of another bounded on one or more sides by water when notices not to trespass thereon have been posted as often as every seven hundred feet on or near the other boundaries thereof for either of said purposes, or shall willfully go or remain upon any land after having been warned by the owner or occupant thereof not to trespass thereon, shall be guilty of a misdemeanor.

An entryman on land under the laws of the United States shall be deemed an owner within the meaning of this section.

Inclosed land shall for the purpose of this act mean any land fenced either with a lawful fence or with such a fence as is usually used in the neighborhood of such land. [L. '13, p. 437, § 1; L. '09, p. 1021, § 413.]

See, also, "Game."

Cited in 95 Wash. 411.

§ 2666. Injury to Baggage.

Every person employed by any person or corporation engaged wholly or in part in the business of carrying passengers or baggage for hire, and every express agent, stage driver, drayman, expressman or hackman who shall willfully or carelessly break, injure or destroy any trunk, valise,

box, package or other baggage, shall be guilty of a misdemeanor. [L. '09, p. 1022, § 414.]

§ 2667. Injury to Other Property.

Every person who shall willfully or maliciously destroy or injure any real or personal property of another, for the destruction or injury of which no special punishment is otherwise specially prescribed, shall—

(1.) If the value of the property destroyed, or the diminution in value by the injury, shall be less than twenty dollars, be guilty of a misdemeanor.

(2.) If the value of the property destroyed, or the diminution in value by the injury, shall be twenty dollars or more, be guilty of a gross misdemeanor. [L. '09, p. 1022, § 415.]

CHAPTER X.

MISCELLANEOUS CRIMES.

§ 2668. Drunkenness.

Every person who shall become intoxicated by voluntarily drinking intoxicating liquors, and who, while intoxicated shall loiter about any place where intoxicating liquors are sold or kept for sale, or create any disturbance or use any profane or indecent language in any public place, street or meeting, or commit any assault or breach of the peace, shall be guilty of a misdemeanor. [L. '09, p. 1022, § 416.]

§ 2669. Common Drunkard.

Every person who shall be three times convicted of a violation of section 2668, or of any municipal ordinance defining and punishing drunkenness or any crime of which drunkenness shall be an element, or who shall squander his property in drink, or who, as a result of the use of intoxicating liquors shall abuse or fail properly to support or care for his wife or any minor child lawfully in his custody, shall be a common drunkard, and shall be adjudged so to be by any magistrate before whom he may be brought on a charge of committing any crime of which drunkenness is an element, in addition to any other punishment inflicted therefor. [L. '09, p. 1023, § 417.]

§ 2670. Opium Joints.

Every person who shall open, conduct or maintain, as owner or employee, any place where opium, morphine, alkaloid cocaine or alpha or beta eucaine or any derivative, mixture or preparation of any of them, shall be in any manner used by persons resorting thereto for the purpose; and every person who shall visit or resort to such place for the purpose of using in any manner any of said drugs, shall be guilty of a gross misdemeanor. [L. '09, p. 1023, § 418.]

§ 2671. Solemnizing Unlawful Marriage.

Every person who shall solemnize a marriage when either party thereto is known to him to be under the age of legal consent, or to be an

idiot, insane person, habitual criminal or common drunkard, or a marriage to which, within his knowledge, any legal impediment exists, shall be guilty of a gross misdemeanor. [L. '09, p. 1023, § 419.]

See *infra*, §§ 8440, 8454, prohibited solemnization of marriage.

§ 2672. Obstructing Public Officer.

Every person who, after due notice, shall refuse or neglect to make or furnish any statement, report or information lawfully required of him by any public officer, or who, in such statement, report or information shall make any willfully untrue, misleading or exaggerated statement, or who shall willfully hinder, delay or obstruct any public officer in the discharge of his official powers or duties, shall be guilty of a misdemeanor. [L. '09, p. 1023, § 420.]

See *supra*, § 2367, resisting officer.

§ 2673. Acting Without Lawful Authority.

Every person who shall in any case not otherwise specially provided for, do any act, for the doing of which a license or other authority is required by law, without having such license or other authority as required by law, shall be guilty of a misdemeanor. [L. '09, p. 1024, § 421.]

Cited in 62 Wash. 246.

§ 2674. Collecting for Benefit Without Authority.

Every person who shall sell a ticket to any ball, benefit or entertainment, or ask or receive any subscription or promise thereof, for the benefit or pretended benefit of any person, association or order, without being duly authorized thereto by the person, association or order for whose benefit or pretended benefit the same is done, shall be guilty of a misdemeanor. [L. '09, p. 1024, § 422.]

§ 2675-1. Uniform Flag Law—Definition of Flag, etc.

The words flag, standard, color, ensign or shield, as used in this act, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof. [L. '19, p. 259, § 1.]

"Act" refers to this and the next six sections.

Validity of statute prohibiting use
of flag or other government symbol
for advertising or other commercial

purposes. 4 Ann. Cas. 270; 10 Ann.
Cas. 528; 7 L. R. A. (N. S.) 1079.

§ 2675-2. Advertising—Use of Flag.

No person shall, in any manner, for exhibition or display:

(a) Place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

(b) Expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or

(c) Expose to public view for sale, manufacture, or otherwise, or to sell, give, or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance. [L. '19, p. 260, § 2.]

§ 2675-3. Desecration of Flag.

No person shall publicly mutilate, deface, defile, defy, trample upon or by word or act cast contempt upon any such flag, standard, color, ensign or shield. [L. '19, p. 260, § 3.]

§ 2675-4. Application of Act.

This statute shall not apply to any act permitted by the statutes of the United States or of this state, or by the United States Army and Navy regulations, nor shall it apply to any printed or written document or production, stationery, ornament, picture or jewelry whereon shall be depicted said flag, standard, color, ensign or shield with no design or words thereon and disconnected with any advertisement. [L. '19, p. 260, § 4.]

§ 2675-5. Penalty.

Any violation of this act shall be a gross misdemeanor. [L. '19, p. 261, § 5.]

§ 2675-6. Construction of Act.

This act shall be so construed as to effectuate its general purpose and to make uniform the laws of the states which enact it. [L. '19, p. 261, § 7.]

§ 2675-7. Citation of Act.

This act may be cited as the Uniform Flag Law. [L. '19, p. 261, § 8.]

"Act" refers to the six preceding sections.

§ 2676. Bribery of Labor Representative.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any duly constituted representative of a labor organization, with intent to influence him in respect to any of his acts, decisions or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person or corporation, shall be guilty of a gross misdemeanor. [L. '09, p. 1024, § 424.]

§ 2677. Labor Representative Receiving Bribe.

Every person who, being the duly constituted representative of a labor organization, shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that any of his acts, decisions or other duties as such representative, or any act to prevent or cause a strike of the employees of any person or corporation shall be influenced thereby, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 425.]

§ 2678. Corrupt Influencing of Agent.

Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any agent, employee or servant of any person or corporation, with intent to influence his action in relation to his principal's, employer's or master's business, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 426.]

Cited in 83 Wash. 103, 104.

§ 2679. Grafting by Employee.

Every agent, employee or servant of any person or corporation who shall ask or receive, directly or indirectly, any compensation, gratuity or reward, or any promise thereof, upon any agreement or understanding that he shall act in any particular manner in connection with his principal's, employer's or master's business; or who, being authorized to purchase or contract for materials, supplies or other articles or to employ servants or labor for his principal, employer or master, shall ask or receive, directly or indirectly, for himself or another, a commission, discount, bonus or promise thereof from any person with whom he may deal in relation to such matters, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 427.]

§ 2680. Use of the Words "Sterling Silver," etc.

Every person who shall make, sell or offer to sell or dispose of, or have in his possession with intent to sell or dispose of any metal article marked, stamped or branded with the words "sterling," "sterling silver," or "solid silver," unless nine hundred twenty-five one-thousandths of the component parts of the metal of which such article and all parts thereof is manufactured is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1025, § 428.]

§ 2681. Use of Words "Coin Silver," etc.

Every person who shall make, sell or offer to sell or dispose of, or have in his possession with intent to dispose of any metal article marked, stamped or branded with the words "coin," or "coin silver," unless nine hundred one-thousandths of the component parts of the metal of which such article and all parts thereof is manufactured, is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1026, § 429.]

§ 2682. Use of the Word "Sterling," on Mounting.

Every person who shall make, sell, offer to sell or dispose of, or have in his possession with intent to sell or dispose of, any article comprised of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood, to which is applied or attached a metal mounting marked, stamped or branded with the words "sterling," or "sterling silver," unless nine hundred twenty-five one-thousandths of the component parts of the metal of which such metal mounting is manufactured is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1026, § 430.]

§ 2683. Use of the Words "Coin Silver," on Mounting.

Every person who shall make, sell, offer to sell or dispose of, or have in his possession with intent to sell or dispose of, any article comprised of leather, shell, ivory, celluloid, pearl, glass, porcelain, pottery, steel or wood, to which is applied or attached a metal mounting marked, stamped or branded with the words "coin" or "coin silver," unless nine hundred one-thousandths of the component parts of the metal of which such metal mounting is manufactured is pure silver, shall be guilty of a gross misdemeanor. [L. '09, p. 1026, § 431.]

§ 2684. Unlawfully Marking Article "Made of Gold."

Every person who shall make, sell, offer to sell or dispose of, or have in his possession with intent to sell or dispose of, any article constructed wholly or in part of gold, or of an alloy of gold, and marked, stamped or branded in such manner as to indicate that the gold or alloy of gold in such article is of a greater degree or carat of fineness, by more than one carat, than the actual carat, or fineness of such gold or alloy of gold, shall be guilty of a gross misdemeanor. [L. '09, 1026, § 432.]

§ 2685. "Marked, Stamped or Branded," Defined.

An article shall be deemed to be "marked, stamped or branded" whenever such article, or any box, package, cover or wrapper in which the same is inclosed, encased or prepared for sale or delivery, or any card, label or placard with which the same may be exhibited or displayed, is so marked, stamped or branded. [L. '09, p. 1027, § 433.]

§ 2686. Protecting Civil Public Rights.

Every person who shall deny to any other person because of race, creed or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage or amusement, shall be guilty of a misdemeanor. [L. '09, p. 1027, § 434.]

Statutes securing equal rights in places of public accommodation. 9 Ann. Cas. 69; Ann. Cas. 1912B, 860; Ann. Cas. 1915B, 872.

What are places of public accommodation or amusement within Civil Rights Acts. 9 L. R. A. (N. S.) 601; 19 L. R. A. (N. S.) 907; L. R. A. 1918F, 829.

§ 2687. Master of Vessel Bringing a Foreign Convict.

Every person who, being the master or commander of any vessel or boat arriving from a foreign country, shall knowingly bring into this state a person who has been or is a foreign convict of any offense, which, if committed in this state would be punishable under the laws thereof, shall be guilty of a misdemeanor. [L. '09, p. 1027, § 435.]

§ 2688. Vagrancy.

Every—

(1.) Person who asks or receives any compensation, gratuity or reward for practicing fortune-telling, palmistry or clairvoyance; or,

(2.) Person who keeps a place where lost or stolen property is concealed; or,

(3.) Person practicing or soliciting prostitution or keeping a house of prostitution; or,

(4.) Common drunkards found in any place where intoxicating liquors are sold or kept for sale, or in an intoxicated condition; or,

(5.) Common gambler found in any place where gambling is conducted or where gambling paraphernalia or devices are kept; or,

(6.) Healthy person who solicits alms; or,

(7.) Lewd, disorderly or dissolute person; or,

(8.) Person who wanders about the streets at late or unusual hours of the night without any visible or lawful business; or,

(9.) Person who lodges in any barn, shed, shop, outhouse, vessel, car, saloon or other place not kept for lodging purposes, without the permission of the owner or person entitled to the possession thereof; or,

(10.) Person who lives or works in a house of prostitution or solicits for any prostitute or house of prostitution; or,

(11.) Person who solicits business for an attorney around any court, jail, morgue or hospital, or elsewhere; or,

(12.) Habitual user of opium, morphine, alkaloid cocaine or alpha or beta eucaine, or any derivation, mixture or preparation of any of them; or,

(13.) Person having no visible means of support, who does not seek employment, nor work when employment is offered to him; or,

(14.) Person who by his own confession thereto or prior conviction thereof is known to have been guilty of larceny, burglary, robbery or any crime of which fraud or intent to defraud is an element, who shall be found in any drinking saloon or cellar, or any public dance-hall or music-hall where intoxicating liquors are sold, or be found intoxicated, or who, except upon lawful business, shall go about any dark street or alley or any residence section of any city or town in the night-time, or loiter about any steamboat landing, passenger depot, banking institution or crowded street, shop or thoroughfare, or any public meeting or gathering, or place where people gather in crowds—

Is a vagrant, and shall be punished by imprisonment in the county jail for not more than six months, or by a fine of not more than five hundred dollars. [L. '09, p. 1027, § 436.]

See *supra*, § 1967, vagrancy defined.

Cited in 69 Wash. 568.

Nature and Elements of Offenses: See Remington's Digest, Vagrancy, § 1; State v. Neitzel, 69 Wash. 567, 125 Pac. 939, Ann. Cas. 1914A, 899, 43 L. R. A. (N. S.) 203.

Constitutionality of vagrancy statutes. 21 Ann. Cas. 478.

Fortune-telling as vagrancy. Ann.

Cas. 1914A, 900; 43 L. R. A. (N. S.) 204.

What amounts to vagrancy. 14 A. L. R. 1482.

Constitutionality of statute requiring persons, regardless of financial condition, to engage in some business, profession, occupation or employment. 9 A. L. R. 1366.

§ 2688-1. False Representation of Physical Defects.

It shall be unlawful for any person to falsely represent himself or herself as blind, deaf, dumb, crippled or otherwise physically defective for the purpose of obtaining money or other thing of value or making sales of any character of personal property and any person so falsely representing himself or herself as blind, deaf, dumb, crippled or otherwise physically defective and securing aid or assistance on account of such representations shall be deemed guilty of a misdemeanor. [L. '15, p. 236, § 1.]

§ 2689. Admitting Convict to Saloon, and Selling Liquor to Drunkard.

Every person, being the owner or manager of, or an employee in any drinking-saloon, drinking cellar or public dance-hall or music-hall where intoxicating liquors are sold or kept for sale, who shall knowingly permit to enter such saloon, cellar or hall, or give employment to, or sell or give any intoxicating liquor to, [any female person], any person previously convicted, whether in this state or elsewhere, of a crime of which fraud or the intent to defraud is an element, or of petit larceny, or of any crime which under the laws of this state would amount to a felony, or who shall sell or give any intoxicating liquor to any person [known or] adjudged to be a common drunkard, or to any person in an intoxicated condition, shall be guilty of a misdemeanor. [L. '09, p. 1029, § 437; L. '09, Ex. Sess., p. 67, § 2.]

This section was amended by Laws 1909, Ex. Sess., p. 67, § 2, but a doubt exists as to the sufficiency of the title. The amendmene of this section omitted the words "any female person" and added the words "known or," in brackets.

§ 2690. Performing or Selling Undedicated Play.

Every person who, without the consent of the owner thereof, shall cause to be publicly performed any dramatic composition, or dramatic musical composition commonly called an opera, or any substantial part thereof, which has been copyrighted under the laws of the United States, or shall knowingly participate in the performance or representation of any substantial part thereof, or knowingly sell a substantial copy of any substantial part thereof, shall be guilty of a misdemeanor. [L. '09, p. 1029, § 438.]

§ 2693. Prohibiting Drinking in Public Conveyances.

Every person who shall drink any intoxicating liquor in any public conveyance, except in a compartment or place where sold or served under the authority of a license lawfully issued, shall be guilty of a misdemeanor. [L. '09, p. 1029, § 441.]

§ 2694. Common Carrier not to Permit Drinking in Public Conveyance.

Every person engaged wholly or in part in the business of carrying passengers for hire, and every agent, servant, or employee of such person, who shall knowingly permit any person to drink any intoxicating liquor in any public conveyance, except in the compartment where such liquor is sold or served under the authority of a license lawfully issued, shall be guilty of a misdemeanor. [L. '09, p. 1030, § 442.]

§ 2695. Selling Liquors not Aged.

Every person who, as principal, agent or otherwise, shall sell or offer for sale any spirituous or distilled intoxicating liquor known as whisky (except Scotch or Irish whiskey), any part of which has not been aged for a period of four years in wooden barrels or casks, or who shall, as principal, agent or otherwise, sell or offer for sale any malt liquor that has not been aged for a period of more than sixty (60) days, or which contains more than eight (8) % alcohol by weight shall be guilty of a gross misdemeanor. [L. '09, p. 1030, § 443.]

§ 2696. Mixing, Distilling, Selling, etc., Low Wines or Spirits.

Every person who, by mixing, compounding or distilling low wines or ardent spirits, or who, by adding thereto any flavoring or other substance, shall produce, or who shall sell or offer for sale or have in his possession with intent to sell, any liquor known as whiskey, gin or brandy so produced, shall be guilty of a gross misdemeanor. [L. '09, p. 1030, § 444.]

§ 2696-1. Improper Conduct by Judges.

It shall be a misdemeanor for any judge or justice of any court not of record, during the hearing of any cause or proceeding therein, to address any person in his presence in unfit, unseemly or improper language. [L. '11, p. 521, § 1.]

§ 2696-2. Fraudulent Use of Name of Secret Societies.

Any person, firm, association, society, order or organization or any officer, agent, representative or employee thereof, or person acting or pretending to act on behalf thereof who in a newspaper or other publication published in this state, or in any letter, writing, circular, paper, pamphlet or other writing or printed notice, matter or device without authority of the grand lodge hereinafter mentioned, fraudulently uses, or in any manner directly or indirectly aids in the use of the name or title of any secret fraternal association, society, order or organization which has had a grand lodge in this state for five (5) years, or any secret fraternal association, society, order or organization having as a necessary qualification to membership, membership in a secret fraternal society, order or organization under the jurisdiction of said grand lodge, or any imitation of such name or title or any name or title so nearly resembling it as to be calculated to deceive, or without such authority publishes, sells, lends, gives away, circulates or distributes any letter, writing, circular, paper, pamphlet or other written or printed notice, matter or device, or by word

of mouth, directly or indirectly advertising for or soliciting members or applications for membership in such secret fraternal association, society, order or organization using or designated or claimed to be known by such title or imitation or resemblance thereof or who offers to sell or to confer or to communicate or to give information directly or indirectly where, how, of whom, or by what means alleged or pretended secret work or any alleged or pretended secrets of such secret fraternal association, society, order or organization or of any alleged or pretended association, society, order or organization designated or claimed to be known by such title or imitation or resemblance thereof can or may be obtained, conferred or communicated, or any person who falsely represents himself to be a member of any such secret fraternal association, society, order or organization or any person who upon false representations as to membership therein seeks or obtains admission into any such secret fraternal association, society, order or organization shall be guilty of a gross misdemeanor. [L. '11, p. 155, § 1.]

CHAPTER XI.

CRIMES UNDER ACTS NOT REPEALED BY THE PENAL CODE OF 1909.

§ 2697. **Selling Cigarettes Containing Injurious Drug—Penalty.**

Any person [selling or giving away cigarettes without a license, or] selling or giving away any cigarette or cigarettes containing any injurious drug, narcotic or other deleterious matter, is guilty of a misdemeanor, and shall on conviction thereof be subject to a fine of fifty dollars for each offense, or be imprisoned for sixty days in a common jail or penitentiary, and any person [having a license, or any person not licensed,] who sells or gives away any cigarette or cigarettes, of any and every kind whatsoever, to a minor under the age of eighteen years, shall be subjected to the same penalty as herein provided. [L. '95, p. 126, § 5.]

Superseded as to words in brackets by § 2968, Rem. & Bal. Code.

§ 2698. **Sale of Any Cigarettes Except in Original Package.**

Any person selling cigarettes of any and every kind whatsoever, except in an original and full package, is guilty of a misdemeanor, and shall on conviction thereof be subject to the same penalty as in the section last above provided. [L. '95, p. 126, § 6.]

§ 2699. **Sale to Minors—Civil Liability to Parents of Minor.**

In addition to the penalty above provided for, the sale or giving away of cigarettes to a minor under the age of eighteen years, the parent or guardian of such minor or any individual or association suing in behalf or for the benefit of such minor, may prosecute, in a civil action, any person so violating this chapter, for the penalty of two hundred and fifty dollars and the costs of the action, one-half of which amount shall be paid to any person as his moiety share who furnished the information upon which the action is brought and penalty recovered. [L. '95, p. 126, § 7.]

§ 2700. Same—Wrappers or Substitutes—Persuading Minor to Smoke.

It shall hereafter be unlawful in the state of Washington for any corporation, company, firm or person to sell, barter, furnish or give away, directly or indirectly, to any minor under eighteen years of age any cigarette, cigarette wrappers or any substitute for either; or to procure for, or to persuade, advise, counsel or compel any minor under said age to smoke cigarettes or for any minor under said age to smoke any cigarette. [L. '01, p. 261, § 1.]

§ 2701. Same—Penalty—Duty of Prosecutors.

Any such corporation, company, firm or person, violating any of the provisions of the preceding section shall, for the first offense, upon conviction thereof, be fined in any sum not more than fifty dollars, nor less than ten dollars; and for a second and any subsequent offense, such corporation, company, firm or person shall, upon conviction thereof, be fined in any sum not more than five hundred dollars nor less than ten dollars, and to which may be added imprisonment in the county jail for any period not exceeding sixty days. It is hereby made the special duty of prosecuting attorneys to enforce the provisions of this act, and he may summon any minor under eighteen years of age who may have or have had in his possession any cigarettes, and compel him to testify before the mayor of a city or a justice of the peace as to where and of whom he obtained such cigarettes. [L. '01, p. 262, § 2.]

§ 2702. Counterfeiting Uncoined Gold, etc.

Any person who shall counterfeit any kind or species of gold-dust, gold bullion or bars, lumps, pieces or nuggets of gold, or any description whatsoever of uncoined gold, currently passing in this state, or shall alter or put off any kind of uncoined gold mentioned in this section, for the purpose of defrauding any person or persons, body, politic or corporate, or shall make any instrument for counterfeiting any kind [of] uncoined gold as aforesaid, knowing the purpose for which such instrument was made, or shall knowingly have in his possession and secretly keep any instrument for the purpose of counterfeiting any kind of uncoined gold as aforesaid, every such person so offending, or any person or persons aiding or abetting in or about said offense or offenses shall be deemed guilty of counterfeiting, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term not less than one year nor more than fourteen years. [L. '62 p. 15, § 7; Cd. '81, § 857; 2 H. P. C., § 66.]

§ 2703. Robbing Sluice-boxes, etc.

Any person who shall break or rob in any manner, or who shall attempt to break or rob, any flume, rocker, quartz-mill, quartz vein or lode, bedrock sluice, sluice-box, or mining claim not his own, or who shall trespass upon such mining claim with the intent to commit a felony, shall, upon conviction thereof, be punished by imprisonment in the penitentiary of this state not less than one nor more than five years, or by fine not less than one hundred dollars nor more than one thousand dollars, or by both

such imprisonment and fine as the court or judge thereof may direct. [L. '90, p. 126, § 6; 2 H. P. C., § 79.]

§ 2704. Malicious Disturbance of or Injury to Settlers on Unsurveyed Lands.

Any person or persons who shall willfully and maliciously disturb, or in anywise injure or destroy, the dwelling-house or other building, or any fence inclosing or being on the claim, of any settler upon the unsurveyed public lands in this state, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than one hundred dollars for each and every offense, to which may be added imprisonment in the county jail not exceeding ninety days. [Cf. L. '83, p. 71, § 2; L. '91, p. 124, § 17; 2 H. P. C., § 89.]

Superseded in part by the next section.

§ 2705. Injury to Buildings or Contents.

If any person shall maliciously or wantonly destroy or deface any cabin or other building or place of shelter or any of the contents of such cabin, building or shelter constructed by any person or persons or society of persons upon any public land of the state of Washington, or of the United States within the state of Washington, or upon any land not owned by such person so destroying or defacing the same, he shall be deemed guilty of a misdemeanor: Provided, that the provisions of this act shall not apply to bona fide settlers on government lands. [L. '99, p. 186, § 1.]

"Act" in this section refers to §§ 2705-2707.

§ 2706. Destruction of Monuments, Records, etc.

If any person shall maliciously or wantonly remove, destroy or carry away any record or record book or document of any kind or any box or other receptacle for containing the same or any instrument or device for scientific purposes established or placed upon any mountain peak or summit or at any other place of resort, or upon any land belonging to this state or to the United States, or in or upon any body or stream of water within this state, such person shall be deemed guilty of a misdemeanor. [L. '99, p. 186, § 2.]

§ 2707. Penalty.

Every person convicted of a violation of any of the provisions of this act shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not less than ten days nor more than six months or by both such fine and imprisonment. Any person acting as informer, in case of conviction, under this act, shall be entitled to one-half of the fine imposed. [L. '99, p. 186, § 3.]

"Act" in this section refers to §§ 2705-2707.

§ 2708. Posting Advertisements on Public Property.

Every person who willfully commits any trespass by either putting up, affixing, fastening, printing, or painting upon any property belonging to the state, or to any county, city, town, or village, or dedicated to the

public, or upon any property of any person or corporation without license from the owner, any notice, advertisement, or designation of, or any name for any commodity, whether for sale or otherwise, or any picture, sign, or device intended to call attention thereto, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars, or by imprisonment in the county jail not more than twenty days, or by both such fine and imprisonment: Provided, that nothing contained in this section shall be construed to prohibit the posting of legal notices. [L. '86, p. 78, § 1, subd. 5; 2 H. P. C., § 90.]

§ 2709. To Prevent Removal of Mortgaged Property.

That when any real estate in this state is subject to, or is security for, any mortgage, mortgages, lien or liens, other than general liens arising under personal judgments, it shall be unlawful for any person who is the owner, mortgagor, lessee, or occupant of such real estate to destroy or remove or to cause to be destroyed or removed from said real estate any fixtures, buildings, or permanent improvements, not including crops growing thereon, without having first obtained from the owners or holders of each and all of such mortgages or other liens his or their written consent for such removal or destruction. Any person willfully violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period not to exceed six months, or by a fine of not more than five hundred dollars, or by both such fine and imprisonment. [L. '99, p. 122, §§ 1, 2.]

See supra, § 2603, the sale of mortgaged personal property.

See supra, § 2629, and infra, § 3789, removal of mortgaged personalty.

§ 2711. False Pretenses, etc., in Selling Mines.

Any person who shall, with intent to cheat, wrong, or defraud, place in or upon any mine or mineral claim any ores or specimens of ores not extracted therefrom, or exhibit any ore, or certificate of assay of ore, not extracted therefrom, for the purpose of selling any mine or mining claim, or any interest therein, or who shall obtain any money or property by any such false pretenses or artifices, shall be deemed guilty of a felony. [L. '90, p. 99, § 1; 2 H. P. C., § 238.]

§ 2712. Altering Sample or Certificate of Assay.

Any person who shall interfere with, or in any manner change samples of ores or bullion produced for sampling, or change or alter samples or packages of ores or bullion which have been purchased for assaying, or who shall change or alter any certificate of sampling or assaying, with intent to cheat, wrong, or defraud, shall be deemed guilty of a felony. [L. '90, p. 99, § 2; 2 H. P. C., § 239.]

§ 2713. Making False Sample or Assay of Ore.

Any person who shall, with intent to cheat, wrong, or defraud, make or publish a false sample of ore or bullion, or who shall make or publish or cause to be published a false assay of ore or bullion, shall be deemed guilty of a felony. [L. '90, p. 99, § 3; 2 H. P. C., § 240.]

§ 2714. Penalty for Violation of Last Three Sections.

Any person violating any of the provisions of the last three preceding sections shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not less than fifty nor more than one thousand dollars, or by imprisonment in the penitentiary for not less than one year nor more than five years, or by both such fine and imprisonment. [L. '90, p. 99, § 4; 2 H. P. C., § 241.]

§ 2715. Extortion by Ferryman, Toll-gate Keeper, etc.

If any ferryman, ferry owner, ferry-keeper, or keeper of a toll bridge or toll gate, himself, or by any person in his employment, shall demand or receive any greater fees on account of ferriage or toll than is or may be fixed by law, or by the proper board doing county business, as the rates of ferriage or toll to be received by such person, upon conviction thereof he shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding one month. [L. '54, p. 95, § 108; Cd. '81, § 923; 2 H. P. C., § 156.]

See *infra*, § 5472, order of carriage by ferryman, penalty.

§ 2716. Mutilation of Sign-boards, Mile-posts, etc.

Any person or persons who shall deface, mutilate, tear down, or destroy any sign-board or post, or any mile-board or post, erected or set up by the authorities of any city, town or county, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine in any sum less than twenty dollars, or by imprisonment in the county jail not exceeding twenty days, or both. [L. '01, p. 25, § 1.]

§ 2717. Protection to Mile-boards Used for Advertising.

Any person, firm, company or corporation desiring to erect or set up sign-boards or posts, or mile-boards or posts, as a means of advertising, and desiring to have the protection of the provisions of the foregoing sections in so doing, shall satisfy the proper officers of the city, town or county that said boards or posts will be set up at correct distances and at proper points and in all other respects be serviceable to the public as sign-boards or posts, or as mile-boards or posts; whereupon said person, firm, company or corporation shall be permitted to place on said boards or posts the words "by authority," and the authorities granting such permission shall make a record of such action in the records of their proceedings; and any sign-board or post, or any mile-board or post, set up by such permission, and having on its face in clear, bold letters the words "by authority," shall have the same protection on [as] such boards or posts set up by the authorities of any city, town or county, and any person or persons who shall deface, mutilate, tear down or destroy any such board or post so set up, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine in any sum less than twenty dollars, or by imprisonment in the county jail not exceeding twenty days, or both. [L. '01, p. 25, § 2.]

§ 2718. Fast Driving Over Bridge.

Any person or persons riding or driving faster than a walk over any bridge located on any county or state road, composed of one or more spans, upon conviction thereof shall be fined in any sum not to exceed ten dollars nor less than five dollars, to be collected by any court having competent jurisdiction thereof, and all moneys so collected shall be paid into the county treasury and become a part of the school fund: Provided, that this section shall apply only to bridges over thirty feet in length. [L. '79, p. 148, § 1; Cd. '81, § 931, 2 H. P. C., § 165.]

§ 2719. Unlawful Use of Traction Engine on Highways.

Whenever any person in charge of and running any traction engine propelled by steam upon any county road or public highway, except in towns, cities, or villages, shall meet or come in close proximity to any person driving a team of horses, it shall be the duty of the person in charge of such engine to come to a full stop, and remain standing until the team has passed. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than ten nor more than fifty dollars. [L. '90, p. 523, §§ 1, 2; 2 H. P. C., § 233.]

§ 2720. Throwing Glass or Tacks in Highway—Penalty.

Any person or persons, corporation or corporations who shall throw, place, or deposit, in any road, street, alley, or highway, in the state of Washington, any bottle, bottles, glass, glassware, tacks, or nails, shall be guilty of a misdemeanor, and on conviction thereof, shall be fined not less than twenty-five dollars nor more than fifty dollars, together with the costs and disbursements of the prosecution, and shall be committed to the county jail until such fine and costs are paid. [L. '09, p. 56, § 1.]

§ 2721. Race-track Gambling a Felony—Penalty.

Any person who receives, records or registers bets, stakes or wagers, or who sells pools, or makes a book or books, upon any horserace, or upon the result of any trial or contest of speed or power of endurance of any animal, whether such race, trial or contest takes place within or without this state; or any person who receives, registers, records, forwards or transmits, or purports or pretends to receive, register, record, forward or transmit, in any manner whatsoever, any money, checks, credits, or any other representative of value, or any property, thing or consideration of value whatsoever, bet, staked, or wagered, by or for any other person, upon any such race or result, whether to be bet, staked, or wagered within or outside this state; or any person who uses, or has in his possession for use, any book, paper, board, device, apparatus or paraphernalia, for the purpose, actual or pretended, of receiving, recording, registering, forwarding or transmitting any bets, stakes or wagers, or of book-making or pool-selling, upon any such race or result; or any person who keeps, manages, conducts, maintains or occupies any house, room, shop, shed, tenement, tent, booth, building, float or vessel, or any part thereof, or who keeps, manages, conducts, maintains or occupies any place

or stand, of any kind, upon any public or private ground, street, park, garden, inclosure or place, for the purpose of receiving, recording, registering, forwarding or transmitting any bets, stakes or wagers, or of selling pools, or of book-making, upon any such race or result; or any person who being the owner, lessee or occupant of any house, room, shop, shed, tenement, tent, booth or building, float or vessel, or part thereof, or of any ground, park, garden, inclosure or place, knowingly permits the same to be used or occupied for any of the purposes herein prohibited, or who knowingly permits to be kept, exhibited or used therein any book, paper, board, device, apparatus or paraphernalia, for the purpose of recording or registering such bets, stakes or wagers, or for the purpose of such pool-selling or book-making; or any person, whether as principal, employer, owner, proprietor, agent, employee or assistant, or as officer, agent or employee of a corporation, who aids, assists or abets, in any manner, any of the said acts or things which are hereby forbidden, is guilty of a felony, and, upon conviction thereof, shall be imprisoned in the penitentiary for a period of not less than one, nor more than three years. [L. '09, p. 7, § 1.]

See *supra*, § 2473, pool-selling and book-making.

• **§ 2721½. Indecent Language, Practices and Drunkenness.**

Any person who shall use in the presence of any person any indecent or vulgar language, or who shall appear upon any public road or street or in any or upon any public place or conveyance in any indecent, drunken or maudlin condition or boisterous manner shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished accordingly. [L. '09, Ex. Sess., p. 61, § 1.]

INDEX—VOL. I.

[References are to Sections.]

- ABANDONMENT** — See Divorce;
Husband and Wife
- ABATEMENT**—See Actions; Nuisances
- ABATEMENT AND REVIVAL**—See Actions
- ABDUCTION**—See Criminal Law
- ABETTERS**—See Criminal Law
- ABSCONDING DEBTORS**—See Ne Exeat
- Arrest, when 613
vacation 614
warrant, service of..... 626
Attachment against property..648, 649
bond for, when unnecessary... 652
Exemption, not entitled to..... 571
Summons by publication authorized 228
- ABSENCE**
- Limitation of actions suspended
by 168
Spouse, as affecting liability for
bigamy 2453
- ABSENTEES**
- Process, service by publication... 228
Property, management of.....1715-1
distribution provisionally.....1715-7
bond of distributees.....1715-1
escheat to state.....1715-10
final distribution.....1715-9
inventory and appraisal.....1715-2
maintenance and upkeep.....1715-4
sale to pay debts, or if perish-
able1715-4
Trustee, appointment1715-1
bond1715-2
compensation1715-4
final settlement1715-10
removal or resignation.....1715-5
accounting1715-5
reports, annual1715-3
term of trusteeship.....1715-6
Wills, probate of.....1715-7
- ABSTRACTS OF RECORD**— See Appeals
Verdict 431-2
- ACCESSORIES**—See Criminal Law
- ACCIDENT**
- Civil action, ground for new trial 399
Ground for vacation of judgment,
when 464
objection by petition and affi-
davit 467
- ACCOUNTS**—See Executors and Ad-
ministrators; Guardian and
Ward; Probate Code
- Assignment of, action on..... 191
Limitation of action upon mutual 166
Mutual, when deemed no longer
current 166
Penalty for falsifying..... 2661
Pleading and evidence in justice's
court 1783
and bill of particulars..... 284
Taking, before referee..... 370
on defaults 411
- ACCUSED**
- Rights of—See Criminal Law.2305- 2312
- ACKNOWLEDGMENT**
- Clerk of superior and supreme
courts may take..... 77
Court commissioners may take... 85
False, constitutes forgery, first de-
gree 2584
Judges and judicial officers may
take59, 60
Wife to join when homestead... 534
- ACQUITTAL**—See Criminal Law
- ACTIONS**—See Accounts; Appear-
ance, Arbitration and Award;
Attachment; Bonds; Corpora-
tions; Counties; Criminal
Law; Costs; Damages; Depo-
sitions; Ejectment; Eminent
Domain; Evidence; Execu-
tion; Executors and Adminis-
trators; Forceful Entry and
Detainer; Infants; Insane Per-
sons; Insurance; Garnishment;
Injunction; Judgment; Jury;
Justice of the Peace; Land-
lord and Tenant; Liens;
Limitation of Actions; Me-
chanics' Liens; Mortgages;
Mandamus; New Trial; Mu-
nicipal Corporations; Negoti-
able Instruments; Parties to
Actions; Partition; Principal
and Surety; Pleading; Pro-
cess; Receivers; Recogniz-
ances; Reference; Specific
Performance; State; Tres-
pass; Venue; Waste; Wit-
nesses
- Abatement and revival—
causes which survive to or
against executor or adminis-
trator 967

INDEX—VOL. I.

[References are to Sections.]

ACTIONS (Cont'd).

limitation on actions by and against representatives.....	170
personal injuries, death not to abate	194
representatives or successors may be substituted.....	193
Abatement of nuisances—See Nuisances	943- 946
Administrators, etc., by and against	967, 973, 1518
Against state—See State	
Against state officers, defense of	890-1
Agreed case (which see).....	378- 380
Arrest and bail (which see)...	748- 777
Bonds of contractors on public works	1161
action for supplies to subcontractors	1159-1
Boundaries, to determine lost, etc.	947- 949
Civil, one form of.....	153
not merged in criminal.....	2295
parties, how designated.....	154
Commencement of	167, 220
forcible entry	814
new, after reversal, limitation.	173
Conflicting claims to property.	199- 201
Consolidation, appeal involving part of actions.....	396
Continuance	322
Corporations, criminal actions against, trial.....	2011-2
Death by wrongful act.....	183-1
Dismissal	286, 320, 321
Divorce (which see).....	982- 997
Eminent domain, exercise of by state	891
Enjoining tax sales or collection	956, 957
Executors and administrators, by and against.....	967, 973, 1518
Fines and forfeitures (which see)	963- 966
Guardians, by and against.....	1576
compromises authorized	1576
Instituting in another's name unlawfully	2376
Interpleader	198
Intervention	202, 203
not to delay trial.....	203
Joinder	296
of defendants, service, and procedure	236
Jurisdiction, when acquired.....	238
Justice's courts—See Justice of the Peace	
Limitations relating to—See Limitation of Actions.....	155- 178
suspension of.....	168
Name, proceedings to change....	998
Official bonds	958- 962
Pendency of another action, ground for demurrer.....	259
Pending at death of deceased, treated as claims.....	1426

ACTIONS (Cont'd).

Personal in claims for labor and material allowed	1142
Physical examination in personal injury case	1230-1
Pleadings—See Pleadings.....	255- 280
Possession of lands, who may bring	785
Public corporations, by and against	950- 957
Purchase price of lands, parties and judgment	195
Quieting title, who may bring...	785
Real party in interest to prosecute property, against unknown heirs	229, 232
title to, how quieted.....	785-1
Remedies, unaffected by enactment of Penal Code.....	2296
Representatives substituted, when	193
Restoration of lost records—See Records	1272- 1277
Setoff allowed, when—See Setoff and Counterclaim.....	266, 272
not defeated by assignment....	266
State, against, authority for.....	890-2
Sureties, to protect.....	974- 981
Survival—See Abatement, this title	

ACTS OF LEGISLATURE—See Laws

ADEQUATE REMEDY AT LAW

Inadequacy of remedy ground for certiorari	1002
ground for mandamus.....	1015
for prohibition.....	1028

ADJOINING LANDOWNERS—See Boundaries

ADJOURNMENTS

Courts, to legal holiday, how construed	65
Court commissioner may grant...	85
Criminal prosecutions.....	2135
Eminent domain proceedings....	893, 909, 924
Execution sales.....	585
Executor's sale of realty.....	1511
Judicial officers, powers of.....	66
Pending deliberation of jury....	355
Preliminary examination.....	1952
Superior court, construed as recess	26
Supreme court, construed as recess	5
Trials—See Continuance	

ADMINISTRATION—See Descent and Distribution; Executors and Administrators; Probate Code

ADMINISTRATORS—See Executors and Administrators

INDEX—VOL. I.

[References are to Sections.]

ADMINISTRATIVE BOARD

Actions against state, may authorize 890-2

ADOPTION

Consent of parents or custodian 1696, 1700
Descent of property..... 1699
Effect of adoption..... 1699
Examination of wife separately.. 1697
Incorporated society having custody may consent..... 1700
Minor children subject to..... 1696
Name of child changed to that of parents 1698
Neglected children, proceeding for 1996
Order confirming 1698
Petition, by whom may be made. 1696

ADULTERY—See Criminal Law

Action for falsely charging..... 294
Ground for divorce..... 982
Proof of marriage..... 2153

ADVANCEMENTS

Effect where widow and issue survive 1365
Intestate's—See Executor and Administrator

ADVERSE POSSESSION

Infants and insane persons, rights 790
Legal owner, who deemed to be—See Ejectment..... 788-790
Liberal construction of statute.. 791
Limitation on actions..... 156, 786

ADVERTISING—See Criminal Law

ADVERTISEMENTS—See Publications

AERIAL TRANSPORTATION

Condemnation for..... 905-1

AFFIDAVITS

Arrest in civil actions..... 750
Attachment, supporting writ.... 648
motion for discharge..... 674
Claim against decedents' estates.. 1482
Complete, when deemed, in perjury 2356
Continuance 322
Garnishment 682
in justice's court..... 1807, 1824
Injunction 723
Judges and judicial officers may take and certify..... 59, 60
Ne exeat 778
New trial 401, 403
Replevin in justice's court..... 1797
Summons after judgment supported by 438
Verification of pleadings..... 281

AFFIRMATION—See Oaths

AFFRAYS—See Criminal Law

AGREED CASE

Controversies which may be submitted 378
Enforcement of judgment..... 380
Judgment 379
Judgment-roll 379

AGRICULTURE—See Animals

AIDERS AND ABETTERS—See Criminal Law (accessories)

ALIENS

Actions by, limitation on suspended by war..... 171
Employment on public works prohibited 2334-1
acceptance of, unlawful..... 2334-2
list of, to be furnished..... 2334-4
penalty 2334-3
Firearms, license for required.... 2517-1
Naturalization of..... 16

ALIMONY—See Divorce

AMENDMENTS—See Judgment; Parties; Pleading

Attachment proceedings 677
Award, reference for..... 425
Bill of exceptions..... 389
Complaint, service of copy..... 262
answer to, effect of failure.... 262
Defects in notice or other paper corrected by 250
Depositions, how noted..... 1244
Extent, in furtherance of justice 250
Forcible entry and detainer, allowance of..... 828
pleadings 826
Habeas corpus, pleadings and return 1073
writ of 1085
Justice's court, pleadings in.. 1786-1788
Loggers' liens, pleadings in enforcement 1174
Pleading, on order of court..... 286

AMOUNT IN CONTROVERSY

Jurisdiction of supreme court on appeal 1
justice of peace..... 44
superior court 15

ANARCHISTS—See Criminal Law

ANIMALS—See Criminal Law

Agister's lien—See Liens (livestock)
Allowing on railway right of way 2659
False representation as to breed.. 2593
Horses, untying and removing... 2659
Infected stock, carcasses to be buried and not sold nor given away 2541
selling 2540
Liens for keeping—See Liens (livestock)

INDEX—VOL. I.

[References are to Sections.]

ANIMALS (Cont'd).

Livestock, liens for keeping—See Liens	
Malicious injury to.....	2659
Registration, fraud in.....	2593
Vicious cattle, criminal responsi- bility of owner for death by.	2399
penalty for allowing at large..	2538
Wild, killing, etc., in parks and cemeteries	2659

ANSWER—See Pleading

After judgment in ejectment, when	806
judgment allowed, when.....	235
Attachment, when debt not due.	650
Garnishment, by corporation.....	684
generally	690, 700, 701
Joint debtor summoned after judgment	439
Judgment for want of.....	411

APPEAL AND ERROR

Absence of right, ground for cer- tiorari	1002
Abstract of Record—See infra, Supreme Court	
Agreed case, judgment in.....	380
Allowed, when	1716
Awards—See Arbitration and Award	
Bill of exceptions.....388-	397
Certiorari, mandamus, and prohi- bition	1033
Commitment of juvenile offender	1985
Contempt judgments subject to.	1062
County commissioners, limitation	164
Court commissioners, judgment..	86
Depositions may be used on trials de novo	1248
Divorce cause, trial de novo.....	996
Eminent domain ...897, 899, 918,	931
Forcible entry and detainer.....	831
bond of defendant on appeal..	831
stay of proceedings.....	832
suspends writ of restitution..	833
Justice of the peace (which see) .....1910-	1924
objection of improper venue... 1857	
Lien of judgment, effect on.....	458
Limitation of actions, effect of reversal	173
Supreme court, appeals to—	
abstracts of record to be filed..1730-1	
amendment when insufficient.1730-6	
dispensed with, when.....1730-1	
expense recoverable as costs.1730-1	
extension of time for supply- ing	1730-8
rules, supreme court to pro- vide	1730-1
statements of fact and bills of exceptions, necessity...1730-2	
affirmance of judgment, motion for	1733
criminal actions, effect on sentence	1745, 1746

APPEAL AND ERROR (Cont'd).

damages awarded, when	1738
judgment against appellant and sureties	1739
power of court.....	1737
remand to lower court to carry into effect.....	1741
amendments allowed, when....	1734
amount in controversy in su- preme court	1
appearance, not a waiver of right to motions.....	1733
in person unnecessary	1748
argument, defendant has right to close in criminal actions..	1748
arrest, refusing to vacate order of	1716
attachment, order discharging or refusing	1716
attorneys' fees	1744
award of arbitrators, order re- lating to	1716
bail authorized in criminal actions	1747
bill of exceptions .....388-	397
bond for costs, when to be filed	1721
additional, when required...	1728
defects not ground for dis- missal	1730-9
execution and conditions....	1722
new required, when	1726
application for, when may be made.....	1728
stay of proceedings	1722
conditions and effect.....	1722
unnecessary in certain cases	1721
sureties, justification	1725
exceptions to	1726
briefs, additional authorities, when	1730
costs disallowed, when.....	1744
extension of time may be granted.394, 1730, 1730-4, 1730-5	
time for filing and serving..	1730
calendar, cases placed on, when	1732
costs, how taxed	1744
criminal actions, reversal, pro- ceedings	1749
damages, award of, when.....	1738
death of party, substitution of representative	1743
decision, to be in writing.....	1737
granting new trial to deter- mine questions presented.	1737
dismissal, motion for.....	1733
grounds for	1733
defective bond not ground for	1730-9
failure to amend abstract.1730-6	
hearing and disposition.....	1734
effected by notice, perfected by bond	1719, 1721
errors and decisions reviewable	387
exceptions, bill of.....388-	397
execution countermanded, when	1727
force and effect	1741

INDEX—VOL. I.

[References are to Sections.]

APPEAL AND ERROR (Cont'd).

final judgment	1716
order after judgment.....	1716
hearing on merits.....	1752
postponement	1732
injunction, temporary, remains in force, when.....	1723
pending appeal to United States supreme court.....	1724
joinder of parties in appeal...	1720
judgment against appellant and sureties on affirmance.....	1739
how enforced	1741
jurisdiction acquired, when....	1731
retained by superior court, to what extent	1731
mandamus to control lower court	1731
mode prescribed to be exclusive	1754
modification of judgment, pow- er of court.....	1737
remand to lower court to carry into effect	1741
new trial, order granting.....	1716
notice, how given.....	1719
joinder in	1720
service, how made.....	1720
orders affecting substantial rights	1716
parties, how designated.....	1717
power to affirm, reverse or mod- ify	1737
practice and procedure, rules for.	1753
probate proceedings, supreme court to hear.....	1591
receivers, orders relating to...	1716
record, what constitutes.....	1729
original papers, custody and transmission	1729
supplemental, when may be filed	1729
transcript, preparation and transmission	1729
what part of, without bill of exceptions	395
rehearing in supreme court....	10
limitation	1740
remittitur, when sent to su- perior court	1740
restitution, writ to issue when.	1742
reversal of judgment, power of court	1737
criminal actions, proceedings on	1749
restitution, writ of, to appel- lant when	1742
review, scope of	1736
rules and regulations	1753
second appeal allowed, when...	1735
sentence on conviction of fel- ony, running of, pending appeal	1745, 1746
period of imprisonment de- ducted, when	1745, 1750
service and filing of papers, order immaterial	1730-4

APPEAL AND ERROR (Cont'd).

state, in criminal action, right restricted	1716
statement of facts.....	388- 397
to be sent up.....	1730-2
stay, criminal actions effected by appeal	1745, 1746
effected how	1722
execution countermanded, when	1727
when bond for may be filed..	1726
technicalities disregarded and amendments allowed	1752
temporary injunction orders re- lating to	1716
time for taking not to be en- larged	250
extended on lost judgments.	1274
time of taking	1718
enlargement of, prohibited..	250
transcript of judgment, force and effect	1751
trial de novo, when.....	1736
various orders may be embraced in one appeal.....	1719

APPEARANCE

Acts constituting.....	241
After judgment, when.....	235
Attachment, execution of bond constitutes	671
Attorney, without authority.....	131
General, unless claimed as special	241
Justice of the peace, time for....	1773
Notice of, rights under.....	411
Personal, unnecessary on appeals to supreme court.....	1748
Rights of defendant after....	241, 242
Time allowed after service of com- plaint	224
Voluntary equivalent to personal service	238

APPRAISAL—See Executors and Administrators; Guardian and Ward; Probate Code

Exempt property	572
Homesteads—See Homesteads.	537- 551

APPROPRIATION—See Eminent Domain

ARBITRATION AND AWARD

Agreement, how made.....	421
Appeal from orders relating to award	1716
time of taking.....	1718
Arbitrators, acceptance of bribe, penalty	2322
bribery of, penalty.....	2320
compensation	423
failure to attend, penalty.....	423
influencing, penalty	2325
intimidating, penalty	2368
oath	422
powers	426, 428
promising award, penalty.....	2326

INDEX—VOL. I.

[References are to Sections.]

ARBITRATION AND AWARD (Cont'd).

Award, affirming, force and effect	430
amendment	425
enforcement	422
exceptions	424
judgment on, when	422
lien of, manner of securing	430
sealing and delivery of	422
Contempts before arbitrators	428
Costs, how taxed	429
execution for	429
Differences authorized to be sub- mitted	420
real estate titles excepted	420
Evidence, rules of	427

ARRAIGNMENT—See Criminal Law

ARREST

Affrays in presence of magistrate	1946
Apprehended danger in peace pro- ceedings	1939
Breaking buildings authorized	2082
Civil actions—See Arrest and Bail	
Contempt Proceedings	1055
Escape, assistance may be com- manded for retaking	2085
Execution, on	516, 517
Executors and administrators, when liable	973
Force may be used, when	2084
Justice may order on complaint, when	1925
Officer to show warrant	2083
Probation officers, authority of— See Delinquent Children and Juvenile Courts	1987-3
Recognizance on — See Recogni- zances	
Refusal to make, penalty	2365
to aid, penalty	2365
Rescue, assistance may be com- manded for retaking	2085
Rights of person under	2611
Telegraphic copy of warrant au- thority for	2081
Vagrants subject, without war- rant	1969
Warrant for, on preliminary ex- amination	1949
issues, when	2077
pursuit and apprehension of party charged	1950
transmission by telegraph	2081
Without warrant, when	1926, 1969

ARREST AND BAIL

Appeal from order refusing to va- cate arrest in civil actions	1716
time of taking	1718
Arrest in civil actions	748, 749
order granted only on proof	750
Bail, action against	761
approval by court	767
arrest of defendant by bail	760

ARREST AND BAIL (Cont'd).

bond, conditions	758
court to fix	751
criminal prosecutions—See Bail	
deposit in lieu	768, 776
disposition after judgment	771
money to be paid into court	769
substitution of bail for money	770
discharge by payment of money	776
examination on oath by officer	775
exceptions to bail	763
exoneration	759, 762
justification, how made	766
liable to sheriff, when	774
notice of justification	764
qualifications	765
return of sheriff	763
surrender of defendant, effect	759
Bonds of plaintiffs	752
informalities not to vitiate	777
Escape, liability of sheriff	772
Justice's courts, procedure	1790-1795
Sheriff may give bail for escape	772
liability on official bond	773
Vacation, proceedings for	753
discharge on vacation of order	753
Warrant, when to issue	754
contents	755
defendant entitled to copy	756
execution	757
fees of sheriff	757

ARREST OF JUDGMENT—See Criminal Law; Judgment

ARSON—See Criminal Law

ART

Injury to works of, penalty	2656
---------------------------------------	------

ASSAULT AND BATTERY—See Criminal Law

Costs in civil actions limited	477
Limitation on civil action for	160

ASSESSMENT OF DAMAGES—See Damages; Eminent Domain

Jurisdiction of superior court	15
--	----

ASSIGNATION HOUSES—See Criminal Law (prostitution)

ASSIGNEES

Action by, when	191
---------------------------	-----

ASSIGNMENTS

Action on by Assignee	191
Assignee, right to execution	519
Costs in civil actions, liability of assignee	490
Defenses by way of setoff not de- feated by	266
right of setoff not conferred by	272
Judgments, recording	447, 448
Liability of assignor in attach- ment	652
Mechanics' liens, rights of as- signee	1136

INDEX—VOL. I.

[References are to Sections.]

ASSIGNMENT FOR BENEFIT OF CREDITORS

Assent of creditors presumed....	1087
Assignee—	
bond	1089
compensation	1093
death	1099
failure to qualify.....	1099
inventory by	1089
power over assets.....	1098
qualification by	1088, 1089
removal	1099
selected how and when.....	1088
sheriff disqualified to act as....	1101
subject to control of court.....	1094
successor, powers of.....	1099
Assignments, how made.....	1088
Benefits must apply to all creditors	1086
Claims, when postponed.....	1097
not due, allowance, how made..	1097
Conveyance, form and requisites.	1088
Creditors, assignee to file list of	
.....	1088, 1091
claims of, exceptions, trial of..	1092
verification necessary	1088
meetings of, when called.....	1088
Custody of property pending	
choice of assignee.....	1088
Debtor, examination of.....	1095
discharge of	1100
exemptions set aside to, when..	1103
Dividends, when authorized.....	1093
Exemptions, right of.....	1102
claim and contest of.....	1103
Final account of assignee.....	1093
Fraud in	2633
Inventory of debtor.....	1088
of additional property.....	1096
Jurisdiction of superior court....	15
Laborer's claims to be first paid..	1153
Notice of assignment, how given..	1090
Omissions not to invalidate, when	1095
Perishable property, sale of.....	1088
Receiver, sheriff disqualified.....	1101
Sale of real property, how made..	1098
Validity of	1086
not void for want of list or	
inventory	1095
Wages of employees are preferred	
claims	1204
disputed, how established.....	1206

ATTACHMENT

Adverse claims to property levied	
on	573, 577
Amendments, allowance of.....	677
Amount of property leviable.....	655
Appeal from orders discharging or	
refusing	1716
time of taking	1718
Application may be heard on legal	
holiday	64
Bond for	652
action on, damages recoverable	654
additional security, when re-	
quired	653

ATTACHMENT (Cont'd).

costs and damages, joint lia-	
bility, when.....	652
excused from filing, when.....	652
release of attached property...	671
judgment on, when.....	672
Claim to attached property, bond	
—See Executions	
Community property, for debts of	
insane spouse	1680
Compensation of officer levying..	655
Construction of statute liberal...	677
Custody of attached property....	663
Damages for wrongful	654
Debt not due, grounds for grant-	
ing	649
answer, filing of.....	650
judgment entered, when.....	651
Discharge, motion for.....	673
granted, when	675
hearing on affidavits.....	674
recording	676
Examination of defendant for dis-	
covery	660
Execution unsatisfied, procedure..	669
Garnishment in aid of.....	680
executor	664
judgment debtor of defendant.	664
sheriff	664
Granted, when	647
debt not due, when granted on.	649
Grounds	648
Insufficiency of levy, collection of	
balance	668
Inventory of sheriff.....	666
Judge at chambers same jurisdic-	
tion as court.....	678
Judgment for defendant, effect...	670
Justice of peace, forms of writ,	
bond and redelivery bond....	1890
power to issue writ.....	44
restriction on powers.....	679
service of writ.....	1762
Levy of writ—	
following property	658
manner of levying.....	659
Lis pendens notice, filing of.....	243
Moneys and property, custody of.	663
in court, how.....	665
in sheriff's or constable's hands	664
Perishable property, sale.....	662
Property unsold, disposition of..	668
Receiver appointed, when....	661, 741
Redelivery bonds—See Executions	
Sales before judgment, when....	662
how conducted	667
proceeds, subjected to judgment	667
balance, disposition of.....	667
Sheriff, for misconduct.....	4000
Wages of employees preferred	
claims	1206
Writ, issuance	648
affidavit in support.....	648
contents of	655
different counties, issuable to..	656
directions to sheriff.....	655

INDEX—VOL. I.

[References are to Sections.]

ATTACHMENT (Cont'd).	
return of sheriff.....	676
several issued, costs on exe-	
cuted writs	656
order of executing.....	657
ATTACHMENT AGAINST PER-	
 SONS —See Contempts	
ATTEMPTS —See Criminal Law	
ATTENDANCE —See Jurors; Wit-	
nesses	
ATTORNEY-GENERAL	
Condemnation by state, to appear	
in	891, 900-1
Counsel for state in actions	
against	888
Defending state officers.....	890-2
Duty to advise tax commission in	
escheats	1363
Powers and duties in court.....	112
supervision of prosecuting attor-	
neys	116
Prosecuting attorneys authorized	
to bring action for.....	116
Prosecution of action to enforce	
forfeiture of corporate fran-	
chise, when	2384
ATTORNEYS-AT-LAW	
Admission to practice—	
application	
citizenship, affidavit of to ac-	
company	139-6
certificates	139-9
diplomas	139-9
fee on admission.....	139-13
from another state.....	139-4
requirements	139-9
local bar to recommend, when..	139-7
oath on admission.....	139-12
on accredited certificate.....	139-9
qualifications for, general.....	139-4
educational	139-9
sex, no bar to.....	139-3
supreme court to make order	
for	139-3
Advertising for divorce business	
prohibited	2463
Annual registration	139-20
fee	139-20
Appearance without authority...	131
Appointment to defend pauper	
criminals	2305
compensation	2305
Argument of	339
Attorney defined	118
Authority and powers.....	130
production of, may be required	132
Bail not to be given by.....	765
Barratry by, punishment.....	2370
Certificate of admission, revoca-	
tion, when	139-18
Change of, how effected.....	133
accrued fees first to be paid....	133

ATTORNEYS-AT-LAW (Cont'd).	
notice of change and substitu-	
tion	134
rights of client.....	130
Clerk of court not to act as....	81, 139-5
Complaints against	139-16
Competency as witness against	
client	1214
Contempt, what constitutes.....	1049
Counsel defined	118
Death or removal of, proceedings.	135
Disbarment, causes for.....	139-14
proceedings for	139-16, 139-17
reviewable by supreme court..	139-18
Disqualification	139-5
sex not to disqualify.....	139-3
Duties enumerated	129
Ethics, code of.....	139-15
Examinations—	
board to conduct.....	139-3
when held	139-2
Exempt from jury duty.....	103
Exemptions on execution.....	563
none against claim of client....	564
Fee for annual registration.....	139-20
Fees, allowed as costs.....	474- 476
amount taxable	481
appeal to supreme court.....	1744
chattel liens, enforcement.....	1157a
contractor's bond actions.....	1161
executor's allowance for.....	1528
fixed by court, when.....	475
garnishment	704
justice court	1862
loggers' liens, enforcement of..	1178
mechanics' lien foreclosure....	1141
orchard liens, enforcement....	1131-3
witness fees not allowed.....	502
Hearings on complaints against..	139-16
procedure on	139-17
Judicial officer may act as, when..	55
Law examiners, state board of	
applications for admission, to	
pass on	139-3, 139-8
created	139-1
law schools, to approve, when..	139-10
meetings	139-2
members, qualifications, term..	139-1
oath of, taking and filing....	139-1
salary and expenses.....	139-1
office, with clerk, supreme	
court	139-2
prosecuting attorneys to assist..	139-17
records	139-2
rules and regulations, to pre-	
scribe	139-19
secretary, who may be.....	139-2
to enforce laws against.....	139-16
to hear complaints against....	139-16
witnesses, may subpoena.....	139-17
Law schools—	
law examiners to approve.....	139-10
Laws repealed	139-23
Lien for compensation, on what..	136
right to hold papers, etc.....	138

INDEX—VOL. I.

[References are to Sections.]

ATTORNEYS-AT-LAW (Cont'd).

- Money and papers, refusal to deliver to client..... 137
- proceedings where lien exists.. 138
- Oath of 125
- Partner of justice not to practice before him 49
- Persons not entitled to practice 142, 139-5
- Power to issue subpoena for witness 1217
- Practicing law prohibited, unless admitted 139-4
- Receiver not to be chosen from, when 741
- Record of, to be kept..... 139-21
- Registration annually 139-20
- fee for 139-20
- failure of 139-20
- Restrictions—
 - holding certain public offices disqualifies 139-5
- Revocation of license, power of supreme court 139-18
- Right of accused to have..... 2095
- Service of notice on, how. 245, 247, 248
- Soliciting business around jails, etc., vagrants 2688
- Students not attending school—
 - registration of 139-11
 - course of study..... 139-11
- Supreme court—
 - hearings against attorneys..... 139-18
 - law examiners, state board of, to appoint 139-1
 - may disbar, suspend or discipline 139-18
 - to admit to practice..... 139-3
- Surety on executors' bond, not to be 1410
- Suspension or removal, causes for. 139-14
- proceedings for..... 139-16, 139-17
- reviewable by supreme court.. 139-18
- Verification of pleadings by..... 281
- Veterans of world war—
 - admitted to examinations for one year 139-11
- Violations, punishment 139-22

ATTORNEYS IN FACT—See Power of Attorney

AUCTIONS

- Mock auctions, penalty..... 2630

AUDITOR—See County Auditor; State Auditor

AUTOMOBILES

- Chauffeur, intoxication of..... 2527
- Larceny of 2601-1
- Malicious injury or removal..... 2659
- Numbers, removal of, penalty... 2601-3
- Stolen, evidence of..... 2601-4
- Traffic regulations—See Highways

AWARD—See Arbitration and Award

BADGES—See Criminal Law

BAGGAGE

- Liens of innkeepers..... 1201, 1202
- Malicious injury, penalty..... 2666

BAIL

- Actions against bail—See Arrest and Bail
- Allowable, when..... 2310
- Amount to be indorsed on warrant 2079
- Civil actions—See Arrest and Bail
- Contempt proceedings 1055
- Exoneration, when 2313
- Fixed by judge on appeal..... 1747
- Forfeiture 2090
- Habeas corpus to admit to bail.. 1077
- admission to bail..... 1076
- Justification of 1956
- Money in lieu..... 768, 776, 2089
- deposit in court..... 769
- disposition after judgment.... 771
- in justice's court..... 1957½
- substitution of bail for money.. 770
- Officer may take..... 2087
- Peace officers taking, must certify to clerk of court..... 2088
- Record 2088
- Taken in open court..... 2086

BAILMENTS

- Fraud by bailee of horse or vehicle 2628

BANKRUPTCY—See Assignments for Benefit of Creditors

BANKS AND BANKING

- Accepting deposits in insolvent bank, penalty 2640
- Acting as executor, guardian, etc. 1457
- Checks and drafts, issuance without funds in..... 2601-2
- Criminal liability for taking deposits when insolvent..... 2640
- Drawing check or draft without deposits 2601-2
- Garnishment, requisites of service 1829
- Insolvent banks receiving deposits, criminal responsibility 2640
- Insolvent, receiving deposits.... 2640
- Issuance of check or draft without deposits 2601-2

BAR—See Criminal Law

BAR TO ACTION—See Limitation of Actions

BASEBALL PLAYING

- Actions for violation of act, venue 2321-6
- Act, scope of..... 2321-7, 2321-8
- Bribing—
 - accepting bribe unlawful..... 2321-2

INDEX—VOL. I.

[References are to Sections.]

BASEBALL PLAYING (Cont'd).
 completion of offense defined..2321-3
 defined2321-4
 players, unlawful2321-1
 Extra compensation to players
 not prohibited2321-7
 Game, causing loss of, unlawful..2321-5
 Prosecution, venue of.....2321-6

BARRATRY—See Criminal Law

BASTARDS

Descent of property to, rights of. 1345
 Inheritance by and from.....1345, 1346
 Property of, how descends..... 1346

BASTARDY PROCEEDINGS—See
 Filiation Proceedings

BAWDY-HOUSE — See Criminal
 Law; Disorderly Houses; Pros-
 titution

BEGGING—See Criminal Law

BEQUESTS—See Wills

BETTING—See Criminal Law (gam-
 ing)

BIAS

Ground for change of venue..... 309
 Juror, actual and implied.....329- 331

BIGAMY—See Criminal Law

BILL OF EXCEPTIONS—See Ex-
 ceptions388- 397

BILL OF PARTICULARS

When may be required..... 284

BILLS AND NOTES—See Negoti-
 able Instruments

BILLS OF LADING

Cancellation on redelivery of
 property2647
 Duplicate, misdemeanor, when... 2646
 False, penalty, for making..... 2635
 Fictitious, penalty2644
 Penalties and offenses, duplicate. 2646
 failure to cancel..... 2647
 false, penalty for making..... 2635
 fictitious2644

BILLS OF SALE

Execution sale of personalty..... 586

BLACKMAIL

Definition and punishment..... 2613

BOARDS

Exercising judicial functions, re-
 viewable by certiorari..... 1002
 Subject to writ of mandate, when 1014
 to writ of prohibition..... 1028

BOATS AND VESSELS

Definition of boat..... 2303
 Destruction for insurance..... 2634

BOATS AND VESSELS (Cont'd).

False lights, etc., displayed, pen-
 alty2654
 Injuries to tackle and equipment 2659
 Intoxication of officers, penalty.. 2527
 Liens on, enforcement of—See
 Liens1182- 1187
 Motorboats, removing numbers
 from2601-3
 . Overloading, death resulting is
 manslaughter2400
 . Pilots, penalty when unlicensed.. 2545
 Reckless operation of steamboat
 causing death, penalty..... 2401
 Ship's register, falsifying..... 2635
 Steamboats, unsafe pressure of
 steam, responsibility of of-
 ficers2532

BONA FIDE PURCHASERS

Logs and timber products liened
 on1177

BONDS—See Appeal; Bail; Bonds,
 Official; Justice of Peace

Action on, jurisdiction of justice 44
 Appeal, in forcible entry and de-
 tainer831
 to supreme court—See Appeal
 and Error (supreme court)
 Appropriation of land pending
 appeal932
 Arrest and bail.....752, 758, 777
 informality not to vitiate..... 777
 Attachment, release of property. 671
 to obtain writ—See Attach-
 ment652- 654
 Bail on appeal1747
 action on defective..... 777
 in general—See Bail
 Compromises undertakings2303
 Contempt proceedings1055
 action on, disposition of pro-
 ceeds1061
 Contractors public work, required
 actions on1159
 supplies furnished1159-1
 validation of1161-1
 Costs, security for.....495, 496
 appeal to supreme court...1171, 1722
 Evidence, certified copies as..... 1260
 Executors and administrators,
 provisions for—See Probate
 Code
 Forthcoming, by judgment debtor 581
 by adverse claimant573
 replevin in justice's court..... 1799
 Garnishment, releases garnishee,
 when1831
 executed when681
 to discharge writ689
 Guardians—See Guardian and
 Ward1573, 1574
 Highway, county, authorized—
 See Finance
 Indemnifying in replevin on
 claim by third party....1805, 1806

INDEX—VOL. I.

[References are to Sections.]

BONDS (Cont'd).		
Injunction	725,	726
Ne exeat	779,	780
Official, action on—See Bonds, Official		959
Probate matters, record of	1279	
Receivers	742	
Redelivery, in replevin in jus- tice's court	1801	
Replevin, for delivery of property	709,	710
redelivery	711,	712
when third person claims prop- erty	716	
Restitution, in forcible entry and detainer	819,	820
application to raise or lower..	821	
Security to public corporations and persons	958	
Stay of execution	523—	527
Supplemental proceedings, bond of debtor—See Executions..	613	
BONDS, OFFICIAL—See Bonds		
Actions on, who may maintain..	959	
county clerk, bond of	70—	72
judgment for one delinquency no bar to others	961	
aggregate not to exceed pen- alty as to surety	962	
leave to sue, private persons must obtain	960	
showing of delinquency essen- tial	960	
BOOKMAKING		
Definition and punishment	2473	
BOOKS AND PAPERS		
As evidence, when writing read without prof of genuineness..	1263	
Inspection and copies by parties to actions—See Discovery	1262	
Malicious injury to	2660	
BOOMS		
Malicious injury to	2658	
BOUNDARIES		
Commissioners to survey and mark	948	
report of, exceptions to	948	
Lost, action to establish	947	
costs to be a lien on lands of both parties	949	
commissioners appointed, duties	948	
lis pendens in	949	
proceedings and decree	949	
survey	948	
who may maintain and where brought	947	
Malicious erection of structures, injunction	720	
Monuments of, injury to, penalty	2656	
Proceedings, how conducted	949	
BRANDS—See Criminal Law (ani- mals)		
BREACH OF PEACE—See Criminal Law		
As contempt of court	1049	
BREACH OF PROMISE		
Limitation on action against	159	
BREAKING—See Criminal Law (burglary)		
Definition	2303	
BRIBERY—See Criminal Law		
BRIDGES		
Fast driving on, penalty	2718	
Injuries to, penalty	2656	
Mooring boats, etc., to	2656	
Tolls, extortion of illegal, penalty	2715	
Unlawful breaking	2656	
BRIEFS—See Appeal and Error		
BROTHEL — See Criminal Law (prostitution)		
BUCKETSHOPS — See Criminal Law (gaming)		
BUGGERY — See Criminal Law (sodomy)		
BUILDINGS		
Defacing or injuring	2659	
Definition	2303	
Malicious injury to	2659	
Public doors to swing outward..	2525	
injury to, penalty	2656	
Unlawful erection on streets or lands of another	2659	
BUOYS		
Malicious injury to	2656	
CARRIERS		
Baggage, injuries to	2666	
Bills of lading by cancellation, penalty for failure	2647	
duplicates, when misdemeanor.	2646	
Employees, intoxication, on duty	2527	
wilful neglect of duty, penalty	2529	
Engineers, illiterate, employment of	2526	
failure to ring bell or sound whistle	2528	
False manifests, invoices, bills of lading, etc.	2635	
Fictitious bill of lading, penalty.	2644	
Freight and storage charges, lien and sale for—See Liens..	1191—	1196
Intoxicating liquors not to be drunk in public conveyances	2693,	2694
Passenger tickets, redemption of unused	2649	

INDEX—VOL. I.

[References are to Sections.]

CARRIERS (Cont'd).

stealing or failure to cancel, larceny	2607
unauthorized sale by scalpers..	2648
Profane, offensive and indecent language, penalty	2561
Quarreling in public conveyances	2561
Receipt for goods, refusal to give, penalty	2643
Refusal to pay fare or leave con- veyance	2561
to receipt for goods, penalty..	2643
Riding of car or engine to avoid paying fare	2561
Train robbery, attempt.....	2650
wrecking, penalty.....	2651

OEMETERIES—See Criminal Law

Counties authorized to provide..	2652
Opening road through, penalty...	2493

CERTAINTY

In indictments and informations	2057
In pleadings	286

CERTIFICATES

False, by officers, penalty.....	2380
Information to annul.....1047,	1048

CERTIORARI

Appeals in	1033
Costs, how taxed.....	492
Defined	1001
Exceptions, bill of, when.....	1007
Hearing on return.....	1009
Judgment in	1009
copy transmitted to lower tri- bunal	1011
Judgment-roll, what constitutes..	1012
Jurisdiction of superior court...	15
of supreme court	1
Questions determinable by court.	1010
Returnable, when	1031
Rules of practice.....	1032
Superior courts may issue writ...	15
court commissioners subject to review by	86
Supreme court, power to issue....	1
Writ, issuable by courts of rec- ord	1002
application for, based on affi- davit	1003
commands what	1005
directed, how	1004
grant, when authorized.....	1002
return, by whom made.....	1004
review, extent of.....	1007
service of, how made.....	1008
statutory writ, how denomi- nated	1001
stay of proceedings, when.....	1006

CHALLENGES

Dueling	2420
Evidence, judgment when.....	340
Grand jurors, who may challenge	2025
grounds for	2025, 2026

CHALLENGES (Cont'd).

Jurors in criminal cases.....	2138- 2142
Jury, civil actions.....	324- 337
Referees	373

CHANGE OF VENUE—See Venue

CHATTEL MORTGAGES

Foreclosure, manner of.....	1104
action before maturity of debt, when	1111
contest of.....	1110
injunction may issue, when....	1110
notice of sale, contents.....	1105
service	1106
publication of.....	1107
purchaser, title acquired.....	1108
sale, how conducted.....	1107
bill of, effect.....	1109
security threatened, remedy... .....1111,	1112
venue	1104, 1111
Franchises may be sold under foreclosure	520, 521
Mortgagor's interest may be sold under process	1115
Possession taken from mortgagor, when	1112
procedure for real estate fore- closure applicable.....	1113
Remedies of mortgagor.....	1114
judgment of foreclosure and sale	1114
for deficiency, when.....	1114
Sale of mortgaged personalty, when larceny.....	2603

CHATTELS — See Chattel Mort- gages; Personal Property

Lien for services and material ex-
pended on—See Liens...1154- 1158

CHECKS

Unlawful issuance.....	2601-2
------------------------	--------

CHIEF JUSTICE—See Judges

CHILDREN—See Adoption; Delin- quent Children and Juvenile Courts; Guardian and Ward; In- fants; Labor; Parent and Child

Action for death of parent.....	183-1
Action for personal injuries to father survive to.....	194
for injury or death, who may bring	184
Adoption of, determination by court commissioner.....	85
Commitment to reform school, powers of court commissioner	85
Custody and maintenance on di- vorce	989
modification, application.....	995-3
certified copy of.....	995-5
hearing	995-4
jurisdiction and venue.....	995-2
Orphans and neglected—See Or- phans	

INDEX—VOL. I.

[References are to Sections.]

CHOSE IN ACTION			CODE (Cont'd).	
Assignment of, action on.....	191		Official compilations.....	151, 152-5
CHRISTMAS			approval of.....	152-8
Legal holiday.....	61		authorized citations..	152, 152-6, 152-7
CHURCHES			certification of.....	152-9
Doors to swing outward.....	2525		Pleadings governed by provisions	
CIGARETTES			of	255
Sale other than original packages	2698		Probate—See Probate Code	
minors, civil liability.....	2699		CODICIL —See Wills	
penalty	2445, 2697, 2700, 2701		COERCION	
when contains injurious drugs.	2697		What is, and penalty.....	2614
CITATION —See Contempt; Probate			COLOR OF TITLE	
Code; Process			Effect on legal ownership of lands	
Probate matters	1373, 1444		. . . . .	788, 789
CITIZENSHIP			COLUMBUS DAY	
Power of superior court to grant	16		Created	63-1
CIVIL ACTIONS —See Actions			COMBINATIONS — See Criminal	
One form of.....	153		Law	
CIVIL RIGHTS			COMMISSIONER TO CONVEY	
Penalty for denial of.....	2686		REAL ESTATE	
CLAIM AND DELIVERY			Appointment by court.....	605, 612
Judgment in actions for.....	434		conveyance pursuant to judg-	
Proceedings in case of property			ment, effect	607
levied upon—See Execution			confirmation by court.....	609
.	573- 577		deed, contents of.....	606
Replevin—See Replevin			execution	610
Variance in actions to recover			pursuant to order of sale, effect	608
personalty	302		recording	611
Verdict, form of.....	363		COMMISSIONERS	
CLAIMS			County—See County Commissioners	
Adverse, levied on—See Execution	573		Perpetuating testimony.....	1251
Decedent's estates—See Executors			Taking testimony, issuance of...	1240
and Administrators.....	1477		interrogatories may be annexed	1240
False audit and payment, penalty	2381		COMMITMENT	
Laborers and materialmen against			Form of, by justice of peace.....	1935
contractor's bonds.....	1161		COMMITTING MAGISTRATES —	
CLAIMS AGAINST DECEDENTS			See Magistrates	
—See Executors and Adminis-			COMMON CARRIER —See Carriers	
trators; Probate Code			COMMON LAW	
CLERK OF SUPREME COURT			Rule of decision, to what extent.	143
Deputies, appointment and powers	78		Supplements criminal code.....	2299
Disqualified from practicing law			COMMUNITY PROPERTY — See	
.	81, 139-5		Husband and Wife	
Duties and powers.....	77		COMPLAINTS —See Pleading	
Fees, schedule of.....	497		COMPOUNDING CRIMES — See	
Oaths and power to administer..	1264		Criminal Law	
Practice of law, prohibited.....	139-5		COMPROMISE AND SETTLE-	
Record of attorneys.....	139-5		MENT	
CLERKS OF SUPERIOR COURTS			Criminal prosecutions.....	2126- 2128
—See County Clerks			Guardian may compound doubt-	
CLOUD ON TITLE —See Ejectment			ful debts	1576
CODE —See Laws			COMPUTATION	
Criminal, construction of....	2289- 2302		Of time	150, 252
Liberal construction of.....	144			

INDEX—VOL. I.

[References are to Sections.]

CONCEALED WEAPONS—See Criminal Law (weapons)

CONCEALMENT

- Attachment may be grounded on 648
- bond for, when unnecessary... 652
- Limitation of actions suspended
by 168
- Of defendant, publication of sum-
mons 228, 785
- Property concealed, how taken in
replevin 714

CONDEMNATION—See Eminent Domain

CONDITION PRECEDENT

- Performance, pleading, and proof 288

CONFESSION

- Criminals, effect as evidence.... 2151

CONFESSION OF JUDGMENT— See Judgment

CONFIDENCE GAME

- Swindling with cards, dice, etc... 2471

CONSANGUINITY

- Change of venue on ground of,
when 209

CONSOLIDATION

- Actions, for trial..... 396
- mechanics' liens 1140
- to enforce loggers' liens..... 1178

CONSPIRACY—See Criminal Law

CONSTABLES

- Attachment applicability of pro-
visions governing sheriffs.... 679
- powers and duties..... 679
- Buying claim or offering induce-
ment for bringing suit, pen-
alty 2371

Fees—

- mileage for plural services in
same cause 501
- Garnishment of moneys in hand. 664
- Limitation on action against.... 159
- for escape of prisoner..... 161
- no suspension of statute be-
cause of personal disability. 169
- Penalty for selecting juror on
request 2327
- Process, service of.....1760, 1762
- return of 1763

CONSTITUTION OF UNITED STATES

- Textpage 4

CONSTITUTION OF STATE

- Amendments 121
- Indexpage 137
- Textpage 41

CONTEMPT

- Acts constituting 1049
- Alias warrant 1061
- Appeal, not to effect stay..... 1062
- Arbitrators, before, how punished 428
- Arrest and bail..... 1055
- Attachment for
- enforcement of judgments.... 612
- judgment in quo warranto.. 1041
- order to satisfy claim..... 744
- executors and administrators
liable, when 973
- injunctions, disobeying732, 733
- justice of peace may have.... 1838
- against, to obtain certified
transcript on appeal..... 1916
- officers of cities and towns for
refusal to satisfy judgments. 954
- witnesses for refusal to attend
.1221, 1900, 1901
- Bond for bail..... 1055
- action on, disposition of pro-
ceeds 1061
- Commitments not subject to ha-
beas corpus 1075
- Courts may punish for..... 53
- Criminal, what constitutes, and
punishment2273, 2372
- Disobeying order for inspection
of books and papers..... 1262
- Garnishee attached for, when.... 696
- Grand juror guilty, when..... 2046
- Imprisonment to coerce perfor-
mance 1059
- In presence of court, how pun-
ished 1051
- Indemnity to injured party..... 1058
- Indictment or information for,
when 1060
- Injunction, disobedience of order
.732- 734
- Investigation of charge.....1056, 1057
- Judgment and sentence.....1057, 1058
- Judicial officers may punish for. 58
- Justice of peace, what provisions
govern 1062
- proceedings and punishment
.1891- 1897
- Manner of serving notices inap-
plicable to 249
- Order to deposit moneys in court,
disobedience 746
- Order to produce offender, when
in custody 1053
- Parties in proceedings for..... 1054
- beyond, procedure 1053
- Procedure when acts not in pres-
ence of court..... 1052
- Punishment as crime.....2273, 2372
- power of court..... 1050
- of court commissioner..... 85
- Refusal of attorney to deliver
papers or money..... 137
- of garnishee in justice's court
to surrender property..... 1838
- to obey judgment requiring
performance of certain act.. 512

INDEX—VOL. I.

[References are to Sections.]

CONTEMPT (Cont'd).

Summary proceedings, when.....	1051
Supplementary proceedings	630
Warrant of arrest, how executed	1055
alias	1061
return of	1056
Witnesses disobeying order to at-	
tend for taking of depositions	1238
disobeying subpoena.....	1220, 1221
refusal to testify.....	1230

CONTEST OF WILLS—See Wills

CONTINUANCE

Admissions to prevent.....	322
Allowed, when	322
terms	322
Costs as conditions.....	484
Criminal cases, proceedings to ob-	
tain	2135
recognizance of defendant.....	2121
state not entitled to, when....	2136
Ground of amendment of plead-	
ings, when	826
Justice's court, when granted....	1788
criminal actions	1932
limit allowed	1847
Partition, when may be had.....	863
Supplemental proceedings, allow-	
able in	634

CONTRACTORS

Bonds on public works.....	1159
action on, attorney fees.....	1161
liability for supplies furnished	
subcontractors	1159
validating certain bonds.....	1159

CONTRACTS—See Frauds, Statute of

Joint, action on	236
Limitations, removal by new	
promise	176
effect of partial payment.....	177
when not in writing.....	159
written contracts	157
Pleaded how, if written.....	284
Public void, when officer has pri-	
ivate interest	2334
Specific performance against ex-	
ecutors, etc.	1558- 1564

CONTRIBUTION

Joint debtors	979
on execution	593
Legatees and devisees.....	1508
Sureties	979

CONTRIBUTORY NEGLIGENCE

CONVERSION—See Criminal Law

CONVEYANCES—See Commissioners to Convey Real Estate; Deeds; Fraudulent Conveyances; Mortgages; Real Property

CONVICTION—See Criminal Law

CONVICTS

Competency as witnesses.....	1212, 2290
Importation of foreign, penalty.	2687
Intoxicating liquors, sale to, pro-	
hibited	2689
Rights of	2288
Vagrants, when	2688

COPYRIGHT

Violation of right in play or	
opera	2690

CORONERS

Fees, mileage, serving more than	
one in cause	501
Limitation on action against....	159
Practice of law prohibited.....	139-5

CORPORATIONS

Appropriation of lands generally	
.....	921- 930
Confession of judgment by.....	414
Criminal actions against, how	
commenced	2011-1
judgment, how entered	2011-3
trial of	2011-2
Dissolution, court commissioner	
may determine	85
False reports of pecuniary con-	
dition	2642
Foreign—	
attachment against property,	
when	648
bond, when unnecessary.....	652
costs in actions, security for..	495
bonds, judgments on.....	495, 496
summons, service on whom....	226
by publication, when	228
Forfeiture of franchise for con-	
spiracy	2384
Franchises subject to execution	
sale	520, 521
Fraudulent stock subscriptions...	2638
issue of stock, penalty.....	2639
Garnishment, answer in.....	684
sales of shares of stock....	697- 699
in justice's court.....	1839- 1841
Interrogatories to, how answered	1227
Notices in forcible entry and de-	
tainer, how served	814
Pleadings, verification	281
Quo warranto against.....	1034, 1044
ouster, when	1043
Receiver in case of insolvency..	741
Subject to writ of mandate, when	1014
to writ of prohibition.....	1028
Summons, manner of service on	
.....	226, 227
by publication, when	228
Supplementary proceedings, an-	
swer in	617
Transacting business without li-	
cense	2641
attendance, how secured.....	631
Venue of actions against.....	206

INDEX—VOL. I.

[References are to Sections.]

CORRUPT SOLICITATION—See Criminal Law (bribery)

COSTS

Action on public contractor's bond	1161
to establish boundaries	949
Allowance, discretion of court	493
limited in certain actions	477
limited to one of several actions, when	478
Appeals from justice of peace	487
taxation in supreme court	1744
Application for placing neglected child in custody of incorporated society	1707
Arbitration, execution for	429
taxation of	423, 429
Arrest and bail, maintenance of prisoner	757
Assignee of cause of action, liability	490
Attachment, execution of several writs	656
Attorneys' fees, when allowed	474-476
amount taxable	481
Bills for, in criminal cases, how made and certified	2228
audit and credit by state auditor	2229
verification and filing	482
Bond for in action against state	886
Change of venue, who to pay	215
Claim and delivery against sheriff	577
Complainant to pay, when	2225
before grand jury to pay, when	2226
Contest of will, how taxed	1389
Continuance before justice, how taxed	1932
or postponement of trial	484
Corporations, attachment for	1044
County liable, when	491, 508
or city to pay, when	2225
Criminal actions, belong to county	2230
judgment for	2187
liability of private prosecutor	2044
Defendant entitled to, when	479
separately defending	480
Disbursements of prevailing party, what taxed	482
Discharge of prisoner under recognizance, now taxed	2236
Divorce, imposition on husband, when	988
Eminent domain, appropriation by school district	917
Execution against homestead	551
Executors, etc., liability for	489
Foreclosure of mortgage, attorneys' fees	475
Fugitives from justice, liability of complainant	2246
Garnishment in justice's court, how taxed	1816-1818, 1843
proceedings	704

COSTS (Cont'd).

Guardian of infant plaintiff, liability for	488
Interpleader	200
Jury fee, advance deposit required	316
taxable as costs	317
taxed to defendant in criminal cases, when	2227
Justices' court, judgment for	1860-1862
jury fee, advance and taxation	1849
Loggers' lien enforcement cases	1173
attorneys' fees, etc., allowed as	1178
Mechanics' lien in foreclosure, attorneys' fees	1141
Partition, expenses of dividing land	849
lien on shares	885
Preliminary examinations, how taxed	1954
abstract to be forwarded with papers	1966
Prevailing party entitled to	476
exception in cases within justice's jurisdiction	476
Proceeding to adjudge habitual drunkard	1711
Quo warranto against corporations	1044
who liable for	1046
Referee, fees allowed	483
Restoration of lost records	1275, 1277
Retaxation	494
Revisory proceedings, taxation in	492
Security in superior court, required, when	495
bond for	495
judgment on	496
in justices' court	1777
Services of stenographer in taking judge's charge	339
State liable, when	491
Supplementary proceedings	628, 629
Supreme court—See Appeal and Error	
Tender, allowable in case of	485, 486
Trustee, etc., liability for	489
Warrants in payment, issuance of	2229

COUNSEL—See Attorneys

Right of accused to have	2305
------------------------------------	------

COUNTERCLAIM—See Setoff and Counterclaim

COUNTERFEITING—See Criminal Law

COUNTIES

Actions by and against	950-954
injunctions against taxation	955-957
on official bonds	958-962
Aerial landing sites	905-1
Appeals by, bond not required	1721
Appropriation of lands by	901-905
Bonds on public works, authority to require	1159

INDEX—VOL. I.

[References are to Sections.]

COUNTIES (Cont'd).

Commissioners—See County Commissioners	
Confession of judgment by.....	414
Costs in civil actions, liability. 491,	508
criminal actions, belong to county	2230
payment by county, when...	2225
County property, garnishment of.	680-1
Jury districts, division into.....	96
Leases—See County Property, this title	
Liability for support of delinquent child	1987-8
for traveling expenses visiting judge	30
Limitations on actions by.....	167
Public works, laborers to be secured by bond	1159-1161
Summons, service on whom.....	226
Venue in cases of newly created counties	211

COUNTY ATTORNEY—See Prosecuting Attorney

COUNTY AUDITOR

Filing of lien notice on chattels, entry	1158
Lis pendens notice, filing and cancellation	243
Records, assignment or satisfaction of judgments.....	447
attachments, discharge of.....	676
bonds of county clerks.....	70
redemptions, certificates of....	597
satisfactions of United States judgments	455
Sheriff's deed, record of.....	604
Warrants for costs bills issued by	2229
for traveling expenses of judges	30

COUNTY CLERKS

Assignment or satisfaction of judgment, recording of.....	447
Bail fixed by, when.....	2079
not to be furnished by.....	765
Bond of, conditions and filing....	70
amount of, how fixed.....	71
new, when may be required....	72
penalty for failure to furnish	72
Books to be kept by.....	75
custody and delivery to successor	76
levies, book of, to be kept....	449
probate records	1372
Change of venue, duty to transmit papers and records.....	215, 219
Contempt, what constitutes.....	1049
Cost bills in criminal cases, making and certifying.....	2228
Deposits in court invested in name of.....	878
reinvestment of interest, etc..	880
Deputies, appointment and powers	78
Duties and powers.....	77
Entry of judgments.....	431, 435
of transcripts and abstracts of judgments	453

COUNTY CLERKS (Cont'd).

Execution docket, must keep....	444
return of sale, duties on.....	591
Fees as superior court clerk.....	497
eminent domain by school district	920
filing abstract of verdict.....	431-2
proceedings for custody of friendless children.....	1707
Injunction, liability for sureties before justification.....	725
issuance of copy of order as writ	727
Issuance of certificate expenses visiting judge.....	30
Judgment-roll, to prepare.....	442
how indorsed	443
Jury drawn by, when.....	97
"Juvenile record," kept by.....	1993
Office, where to be kept.....	73
open on judicial days.....	73
Order-book, supplementary proceedings	646
Practicing law, disqualified from	81, 139-5
Record of index of judgments, to keep	446
probate records	1372
proceedings in criminal cases..	2224
witnesses' attendance and mileage	482
Retention of moneys paid by sheriff, penalty.....	515
Sheriff's deed, entry and indorsement	604
Writ of garnishment issuable by	680

COUNTY COMMISSIONERS

Employment of county prisoners authorized	2279
Friendless children, surrender of custody to.....	1701
county charges, custody may be awarded to incorporated society without consent of parents	1702
expenses of proceedings paid by county.....	1707
Limitation of actions for rejected claims	164
on appeals from orders.....	164
Power to determine public use in eminent domain.....	901
taxation to pay cost of condemnation	902
Probation officers, additional....	1987-3
Rewards for fugitives, may offer payment, how	2249, 2250

COUNTY SHERIFF—See Sheriffs

COUNTY TREASURER

Bonds of county clerk filed with.	70
-----------------------------------	----

COURT COMMISSIONERS

Acts of, revision by superior court	86
---	----

INDEX—VOL. I.

[References are to Sections.]

COURT COMMISSIONERS (Cont'd).

Appointment, qualifications, term of office.....	83
Fees of	85
Jurisdiction and powers.....	85
Juvenile delinquents.....	1987-2
Oath	88
Power to subpoena witnesses....	1217
Salary, allowance and payment of	87

COURT REPORTERS

Act applicable to certain counties	42-3
Amanuensis to court.....	42-9
Bond required of.....	42-1
Clerk's files, right to take.....	42-10
Committee to examine.....	42-1
Compensation	42-3, 42-9
additional fees allowed.....	42-4
fees for transcripts.....	42-5
Counties of over twenty-seven thousand to have.....	42-1
Counties of over two hundred thousand exempt from.....	42-13
Duties	42-2
Expenses of office paid by county	42-11
Fees, additional, litigants to pay.	42-4
Judges to appoint.....	42-1
Notes to be filed with clerk.....	42-2
Officer of court.....	42-1
Pro tem, appointments.....	42-8
Qualification	42-1
Records, right to take.....	42-10
Removal for cause.....	42-1
Substitutes, expenses of, litigants to pay.....	42-12
Term of office.....	42-1
Transcripts, additional authorized fees for.....	42-7, 42-5
county to pay in forma pauperis cases	42-5
made by.....	42-5
prima facie correct.....	42-6
Trials to be reported.....	42-2

COURTS—See Judges; Justices of the Peace

Adjournment to holiday, how operates	65
power to adjourn proceedings.	66
Attorneys and counselors—See Attorneys	
Chambers, hearings in.....	1445
Closed on legal holidays, except..	64
Contempt of, acts constituting...	1049
committed in presence of, punishment	1051
without the presence, procedure	1052
power to punish.....	53, 1050
Court commissioner, appointment, etc.	83
acts may be revised by.....	86
powers of commissioners.....	85
Deposits in.....	745-747
Discretion to allow costs.....	493
Funds in, how attached.....	665

COURTS (Cont'd).

Holidays—See infra Legal Holidays	
Issues of law triable by.....	313
of fact, when court tries...314,	315
Judges of—See Judges	
Judicial officers defined.....	54
act as attorney, when.....	55
contempts may punish.....	58
disqualified, when.....	54
judges of superior and supreme courts, powers of.....	59
other judicial officers, powers of	60
justice of peace, powers of....	43
powers of.....	57
Jurisdiction, exercise of powers conferred	69
superior courts.....	15, 17
supreme court.....	1
Legal holidays, what are.....	61-63
judicial business restricted to certain kinds.....	64
sessions, effect of.....	65
Liens of judgments, how secured	445
justice courts	450
United States courts.....	445
Lost or destroyed records, files and proceedings, how substituted	1270
judgments, how replaced.....	1271
action to restore, procedure..	1272
appeal, extension of time for	1274
costs on application to restore	1275
hearings, evidence admissible	1273
pleadings, how substituted....	1270
probate records, how restored.	1276
costs of proceedings.....	1277
Minor court judges to be decent in language	2696-1
Oaths, power to administer.....	1264
Powers of, generally.....	52
of judge as distinguished from court	56
Proceedings reviewable by certiorari	1002
not affected by vacancies or failure of sessions.....	67
Prosecuting attorney appointed, when	114
Recess during deliberations of jury	355
Records and proceedings as evidence	1254
Rooms, supplies, etc., court may provide	68
Sittings appointed for holiday, effect	65
Subject to writ of mandate, when	1014
to writ of prohibition.....	1028
Superior courts, adjournment construed as recess.....	26
appeals from justices' courts	1910-1924
clerk not to practice law.....	139-5
commissioners to convey realty, appointment	605

INDEX—VOL. I.

[References are to Sections.]

COURTS (Cont'd).

court commissioners, appointment	84
courts of record	18
decisions, time for rendition limited	39
where may be rendered	42
distribution of business among judges	29
injunctions, power to grant	718
judges are magistrates	51
powers in counties of district	41, 42
at chambers in attachments pro tempore, appointment	678
oath and compensation	40
visiting other county on order of governor	27
on request of local judge	28
powers	29
traveling expenses, payment	30
judgments, effect where rendered by one of several judges	29
jurors—See Juries	
jurisdiction, appellate	17
loggers' liens, enforcement	1172
original	15
juvenile court—See Delinquent Children	1987-1
designated as, when	1987-2
open, except on nonjudicial days	18
powers, generally	59
naturalization	15, 16
witnesses to depositions before notaries, etc., attendance compelled	1236-1238
probate jurisdiction and powers	15, 1371
records to be kept	1372
process, extent of	32
directed to whom	35
reporters for—See Court Reporters	42-1
rules for government of	36
seal, design of	38
sessions, where held	18
number at same time	29
special, when to be held	18
visiting judge to hold, when	27, 28
visiting judges, powers of	29
writs issuable by	15
Supreme court, adjournments construed as recesses	5
admission of attorneys	139-5
revocation of licenses	139-18
appeals to, when allowed	1716
chief justice, acting, when and how selected	12
clerk, record of attorneys	139-21
court of record	2
departments, apportionment of business	9
assignment of judges	8

COURTS (Cont'd).

decisions, number requisite for concurrence	8
suspension of	10
time of taking effect	10
hearings	8
quorum of department	8
rehearing, effect of order	10
en banc, hearings ordered when decisions, number requisite for concurrence	9
finality of	11
time of taking effect	11
quorum of court	11
reargument, when and before whom	11
judges of—See Judges	
judgments and decrees, effect	14
execution, power of	2
jurisdiction, appellate and original	1
aider by issuance of writs, power of	1
open except on nonjudicial days	4
practice, adoption of rules	13
process, style and requisites	6
form, court may prescribe	13
rehearing, vacates department decision	10
rooms, furnishings, etc., when court may provide	3
rules of practice	13
seal	7
sessions, when and where held	4
trial by, findings and conclusions	367
order of proceedings	368
United States supreme court, appeal to, effect on injunctions	1724
vacancy in office of judge, proceedings not affected	67
want of jurisdiction, ground of demurrer	259
waiver of, not allowed	263

COURTS OF RECORD

Superior court	18
powers of, vested in justice of peace	43
Supreme court	2

CREDIBILITY—See Witnesses

CREDITORS—See Absconding Debtors; Assignment for Benefit of Creditors

Right of administration	1431
-----------------------------------	------

CRIME

Falsely charging, actionable, when	294
--	-----

CRIME AGAINST NATURE—See Criminal Law (sodomy)

CRIMINAL CONVERSATION

Costs limited	477
Justice of peace has no jurisdiction	45

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL INSANE—See Insane Persons; Prisons and Reformatories

CRIMINAL LAW

Abduction for prostitution, etc., penalty	2439
element of kidnaping	2410
Abortion, administering drugs to produce, penalty	2397
advertising or displaying means for producing	2460
attempt by pregnant woman, penalty	2449
concealment of birth of child, penalty	2452
definition and punishment	2448
manufacture or sale of drugs or instruments to procure	2450
producing by use of instruments through external injuries, penalty	2397
witness not to be excused on ground of self-crimination	2396
woman taking drugs for, or submitting to operation, penalty	2451
Accessory after the fact, definition and penalty	2398
before the fact, distinctions abolished	2008, 2261
defined	2007
liability to punishment for acts out of state	2261
punishment	2254
triable, though principal not convicted	2262
trial, when may be had	2009
venue	2262
in felony cases	2262
Accounts, falsifying, penalty	2017
Accused, acquittal, see infra	2661
bail, when allowable	1957, 2310
exoneration, when	2313
conviction of lesser degree, when	2308
only on verdict or confession	2309
when a bar	2316
counsel, right to have	2095, 2305
dismissal for failure to prosecute, see bar, infra	2311
bars prosecution for misdemeanors	2315
hearing, right to	2307
presumption of innocence	2308
separate trial if demanded	2161
speedy trial	2312
witnesses, right to meet	2306
depositions allowed, when	2306
right to subpoena	2307
rights as witness	2148
instructions of court	2148
Acknowledgment, false, is forgery	2584
Acquittal or conviction, a bar	2113
defects in complaint, no bar	2316
different degrees, bar	2316
other county, bar	2272
other state, bar	2271

CRIMINAL LAW (Cont'd).

reconsideration, none for mistake	2170
vacation, prohibited	472
variance, no bar	2166, 2316
Acting without lawful authority, penalty	2673
Actions, unlawfully instituting in name of another	2376
Adultery, punishment	2457
limitation on	2457
Advertisements, affixing to public or private property	2708
affixing devices on private property, penalty	2659
Advertising cures of venereal diseases, prohibited	2462
evidence of	2462-1
counterfeit money	2592
divorce business, penalty	2463
false, prohibited	2622-1
indecent articles	2640
lotteries	2465-2468
means to prevent conception	2460
Affrays, penalty	2556
in presence of magistrate, proceedings	1946
Age of child, opinion evidence and inspection to determine	2257
Aliens carrying firearms without license	2517-1
employment on public work	2334-4
Anarchy, criminal, defined	2562, 2563-7
advocacy by word of mouth, writing or actions, penalty	2563
assemblage of anarchists, penalty	2566
premises used for, penalty	2567
liability of editors and proprietors	2565
witnesses, compulsory testimony	2568
Animals—	
brands on, defacing, penalty	2594
imitation, penalty	2595
carcasses of diseased not to be sold or given away	2541
burial under ground required	2541
diseased, importation, sale, etc. prohibited	2540
false certificate of registration	2593
representation as to breed	2593
horses, untying or removing	2659
malicious injury to	2659
permitting at large on railroad right of way	2659
sheep—See sheep, this title	
vicious, allowing at large, penalty	2538
causing death, criminal responsibility of owner	2399
wild, trapping or destroying in parks or cemeteries	2659
Appeals in criminal cases—See Appeals	
bond not required of defendant	1721

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

by state restricted to certain errors	1716
time of taking	1718
imprisonment pending, deducted when	1745, 1750
justice court—See Justice of Peace	1910
proceedings on reversal	1749
Arbitrator, acceptance of bribe	2322
bribery of	2320
influencing, penalty	2325
intimidating, penalty	2368
promising award, penalty	2326
Armed associations unlawful	2546
Arraignment, time of	2093
appearance by counsel, when	2094
counsel, defendant's right to	2095
court to appoint, when	2095
name of defendant, true, to be ascertained and entered	2096, 2097
Arrest, bail, rights of accused	1957, 2310
bail, amount, indorsement on warrant	2079
breaking open dwelling-house, etc.	2082
escape or rescue, assistance may be commanded	2085
force may be used	2084
officer to show warrant	2083
process, to whom directed	2080
service, by whom	2080
rights of person under	2611
warrant for, when issued	2077
by telegraph authorized	2081
Arrest of judgment, recommittal of defendant	2185
Arson, contiguous fires, when liable for setting	2574
degrees, first, definition and penalty	2572
second, definition and punishment	2573
limitation on prosecution, none where death ensues	2005
ownership of building immaterial	2576
preparation to set on fire is attempt	2577
set on fire defined	2575
Art, works of, injury to	2656
Assault, conviction for, on recovery from maiming	2409
degrees, first, definition and punishment	2413
second, definition and punishment	2414
third, definition and punishment	2415
force, when use does not constitute	2416
indecent, penalty	2442
injured party to be summoned	1930
provoking, penalty	2417
Assault and battery—See Assault	

CRIMINAL LAW (Cont'd).

Assemblage, disturbing peaceful	2547
unlawful, penalty	2550
Assignment houses, violation of injunction abating (See Prostitution)	946-4
Assignment for benefit of creditors, penalty for fraud	2633
Attempt to commit arson, preparation to set fire constitutes	2577
to commit crimes, how punished conviction under indictment for offense	2264
to commit train robbery	2263
to suborn perjury	2651
Attorneys, barratry by	2361
soliciting business around jails, etc., vagrants	2370
Auctions, mock, etc., penalty	2688
Automobiles, removal of, penalty	2630
intoxication of chauffeur	2659
removal of numbers from	2527
taking without owner's permission	2601-3
Badges of secret and other orders, falsely worn	2601-1
Baggage, wilful injury to	2626
Bail, allowable when	2666
amount fixed by court	2310
indorsed on warrant	2077, 2310
capital cases	2079
deposit in lieu of	2091
in justice court	2089
exoneration of	1957½
forfeiture of	2313
record	2090
Bar, acquittal—See Acquittal, supra	2088
conviction (which see), infra dismissal a bar	2113, 2271, 2316
compromise	2315
demurrer	2127
discharge to give evidence	2114
failure to indict	2162
failure to prosecute	2315
misdemeanor	2315
order without prejudice	2315
Barratry, penalty	2165
attorney guilty of, punishment	2370
constable committing, misdemeanor	2370
justice of peace committing, penalty	2371
Baseball playing (which see)	2371
Bastards—See Filiation Proceedings	2321-1
Beggar is vagrant, when	
Begging, employment of minors, unlawful	2688
Bids, suppression of	2446
Bigamy, definition and punishment	2333-1
consort, when punished	2453
proof of marriage, sufficiency	2454
Billiard-halls, admitting minors to	2153
Birds, injury to in parks or cemeteries	2445
	2659

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Blackmail, definition and punishment	2613
Boat defined	2303
Boats and vessels, crimes on, jurisdiction	2293
death through overloading, penalty	2400
through reckless operation manslaughter	2401
destruction for insurance	2634
false lights, penalty for displaying	2654
injuries to tackle and equipment	2659
intoxication of officers, penalty	2527
pilots, unlicensed, penalty	2545
removal of numbers from motors	2601-3
ship's register, penalty for false	2635
steamboats, unsafe pressure of steam	2532
Boilers, unsafe pressure of steam.	2532
Bond defined	2303
Book-making, penalty	2721
prohibited	2473
Books and records, malicious injury	2660
Booms, malicious injury to	2658
Brands, penalty for defacing	2594
imitating, penalty	2595
Breach of the peace, publication or circulation of matter inciting	2564
provocation to commit	2417
Break defined	2303
Bribery, arbitrator, penalty	2320, 2322
baseball players (which see)	2321-1
juror, etc., penalty	2320, 2322
labor representative giving bribe to	2676
representative receiving bribe	2677
public officer, penalty	2320, 2321
referee, penalty	2320, 2322
witnesses, immunity of	2149, 2150
accepting bribe, penalty	2324
bribing, penalty	2323
witnesses, penalty	2323, 2324
Bridges, fast driving on, penalty.	2718
injuring or mooring to	2656
tolls, extortion of illegal	2715
Bucketshops—See gaming, this title	
Buggery—See sodomy, this title	
Building defined	2303
Buildings, damaging or defacing.	2659
doors of public, to swing outward	2525
placing on streets or lands of another	2659
Bunco-steering	2479
Buoy or beacon, injury to	2656
Burglary—	
degrees, first, definition and penalty	2578
second, definition and penalty	2579

CRIMINAL LAW (Cont'd).

evidence, presumption of intent	2580
possession of burglary tools.	2582
offenses in commission of burglary, separately prosecuted..	2581
tools for, manufacture and possession	2582
Burial—See sepulture, this title	
Burning—See arson; fires, this title	
Carnal knowledge of female child, penalty	2436
penetration, sufficiency of	2437
castration of accused, when	2287
Carriers, baggage, injuries to	2666
bills of lading, offenses relating to	2635, 2644, 2646, 2647
employees, intoxication on duty	2527
wilful neglect of duty	2529
engineers, employment of illiterate, penalty	2526
failure to ring bell or sound whistle	2528
injuring or endangering by explosives	2652, 2653
intoxicating liquors, drinking on, unlawful	2693, 2694
profane and indecent language and quarreling, penalty	2561
receipt for goods, refusal to give	2643
refusal to pay fare or leave	2561
riding on car or engine to avoid paying fare	2561
tickets, passenger, larceny of	2607
redemption of unused required	2649
sale, regulating of	2648
train robbery, attempt, penalty	2650
wrecking, punishment	2651
Castration for rape authorized	2287
Cattle—See animals, this title	
Cemeteries, opening graves unlawfully, penalty	2491
roads through without consent, penalty	2493
Certificate, false, by officer, penalty	2380
Checks, issuance without funds or credit	2601-2
Children—See infants, under this title	
Cigarettes, possession or sale, penalty	2536
sale to minors, penalty	2445, 2697, 2700, 2701
other than in original packages	2698
when containing injurious drugs	2697
Civil remedies preserved	2296
Civil rights, penalty for denial	2686
Claims, false audit and payment, penalty	2381
Clairvoyant is vagrant	2688
Classification of crimes	2253
Coercion, punishment	2614
Cohabitation with prostitute, penalty	2440

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Coin silver, fraudulent brand on goods	2681, 2683
Collecting for entertainments without authority	2674
Combination to resist process	2555
Commitment to state training school	2276
to state penitentiary—See sentence, this title	
to state reformatory	2277
to women's home and clinic	1996
Common drunkard, selling liquor to	2689
vagrant	2688
Common gambler is vagrant	2688
Common law supplements code	2299
Competitive bidding, suppression of	2333-3
Compounding, penalty	2367
evidence on prosecution	2367
Compromise, bar when	2127
misdemeanor	2126
prohibited	2128
Compulsory process, accused entitled to	2091
Conception, prevention of, advertising means for, unlawful	2460
Concert saloons, admission of minors unlawful, when	2445
Conspiracy, what constitutes	2382
evidence of overt act unnecessary	2383
forfeiture of corporate franchise, when	2384
resisting process, combination for	2555
Construction of penal code, rule	2298
application to prior offenses	2294
common law to supplement code	2299
continuation of prior acts	2300
existing civil rights	2295
former laws repealed	2301
revival not effected by repeal	2302
terms employed, definition	2303
Contagious disease, penalty for exposing public to	2539
Contempt, criminal, punishment	2372
how punished	2273
Contributing to delinquency of child	1987-17
Conviction, bar, when—See Acquittal, supra	2113, 2166, 2316
defense, when	2271, 2272
lesser crime, when	2166, 2263
lowest degree, when	2308
more than one offense, sentence necessary before punishment	2285
none except by confession or verdict	2118
plea of	2309
form	2108
Convicts, competent as witness	2109
.	1212, 2290
foreign, penalty for importation	2687
protection of law	2288
right to protection, etc	2288

CRIMINAL LAW (Cont'd).

sale of liquor to, penalty	2689
vagrants, when	2688
Copy of indictment, etc., accused entitled to	2091, 2092
Copyright in play or opera, violation	2690
Corporation, actions against, procedure	2011-1
appearance by	2011-2
conspiracy forfeits franchise	2384
doing business without license, penalty	2641
fraud in stock subscriptions	2638
issuance of stock fraudulently	2639
person, includes	2011, 2303
publishing false reports of condition	2642
Corrupt, corruptly, defined	2303
Corrupt solicitation, immunity of witnesses	2149, 2150
Corruptly influencing employee or agent	2678
Costs, audit and credit to county by state auditor	2229
bills, how made and certified	2228
complainant to pay, when	2225
before grand jury, enforcement against	2226
county or city to pay, when complaint unfounded	2225
forfeited recognizance, how taxed	2236
fugitives from justice, liability of complainant	2246
judgment for	2187
jury fee taxed to defendant, when	2227
liability of private prosecutor	2044
moneys collected for costs, etc., belong to county	2230
warrants for, issuance and payment by county	2229
Counsel, right of accused to have	2305
Counterfeiting, advertising counterfeit money	2592
possession of coin, penalty	2591
search-warrants authorized	2238
trademarks, penalty	2596
uncoined gold, as nuggets, bullion, dust	2702
Crime against nature, what constitutes	2456
Criminal syndicalism	2563-1
use of rooms for	2563-2
Crops, malicious injury to	2659
Dagger, dirk, etc., carrying and concealing, penalty	2517
Dams, malicious interference with	2658
Dance-halls, admission of minors unlawful, when	2445
Dangerous exhibitions, penalty	2535
weapons, carrying or concealing, penalty	2517
Daytime defined	2303
Dead bodies—See sepulture, this title	

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Death sentence, how executed.....	2210- 2214
Death penalty abolished.....	2392
Decency, offenses out of state punishable here	2254
Definition of crime	2253
terms in criminal code.....	2303
Defraud, intent as element, showing	2292
Delay ground for discharge..2311,	2312
Dentists, practicing without license	2544
Depositions, deemed complete in perjury, when	2356
permissible in criminal cases, when	2306
use before grand jury.....	1962
Desecration of flag.....	2675
Dikes and locks, injury to.....	2656
Discharge on dismissal—See Bar..	2313
Disease, exposing to contagious, penalty	2539
Dismissal for delays.....2311,	2312
bar, when—See Bar.....2315,	2316
nolle prosequi	2314
Disorderly conduct in presence of legislature, penalty	2337
houses—See prostitution, this title	
Dissection, lawful, when.....	2489
wrongful, penalty	2489
Ditches and flumes, injuries to...	2656
Divorce, advertising to procure, penalty	2463
Docks and quays, injury to.....	2656
Domestic animals—See animals, this title	
Drafts, uttering without funds or credit	2601-2
Drinking liquors in public conveyances	2693
common carrier to prevent....	2694
Drugs, administration by intoxicated physician	2402
narcotic, regulation of sale....	2509
poison, sale without label and record	2508
prescriptions fraudulently made and presented	2510, 2511
wrong or omitted labels, penalty	2507
Drunkard, common, defined.....	2669
Drunkenness, punishment...2668, 2721½,	2258
no defense to crime.....	2258
sale of liquor to drunkard, penalty	2689
trainmen, etc., penalty for intoxication	2527
vagrant, when	2688
Dueling, abetting, penalty.....	2420
challenging to duel, penalty...	2420
death resulting, murder in second degree	2394
fighting a duel, penalty.....	2419
provoking a challenge or acceptance, penalty	2421

CRIMINAL LAW (Cont'd).

venue, when fought outside state	2422
witnesses, participants competent as	2423
Duress as defense.....	2256
of married woman.....	2255
Dwelling-house defined	2303
Electric meters and appliances, tampering with	2657
transmission lines and appurtenances, injuries to.....	2656
Embezzlement ...2569, 2571, 2601,	2604
decedent's estate, penalty.....	1471
indictment, allegations of.....	2074
Emblems, displaying seditious, penalty	2563-7, 2563-11
searches and seizures.....2563-10	
Embracery, penalty	2325
Employees, intoxication of certain classes, penalty.....	2527
railway, neglect of duties, penalty	2529
refusal to labor, endangering life	2533
service of prostitutes is vagrancy	2688
Enforcement of criminal fine....	2200, 2201, 2206
Engineers, illiterate, penalty for employing or acting as.....	2526
failure to ring bell, penalty....	2528
intoxication on duty, penalty..	2527
wilful omission of duty, penalty	2529
Engines, spark-arresters to be supplied	2524
Enter defined	2303
Escape by prisoner, penalty.....	2342
aiding and suffering, penalty...	2343- 2345
concealing prisoner	2346
recapture and imprisonment...	2341
officer may command assistance	2085
women's home and clinic.....	1999
Evidence, abortion, tendency to incriminate no excuse to witness	2451
adultery, proof of marriage....	2153
advertising diseases.....2462-1	
automobile theft	2601-4
bigamy, proof of marriage.....	2153
confession	2151
conspiracy, overt acts unnecessary	2383
destroying, penalty	2362
detention of documents, etc...	2359
false, penalty for offering.....	2358
gaming, testimony of player...	2480
incest, proof of marriage.....	2153
incriminating, not to be used..	2148, 2150, 2291
in abortion and selling drugs	2451
in bribery and corruption...	2330
in criminal anarchy.....	2568
in gambling	2480
injured party to be taken.....	1930

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

intent in maiming.....	2407
not to be pleaded in indictments, etc.	2067
pleadings in civil cases inadmissible	282
presumption of innocence.....	2308
receiving stolen property.....	2154
removal of motor license numbers	2601-4
rules same as in civil cases....	2152
slander of woman, corroboration	2434
state's, discharge of accused to give	2162
stolen automobile.....	2601-4
Exceptions, how taken.....	2186
taking and certifying, etc..	381- 397
Executions, detailed account, unlawful	2461
fine and costs.....	2201
forfeited recognizances	2232
stay, by recognizance.....	2204, 2205
Executor, embezzlement by.....	1471
failure to return inventory....	1469
Exhibitions dangerous to public..	2535
dangerous employment of minors unlawful	2446
immoral, employment of minors in, unlawful	2446
indecent shows unlawful.....	2459
Sunday performances prohibited	2499
Explosives, damages caused by, penalty	2653
death caused by, manslaughter, when	2403
keeping unlawfully	2504
placing so as to endanger life or property	2652
transporting, when misdemeanor	2506
Ex post facto application denied.	2294
Exposure, indecent, penalty.....	2458
Extortion, definition and punishment	2610
by public officer, penalty.....	2612
of tolls for bridges and ferries.	2715
Failure to ring bell or sound whistle at crossings.....	2528
False advertising prohibited.....	2622-1
accommodations from innkeepers obtained by.....	2625
animal or vehicle obtained by.	2628
claim to public officer.....	2627
indictment describing money or notes	2074
instruments affecting title.....	2621
lights and signals to boats and trains	2564
manifest, invoice, etc.....	2635
permit, license or diploma.....	2617
personation of another, penalty	2615
of officer, penalty.....	2616
obtaining property by, larceny	2601
sale of mines by, penalty.....	2711
signature obtained by.....	2619

CRIMINAL LAW (Cont'd).

False representation of physical defects	2688-1
as to credit	2620
as to recommendations.....	2623
False return or failure to execute process	1776
False statements about financial institutions	2432-1
Fast driving over bridge.....	2718
Felony, cumulative sentence, when defined	2285
limitation on prosecution.....	2005
punishment when not fixed....	2265
wrongful death from, damages.	183
Females, abduction for prostitution or sexual intercourse, penalty	2439
compelling marriage or defilement, penalty	2438
employment in saloons, penalty	2689
indecent assault on.....	2442
placing in house of prostitution	2440
seduction, penalty for.....	2441
marriage as defense.....	2441
selling liquors to.....	2689
slander of, penalty.....	2433
corroboration necessary.....	2434
Feticide—See abortion, this title	
Final record, what included.....	2224
Fines—See Fines and Penalties	
Fire apparatus, injury to....	2519, 2656
Firearms, aiming or discharging.	2559
aliens carrying without license.	2517-1
carrying and concealing, penalty	2517
sale to minors, unlawful, when	2445
setting spring guns, penalties..	2518
using contrivance to suppress noise	2517
by minors, when unlawful...	2560
Fires, apparatus for extinguishment, interference with.....	2519
doors of public buildings to swing outward.....	2525
engines operated without spark-arresters	2524
negligently setting or guarding	2523
obstructing firemen, etc.	2520
setting without permit of firewarden	2522
smoking where prohibition posted	2521
willfully setting or refusing to extinguish	2523
Fish, oysters, injuries to beds....	2659
Flag, uniform regulations, violation of—See Flags.....	2657-5
Food, poisoning, penalty.....	2516
Force, when use does not constitute assault.....	2416
as means of escape does not raise larceny to robbery.....	2418
Forcible entry and detainer, penalty for unlawful force.....	2558
Foreign conviction or acquittal a defense	2271

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

jurisdiction not to exclude prosecution, when.....	2270
Forfeitures for crime abolished..	2288
of office, when.....	2289
Forged or false instruments or records, penalty for offering detention by court.....	2358 2359
Forgery, definition of terms.....	2590
corporate officer, falsely signing as.....	2586
degrees, first, definition and punishment	2583
second, definition and punishment	2585
false certificate of acknowledgment constitutes.....	2584
falsely signing as corporate officer	2586
forge, forged, forgery, forging, defined	2590
form and similitude defined...	2590
genuine signature by one personating another of same name	2588
instruments, forged, offered in evidence	2358, 2359
misconduct in signing petitions circulated under law or ordinance	2589
pleading in indictment, etc....	2071
uttering forged instruments...	2587
writing, written instrument defined	2590
Form and similitude in forgery. in trademarks.....	2590 2600
Former acquittal—See acquittal, this title	
Forms of pleading, ancient, abolished	2022
indictment	2506
Fortune-teller is vagrant.....	2688
Fraud, assays, or samples of ore, falsifying	2712-2714
assignment for benefit of creditors, criminal responsibility	2633
badges of orders, falsely wearing	2626
bailee of horse or vehicle, acts constituting fraud.....	2628
banks, receiving deposits when insolvent	2640
boats or vessels destroyed for insurance, penalty.....	2634
claims, presentation of false, to public officers.....	2627
concealing foreign matter in merchandise	2618
corporations doing business without license	2641
publishing false reports of condition	2642
employment of agents, false representations	2624
obtained by false recommendations	2623

CRIMINAL LAW (Cont'd).

false practices—See false, this title	
fraudulent conveyance, when misdemeanor	2631
receiving knowingly, penalty	2632
improper use of badges and other insignia of orders or societies	2626
innkeepers, defrauding, what constitutes	2625
insolvent bank receiving deposits, penalty.....	2640
insured property, fraudulent destruction	2636
intent as element, sufficiency	2292, 2303
license, diploma or permit, use of false	2617
market price, false statements as to	2622
misrepresentation as to secret society	2696-1
mock auctions, penalty.....	2630
removal or destruction of mortgaged property, etc.....	2629
signature obtained by false pretenses	2619
stock, false subscriptions to... issuance fraudulently, penalty	2638 2639
reissuance of canceled.....	2639
vessels destroyed for insurance weights and measures, use of false	2634 2637
Fraudulent conveyances, criminal responsibility	2631
knowledge of grantee, penalty.	2632
Fruit trees, malicious injury to..	2659
Fugitives from justice, requisition of.....	2241-2246
return by foreign government, expenses	2252
rewards for apprehension..	2247-2251
Gaming, admittance of minors to gambling places, unlawful..	2445
betting games, etc., penalty....	2470
bookmaking prohibited.....	2473
bucketshops, definition.....	2475
conducting, penalty.....	2476
names of purchaser or seller to be furnished customer..	2477
bunco-steering, definition and penalty	2479
common gambler, punishment..	2469
is vagrant.....	2688
evidence, testimony of player..	2480
gambling devices, keeping, penalty	2472
search-warrant for.....	2238
seizure and disposition of...	2478
pool-selling prohibited.....	2473
racetrack gambling, penalty...	2721
swindling by means of cards, etc.	2471
use of building for, penalty...	2474
warrant for search and seizure of devices	2238

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Garden, injury to.....	2659
Gas-meters and appliances, tampering with.....	2657
pipes, malicious injury to.....	2656
Gender, masculine includes feminine and neuter.....	2303
Gold articles, fraud in marking.	2684
Governor may commute sentences	2233
Grafting, gross misdemeanor.2333-	2335
by employee.....	2679
witnesses, immunity.....2149,	2150
Grain, malicious injury to.....	2659
Grand jury, disclosure of transactions and depositions, penalty	2378, 2379
finding and presenting indictments	2042- 2049
juror acting after challenge allowed	2373
powers, duties, challenges.2025-	2041
Grand larceny defined, penalty...	2605
Grass, malicious injury to.....	2659
Gross misdemeanor, punishment when not fixed.....	2267
Guideboards, injury to.....	2656
Habitual criminals, punishment..	2286
Halls, public, doors to swing outward	2525
Heir, pretended, production of...	2374
Highways, disturbance on, penalty for creating.....	2534
deposit on, of unwholesome substances	2537
fast driving over bridge, penalty	2718
glass or tacks placed on, penalty	2720
malicious injury to.....	2656
mileposts and signboards, injury to	2716, 2717
unlawful use of traction engine on	2719
Hobo is vagrant.....	2688
Homicide, bail not allowed, when classified	2310 2390
death penalty.....	2392
excusable, when.....	2404
facts necessary to be established	2391
justifiable, when.....	2406
by public officer, when.....	2405
manslaughter, definition and punishment	2395
abortion constitutes, when	2396- 2398
death by vicious animal, manslaughter by owner, when	2399
caused by explosion of explosives unlawfully kept	2403
caused by overloading boat or vessel constitutes....	2400
caused by physician administering drugs while intoxicated, penalty.....	2402
murder in first degree, definition and punishment.....	2392

CRIMINAL LAW (Cont'd).

in second degree, definition and punishment.....	2393
killing in duel, murder in second degree.....	2394
no limitation on prosecution....	2005
plea of guilty, jury trial necessary	2116
proof required.....	2391
venue of prosecutions.....	2016
Horseracing, bookmaking, and poolselling prohibited.....	2473
on Sunday prohibited.....	2499
prohibited, when.....	2721
Horses and vehicles, removal of.	2659
Ill fame—See prostitution, this title	
Impeachment, power preserved...	2297
Incest, definition and punishment	2455
proof of marriage.....	2153
Indecent articles, advertising, etc.	2460
assault, penalty	2442
exposure, penalty.....	2458
language or conduct.....2721½	
Indeterminate sentence, when may be imposed.....2194, 2195,	2281
determination by board of control, etc.	2282
Indicted, indictment defined.....	2303
form and sufficiency.....2054-	2076
offenses prosecuted by.....	2023
setting aside, grounds.....2099-	2101
variance immaterial, when.2076,	2156
acquittal no bar.....	2316
Infants, age, how may be determined	2257
beggars, employment as, penalty	2446
billiard and poolrooms, admission unlawful, when.....	2445
cigarettes and material for, sale to, unlawful.....	2445
compulsory testimony on cigarette sales.....	2701
sale to.....2697,	2701
smoking cigarettes prohibited	2700
delinquent1987-1, 1987-18	
disorderly house, admittance to	2445
sending to, as messenger, penalty	2446
employment at labor below certain ages, when unlawful..	2447
to sell or distribute obscene literature	2459
exhibitions, employment for immoral or dangerous, unlawful	2446
firearms, sale, when unlawful..	2445
use of, when misdemeanor...	2560
gaming, unlawful to admit to gambling house.....	2445
health and moral law violations	2445
intoxicating liquors, admittance to place of sale, unlawful.	2445
sale to, penalty.....	2445
juvenile offenders, treatment1980-	1986

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

obscene literature, exhibiting to	2459
opium houses, admission to, un- lawful	2445
pool and billiard rooms, admit- tance to, when unlawful....	2445
responsibility for crime.....	2257
substitution of child by custo- dian, penalty.....	2375
tobacco and cigars, sale to, pen- alty	2445
use of, by minor.....	2445
Information, informed against, de- fined	2303
form and sufficiency.....	2054-2076
offenses may be prosecuted by	2023, 2024
Injuries to property generally...	2667
Injuring United States lighthouse	2655
Innkeepers, frauds on.....	2625
Innocence presumed.....	2308
Insane prisoners, acquittal, special verdict to be returned.....	2175
committed when.....	2176
discharged when.....	2176
plea of insanity.....	2174
removal from one institution..	2284
Inspection, penalty for selling pe- troleum without.....	2505
Insurance, in reference to—See Insurance; Penalties	
Insured property, fraudulent de- struction	2634, 2636
Intent to defraud, sufficiency of showing	2292, 2303
Intoxicating liquors, compounding low wines and selling as whisky, etc.	2696
drinking in public conveyances prohibited	2693, 2694
fraudulent prescription by physician	2510
place of sale, minors not to be admitted	2445
females not to be admitted..	2689
sale to minors.....	2445
to drunkards and convicts unlawful	2689
when not aged.....	2695
saloons, obstructing view of in- terior prohibited.....	2495
Intoxication of employees of rail- roads, steamboats, etc.....	2527
not a defense.....	2258
Invoice, making false, penalty...	2635
Irrigation ditches and flumes, in- terference with	2657
Jetty, injury to	2656
Judge, defined	2303
Judgment, acquittal, vacation pro- hibited	472
arrest of, when	2183, 2184
attendance of defendant, arrest to compel	2197
bench-warrant for defendant	2199
confinement pending execution.	2214
costs, when	2187

CRIMINAL LAW (Cont'd).

cumulative sentence, when	2285
custody pending issuance of death warrant	2219
death sentence, failure to exe- cute, proceedings	2222
commutation by governor...	2223
infliction of penalty, how ...	2212
warrant, to whom directed..	2211
defendant informed of verdict prior to	2198
execution of condemned prison- er, how	2214
fine and costs, commitment un- til paid	2200
disposition of	2189
execution against property..	2201
stay by recognizance..	2204, 2205
imprisonment to enforce pay- ment	2206
lien of	2188
penalty for not paying over..	2189
worked out, rate allowed..	2206, 2209
indeterminate sentence to peni- tentiary	2281
applicable to sentence to state training school	2194
termination of sentence to state training school	2195
to reformatory	2195
mittimus to sheriff	2207
pardons may be granted by gov- ernor	2223
pleaded in indictment, how....	2068
presence of defendant, when necessary	2196
pronounced by court, when....	2190
recognizance to keep peace, when	2202
breach, proceedings on	2203
record of death warrants and returns	2215
reprieves may be granted by governor	2223
return of death warrant	2216
filing by county clerk	2218
saving clause on repeal of prior act	2220, 2221
sentence to penitentiary, form.	2208
suspended, when	2280
sheriff ordered to deliver prison- er to penitentiary for exe- cution	2213
return of proceedings	2217
suspension, when permissible..	2280
sustaining demurrer to indict- ment, when final	2106
no bar, when	2114
transcript of conviction	2207
verdict, judgment on	2187
Jurisdiction, justices of peace...	46
persons	2010
state courts not ousted by for- eign, when	2270
superior court	15
Jurors, acceptance of bribe.....	2322
alternates authorized.....	2137-1
challenges	2137-1

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

bribery of	2320
defined	2303
grand juror acting after chal- lenge allowed, penalty ...	2373
disclosure of transactions ..	2378
influencing, penalty	2325
intimidating, penalty	2368
promising verdict, penalty	2326
soliciting duty as	2328
Jury, challenges	2138-2142
civil practice applicable	2137
drawing, misconduct in	2327
fee, taxed to defendant on con- viction	2227
misconduct of officer in charge	2329
number required	2137
oath	2143
separation allowed, when	2159
view of place of crime.....	2160
waiver, when allowed	2144
Justice of peace, criminal cases before	1919-1935
Juvenile offenders, commitment to state training school.....	1980, 1986
Kidnaping, definition and pun- ishment	2410
consent not a defense, when..	2412
selling services of kidnaped per- son	2411
venue of prosecution.....	2412
Knowingly defined	2303
Labor of minors below certain ages, when unlawful	2447
endangering life by refusal...	2533
Larceny, acts constituting	2601
automobile	2601-1
evidence of	2601-4
bank officers accepting deposits in insolvent bank	2810
claim of title as defense.....	2608
commissions, right to, no de- fense	2602
contractor failing to apply moneys received to payment of labor and material	2604
defenses of claim of title.....	2608
part ownership no defense..	2602
right to commissions no de- fense	2602
defined	2601
embezzlement by agent or fidu- ciary	2601
by executors, etc.	1471
grand larceny, penalty	2605
issuance of checks or drafts without money or credit....	2601-2
money, allegations of indict- ment	2074
mortgaged personalty, sale or mortgage of	2603
obtaining property by mistake and secreting	2601
property by false personation or false pretense	2601
ownership in part no defense..	2602

CRIMINAL LAW (Cont'd).

passenger tickets of railways and steamboats, failing to cancel, etc.	2607
petit larceny, what is.....	2605
receiving stolen property.....	2601
evidence of.....	2154
sale of mortgaged personalty..	2603
stolen property, disposition of.	2609
value, what and how ascer- tained	2606
Legal holidays, magistrates may act on.....	64
notices, destruction of.....	2656
Legislature, disturbing, gross mis- demeanor	2337
disorderly conduct in presence of	2337
intimidation of member, gross misdemeanor	2337
witness, refusal to testify be- fore legislature or its com- mittees	2338
Lesser crime, conviction when...	2263
Letters, concealment of, penalty.	2660
opening unlawfully.....	2663
sending complete, when.....	2274
Lewd or dissolute person is vag- rant	2688
Lewdness, definition and penalty.	2458
Libel, definition and penalty....	2424
excuse as defense.....	2425
falsely charging with certain crimes	294
financial institutions, false state- ment about.....	2432-1
furnishing libelous information, penalty	2431
justification	2425
liability and defense of edi- tors, etc.	2427
malice presumed, when.....	2425
pleading in indictment.....	2070
privileged communications	2430
publication defined.....	2426
reports of public proceedings privileged, when.....	2428
slandering female, penalty.....	2433
corroboration of woman slan- dered	2434
justification	2433
suppression of publication, of- fering for gain.....	2432
threatening to publish, penalty	2432
venue	2429
Lighthouses, injury to.....	2655
Limitations, in misdemeanors....	2005
cases punishable by imprison- ment in penitentiary.....	2005
computation where indictment set aside	2005
none in murder or arson result- ing in death.....	2005
Literature, obscene, unlawful to sell or show.....	2459
Livestock law—See animals, this title	

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

defacing brands on, penalty....	2594
imitation of brands.....	2595
Lotteries, advertising, drawing, penalty	2465
definition and punishment.....	2464
disposal of real or personal property by means of, penalty	2466
advertising, unlawful.....	2466
leasing building for, penalty.	2466
maintaining office for registry, etc.	2466
foreign, criminal code applicable to.....	2468
insuring lottery tickets, penalty	2467
advertising offers to insure..	2467
selling tickets, penalty.....	2465
Machinery, injury to.....	2659
Maiming, definition and punishment	2407
liability for assault, when.....	2409
manner or instrument immaterial	2408
recovery as defense.....	2409
Malfeasance by officers.....2569—	2571
disqualifies public officer.....	2289
Malice, maliciously, defined.....	2303
Malicious mischief, attempt to commit train robbery.....	2651
baggage, injury to.....	2666
damaging property and endangering life by exploding substances	2653
discharge firearms at trains, etc.	2650
endangering life and property by placing explosives...2652,	2653
false lights and signals to boats, railway engines, etc...	2654
falsifying accounts.....	2661
fires, unlawful setting — See fires, this title	
gas, electric, steam or water appliances, interference with	2657
injuries to improvements, etc., on public lands.....2704—	2707
to property.....2659,	2667
to railroads.....	2650
to United States lighthouse.	2655
interfering with dam, reservoir, boom or pier.....	2658
letters and telegrams, opening and divulging.....2662,	2663
lighthouses, injuries to.....	2655
mileposts, injury to, penalty2716,	2717
property subject to, enumeration	2659
generally, where not specified	2667
public utilities, injuries to....	2656
gas, electric and water appliances, interference with	2657
reservoirs, dams, booms, etc., interference with.....	2658
railroad property, injury to....	2650
signboards on highways, injury to2716,	2717

CRIMINAL LAW (Cont'd).

tampering with books, papers, and records.....	2660
telegrams, opening and divulging2662,	2663
throwing missiles at trains....	2650
trespass on railway tracks or land of another.....2664,	2665
train robbery, attempt to commit	2651
Malicious prosecution, penalty...	2369
Manifest, making false, penalty.	2635
Manslaughter—See homicide, this title	
Marked, stamped or branded defined	2685
Marriage, compelling under threat of defilement.....	2438
proof of, in certain cases....	2153
solemnizing unlawfully	2671
Masked persons, assemblage prohibited	2553
allowing use of premises gross misdemeanor	2554
Mayhem—See maiming, this title	
Medicine, practicing without license	2544
regulation of sale and prescription2507—	2509
Meetings, disturbing, penalty....	2547
Messages, telegraph, tampering with2656,	2660
divulging, penalty.....	2662
opening unlawfully.....	2663
Mileposts, injury to....2656, 2716,	2717
Minerals, robbery of deposits or appliances	2703
assay, etc., falsifying.....2712—	2714
Mines, fraudulent sale of.....	2711
ores, altering assays and samples2711—	2714
Minors—See infants, this title	
Miscarriage, producing, penalty2397,	2398
Misdemeanor, compounding, when and how.....2126—	2128
compromise, when authorized..	1964
definition	2253
jurisdiction of justice of peace over	46
limitation on prosecution.....	2005
neglect of duty by officer constitutes	2268
prohibited acts constitute, when punishment; when not fixed by statute	2266
will, penalty for withholding..	1379
Misfeasance and nonfeasance, when not punishable.....	2275
Misprision of treason.....	2319
Misrepresentation as to secret society2696—1	
Missile, deadly, throwing in public place	2259
Monuments of boundaries, malicious injury.....	2656
Mooring to bridges and buoys...	2656

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Morphine user is vagrant.....	2688
Mortgaged realty, removal of im- provements, etc., penalty....	2709
Motor vehicles, removing num- bers	2601-3
taking without owner's permis- sion	2601-1
evidence of.....	2601-4
Murder—See homicide, this title	
Names, indictment by wrong name	2058
true, to be declared and en- tered	2096, 2097
Narcotic drugs, regulation of sale	2509
Navigable waters, obstructing...	2656
lighthouses, injury to.....	2655
Neglect defined.....	2303
Negligence defined.....	2303
Negligent, negligently, defined...	2303
Negotiable instruments, false pro- test	2635
New trial, grounds for.....	2181
application supported by affi- davit, when.....	2182
Next of kin, false personation...	2374
Night-time, defined	2303
Night wanderer, is vagrant.....	2688
Nolle prosequi, how obtained....	2314
Nonfeasance constitutes misde- meanor	2268
not punishable, when.....	2275
Notices, legal, removal or destruc- tion	2656
Nuisance, public, definition of	2500, 2501
abatement authorized.....	2503
deposit of unwholesome sub- stance on highway.....	2537
explosives, keeping unlawfully.	2504
transporting, when misde- meanor	2506
lottery is	2464
maintaining or permitting, pen- alty	2502
oil and petroleum products, sale of uninspected, penalty...	2505
brands to be effaced on empty barrels	2505
Number, singular includes plural	2303
plural includes singular.....	2303
Oath, defined.....	2354
jury, oath of.....	2143
Obscenity, indictment, sufficiency of allegations.....	2075
indecent exposure of person, penalty	2458
articles for prevention of con- ception, etc.	2460
obscene literature and pictures	2459
employing minor to distrib- ute, etc.	2459
exhibiting to minor, penalty.	2459
venereal diseases, advertising cures	2462, 2710
Obstructing firemen, penalty.....	2520
extinguishment of fires.....	2519

CRIMINAL LAW (Cont'd).

justice by resisting process....	2555
public officer.....	2672
Offenses prior to Penal Code gov- erned by laws existing at time of commission.....	2294
Office, appointment to, penalty for offering reward.....	2332
Officer, acceptance of bribe.....	2321
appointment as, offering re- ward, penalty.....	2332
bribery of.....	2320
concealing or destroying ac- counts	2569
conviction forfeits office.....	2289
corruption in office, penalty	2334, 2335
defined	2303
escape of prisoner, connivance in	2345
extortion by, penalty.....	2612
failure to pay over moneys re- ceived	2569
false audit and payment of claims	2381
certificates, penalty.....	2380
official reports, penalty.....	2350
falsely certifying acknowledg- ment, forgery.....	2584
falsification of accounts.....	2569
homicide by, when justifiable..	2405
impeachment and removal, pow- er preserved.....	2297
influencing, when constitutes grafting	2333
interference with, penalty.....	2331
intimidating, penalty.....	2368
intrusion, willful, into office, penalty	2336
legislative member, intima- tion of.....	2337
malfeasance not specified, pen- alty	2570
misappropriation of public funds	2569, 2571
misconduct relating to juror.	2327, 2329
mutilating or falsifying records	2348
nonfeasance, willful, misde- meanor	2268
obstructing, gross misdemeanor	2331, 2672
official functions, grant to an- other, penalty.....	2335
oppression in office, penalty....	2611
personating, punishment...2336,	2616
records, falsifying, mutilating, etc.	2348
refusal to receive person into custody	2364
to arrest or aid in arrest....	2365
resisting, penalty.....	2366
gross misdemeanor.....	2331
surrender of office, penalty for refusal	2336
taking personal property from custody, penalty.....	2340

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

treasurers, misappropriation of public funds.....	2571
Oils, pipes, malicious injury to..	2656
uninspected; possession and sale	2505
Opium-houses, admittance of minors, unlawful.....	2445
joints, maintaining or visiting.	2670
user is vagrant.....	2688
Oppression under color of office, penalty	2611
Orchard, injury to.....	2659
Owner defined.....	2303
Oyster-beds, injury to.....	2659
Oysters—See fish, this title	
Palmist is vagrant.....	2688
Papers, tampering with.....	2660
Pardon, governor vested with power	2223
Parole of prisoners, when.....	2282
of women.....	1997
Parties to prosecutions.....	2007, 2008
Pauper criminals, attorneys' fees, how paid.....	2305
Pawnbrokers, defined.....	2487
interest, rate allowed.....	2486
penalties	2485
record of transactions.....	2481
inspection by prosecuting attorney and police.....	2482
reports to chief of police.....	2483
retention of property pledged..	2484
sale of pledged property, limitations	2486
Peace, preservation of.....	1936-1948
Penal Code—See construction of, this title	
Pedigree, false representations as to	2593
Perjury, affidavit or deposition, when complete.....	2356
affirmation, false, same as false oath	1269
degrees, first, penalty.....	2351
second, penalty.....	2353
deposition, when deemed complete	2356
materiality of statement, ignorance of no defense.....	2352
oath and swear defined.....	2354
pleading in indictment.....	2072
subornation of.....	2360
attempt, penalty.....	2361
witnesses, conviction of perjury renders incompetent.....	1212
incompetency, no defense...	2355
irregularity in swearing no defense	2355
offering false evidence..	2291, 2358
statements by, not known to be true, effect.....	2357
summary commitment may be ordered	2359
"Person" defined.....	2011, 2303
includes corporations and governments	2303

CRIMINAL LAW (Cont'd).

Personal property defined.....	2303
Personating public officer.....	2336
Personation, false, to claim interest in estate, penalty.....	2374
Persons punishable.....	2254
accessories	2008, 2261
principals	2260
soliciting law business around jails, etc., are vagrants.....	2688
without visible means of support are vagrants.....	2688
Petit larceny—See larceny, this title	
Physical defects, falsely representing	2688-1
Physicians, fraudulent prescriptions by.....	2510
narcotic drugs, prescribing of..	2509
practicing without license, penalty	2544
prescribing when intoxicated causing death, penalty.....	2402
Pictures and photographs, obscene, penalty for selling or exhibiting	2459
Pilots, acting without license....	2545
intoxication on duty, penalty..	2527
Pleading and practice, acquittal or conviction, when a bar	2271, 2272
answer to indictment, etc.	2098
time for.....	2098
compromise of misdemeanors, when and how.....	2126-2128
demurrer or answer on denial of motion.....	2102
grounds of.....	2105
judgment on, when final....	2106
failure to plead after overruling demurrer.....	2107
judgment on demurrer, no bar.	2114
order setting aside indictment, etc., no bar to prosecution...	2104
plea of guilty, made by defendant in open court.....	2110
court may hear testimony...	2116
of insanity.....	2174
of murder, jury impaneled..	2116
of not guilty, effect of.....	2112
court to enter, when.....	2115
withdrawal	2111
pleas of defendant.....	2108
form of entry.....	2109
punishment imposed only on conviction	2118
refusal to plead, plea of not guilty entered.....	2115
resubmission, effect of.....	2103
setting aside indictment, grounds for motion...2099,	2100
information, grounds for motion	2101
stolen property, recompense to prosecutor and officer.....	2130
restoration to owner.....	2129
sale not to affect title.....	2129

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Poisoning food, drinks, and medicines, etc.	2516
Poisons, sale without label and record	2508
narcotic drugs, sale and prescriptions	2509, 2510
Pollution, water supply.....	2542, 2543
Pool and billiard rooms, admission of minors unlawful, when	2445
Poolselling, penalty	2721
prohibited	2473
Practice in justice's courts...1925-	1935
Preliminary examinations, bail, manner of justification.....	1956
certification to superior court..	1963
complaint and warrant.....	1949
compromise of offenses, when..	1964
costs against complainant, when abstract to be transmitted..	1954
depositions, when taken and used	1966
discharge of person accused, when	1962
on bail, when.....	1954
hearing and adjournments.....	1957
magistrates may associate others	1952
pursuit and apprehension of party charged.....	1958
recognizance for appearance	1950
forfeited, action on.....1951,	1952
to appear before justice of peace, when.....	1965
testimony, how taken.....	1955
witnesses recognized, how and when	1953
commitment for failure to give	1959-1961
Prescriptions, fraudulent, penalty for giving.....	1962
presentation of, penalty.....	2510
Presumption of innocence.....	2511
Principal, who is.....	2308
Prior offenses, existing laws to govern	2260
Prison, prisoner, defined.....	2294
Prisoners, communication with, penalty	2303
escape, penalty.....	2377
aiding, penalty.....	2342
concealment of prisoner.....	2343
connivance of officer, penalty	2346
custodian suffering, penalty..	2345
insane, confinement—See insane, this title	2344
parole, when.....	2282
recapture and imprisonment...	2341
rescue of, penalty.....	2339
transfer from one institution to another	2278
working prisoners in county jail	2279
Prizefighting, penalty for aiding or engaging in.....	2556

CRIMINAL LAW (Cont'd).

parties may be arrested and recognized not to commit offense	2557
Procedure as to commitment and recognizances same under information as indictment....	2052
Proceedings to preserve peace, appeal in.....1922-	1924
affrays in presence of magistrate	1946
commitment to jail, when.....	1941
complaint of threatened offense	1937
costs, complainant to pay, when against defendant, how enforced	1942
discharge of defendant, when. on giving bond.....	1943
examination of accused.....	1942
recognizance, when danger apprehended	1944
deposited, where	1938
prosecution for forfeiture, remission	1940
surrender of principal by surety, effect.....	1945
warrant, when to issue.....	1947
who may issue process.....	1948
Process, combination to resist... service on Sunday prohibited, except	1939
Procreation, prevention, when authorized	1936
Prohibitions of statute, violations constitute misdemeanor, when	2555
Property defined.....	2497
malicious injury to, penalties	2287
Prosecutions, how commenced...	2269
Prostitutes are vagrants.....	2303
accounts or interviews of, denied publication.....	2650-2667
cohabitation with, penalty....	2023
earnings of, acceptance.....	2688
Prostitution, admitting minor to place of.....2445-1	
abduction of female for purposes of.....	2439
places used for—See Prostitution	946-8
placing female in house of, penalty	2440
Protest, false, penalty for making	2440
Publications prohibited, when...	2635
Public buildings, malicious injury to	2461
conveyances, liquors not to be drunk in.....2693,	2656
offenses in.....	2694
indecent, a misdemeanor.....2721½	2561
lands, malicious injury on.2704-	2707
officer—See officer, this title	
utilities, malicious injury to... interference with certain	2656
works, suppression of bids.....2657,	2658
	2333-1

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Punishments, attempts	2264
contempts	2273
death penalty, for jury.....	2392
felony, when not fixed by statute	2265
gross misdemeanor, not fixed by statute	2267
jury to fix, murder.....	2392
misdemeanor, not fixed by statute	2266
nonfeasance in office.....	2268
omissions, when not punishable.	2275
prevention of procreation.....	2287
prohibited acts	2269
punishable elsewhere	2270
Racetrack gambling, penalty.....	2721
use of premises for, penalty...	2721
Rape, definition and punishment.	2435
carnal knowledge of female child, penalty	2436
penetration, sufficiency of.....	2437
punishment by castration.....	2287
threat of, to compel marriage, penalty	2438
Real property defined.....	2303
removal of fixtures from mortgaged	2709
Receiving stolen goods, penalty...	2601
bringing into state property stolen in another state.....	2601
evidence, sufficiency of.....	2154
receiver is vagrant.....	2688
Recognizances, action on, by prosecuting attorney.....	2234
not defeated by defects or omissions	2235
costs, fees and charges, how taxed	2236
deposit of money in lieu.....	2089
in justice court.....	1957½
execution, stay of.....	2232
forfeited, judgment	2231
forfeiture of bond or money, when	2090
judgment vacated on production of defendant	2233
officers may take.....	2087
taken by peace officers, certifying and recording	2088
in open court.....	2086
Records, alteration or concealment, penalty	2347
false instrument, offering for record	2349
final in criminal actions includes what	2224
mutilation or falsifying by officer	2348
Referee, acceptance of bribe, penalty	2322
bribery of	2320
influencing, penalty	2325
intimidating, penalty	2368
promising decision	2326
Registration of animals, fraud in	2593
of trademarks, fraudulent.....	2599

CRIMINAL LAW (Cont'd).

Religious assemblies, disturbing..	2499
acts prevention of, penalty....	2498
Remedies, civil, preserved....	2295, 2296
Removal from office, power preserved	2297
license numbers on motors....	2601-3
evidence of	2601-4
timber without paying tax....	2629-1
Repeal of prior criminal statutes declared	2301
does not revive former law....	2302
enumeration of express repeals.	2304
saving clause	2006
Reprieves, governor may grant..	2223
Rescue of prisoner, penalty.....	2339
retaking, officer may command assistance	2085
Reservoirs, malicious injury to...	2658
Resisting public officer, penalty..	2331
process, combination for, penalty	2555
Rewards—See Rewards	
Rights and remedies, civil, not affected	2295
of accused on capital charge...	2091
on charge of felony.....	2092
Riot defined	2548
punishment	2549
Robbery, definition and punishment	2418
sluice-boxes, vein or lodes, etc., on claims	2703
train, attempt at.....	2651
Sabbath-breaking, definition and penalty	2494
observance of other day excuses	2496
process, service prohibited, except	2497
racine horses prohibited.....	2499
religious acts and assemblies, disturbing	2498, 2499
theaters and shows, exhibitions prohibited	2499
Sabotage	2563-3
advocacy of.....	2563-5
penalty	2563-4
repeals not intended.....	2563-6
Saloons, common drunkard, selling liquor to	2689
convicts, admission or sale of liquors to	2689
female persons, employment, etc., prohibited	2689
obstructing view of interior...	2495
Search, without warrant, penalty.	2240-2
Search-warrants, issuance of.....	2237
contents and directions.....	2239
counterfeit coin and apparatus.	2238
destruction of	2240
dwelling-house, necessity for...	2240-1
execution of warrant.....	2240
gaming apparatus	2238
destruction of	2240
sedition emblems.....	2563-10
stolen property	2237
restoration to owner.....	2240

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Second-hand dealer, defined.....	2488
penalties	2485
record of transactions.....	2481
inspection by prosecuting at- torney and police.....	2482
reports to chief of police.....	2483
retention of property.....	2484
Seduction, penalty	2441
marriage as defense.....	2441
suspension by marriage.....	2441
revival through abandonment	2441
Sentence, cumulative, when.....	2285
indeterminate, when..2194, 2195,	2281
limit may be fixed by board of control	2282
suspended, when	2280
Separate trials for joint offenders	2161
Sepulture, burial or cremation, right of	2490
interference with funeral or corpse	2492
opening grave, etc., to steal body, coffin, vestments, etc., penalty	2491
road through cemetery, pen- alty	2493
receiving body wrongfully dis- interred	2491
Sewers and drains, injuries to....	2656
Sexual crimes, detailed account unlawful	2461
organs, disease, etc., advertis- ing cures, prohibited.....	2462
Signature defined	2303
obtaining by false pretense, penalty	2619
Signboards, injury to, penalty....	2716, 2717
Signs and notices posted, injury to on real property, penalty.....	2656, 2659
Silverware, fraud in sale of..2680-	2683
Slander of female, penalty.....	2433
evidence, corroboration neces- sary	2434
justification	2433
Smoking, where prohibition posted, penalty	2521
Sodomy, definition and punish- ment	2456
Soil and stone, digging or taking	2659
Soliciting subscriptions for bene- fits, etc., unlawfully.....	2674
Spring-guns, penalty for setting.	2518
State reformatory, first offenders committed to	2277
training school, juvenile of- fenders committed to.....	1980
Steamboats, unsafe pressure of steam	2532
engines and boilers, death through reckless operation manslaughter	2401
Sterling silver, fraudulent sales..	2680, 2682
Stolen property; disposition of...	2609
restoration to owner.....	2129

CRIMINAL LAW (Cont'd).

search-warrant for	2237
Strike by employee, endangering life, penalty	2533
Subornation of perjury, penalty..	2360
attempt, penalty	2361
Substitution of child, penalty....	2375
Suicide defined	2385
aiding or abetting crime.....	2387
attempting, penalty	2386
abetting attempt, penalty....	2388
incapacity of person aided no defense	2389
Sunday—See sabbath-breaking, this title	
Supersedeas, appeal, effect.....	1745
Suppression of competitive bids..	2333-1
Suspension of sentence, when....	2280
Swear defined	2354
Swindling, punishment	2471
Syndicalism	2563-3
Tackle and equipment of boats, injury to	2659
Telegrams, tampering with or divulging	2660, 2662
opening unlawfully	2663
Telegraph and telephone lines, in- juries to	2656
messages, intercepting or inter- fering with	2656
Tense, present includes future....	2303
Terms in criminal code defined...	2303
Theaters and shows—See exhibi- tions, this title	
Throwing glass or tacks on high- ways	2720
Ticket-scalping, penalty	2648
redemption of unused passage tickets	2649
Timber, malicious injury to.....	2659
removal from land delinquent for taxes	2629-2
Tobacco, sale or gift to minors, unlawful	2445
Tolls, illegal demand, penalty....	2715
Traction engine on highway, failure to stop.....	2719
Trademarks, affixed, when deemed to be	2598
counterfeiting, penalty	2596
displaying goods with false, penalty	2597
form and similitude defined....	2600
fraudulent registration, penalty	2599
Trade unions, bribery of repre- sentatives	2676, 2677
Train robbery, attempt.....	2651
Tramp is vagrant.....	2688
Transfer of prisoners.....	2278
of insane convicts.....	2284
Treason, definition and penalty..	2317
evidence necessary for convic- tion	2317
levying war defined.....	2318
misprision of, penalty.....	2319
Treasurers, public, misappropria- tion of funds.....	2571

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

Trees, injury to.....	2659
Trespass, advertisements affixed to property, penalty	2708
on double track railroad.....	2664-4
on land of another.....	2665
warning against, sufficiency.	2665
on railway track	2664
Trials and verdicts—	
accused, presence necessary, when	2145
absence from trial, when allowed	2146
right to speedy trial.....	2312
committed, when	2176
conduct of trial.....	2158
continuance, when granted....	2135
state not entitled to, when..	2136
conviction or acquittal a bar, when	2166
"criminally insane," defined...	2173
discharge of defendant to give evidence, effect	2162
when discharged	2176
docket entries	2134
evidence, confession as.....	2151
marriage, proof in adultery, bigamy and incest.....	2153
receiving stolen property, necessary proof	2154
rules in civil actions, applicable	2152
state's, when defendant may give	2162
variance as to ownership....	2156
insanity, how and when pleaded	2174
jury trials, number of jurors..	2137
alternates	2137-1
challenges, peremptory, number allowed...2137-1, 2138,	2139
to panel, when allowed.....	2140
for cause, when allowed...	2141
for conscientious scruples as to capital punishment	2142
civil rules applicable.....	2137
custody of.....	2159
discharged without prejudice, when	2165
oath to	2143
separate for joint offenses...	2161
view of place of crime.....	2160
waiver, when allowed.....	2144
mental irresponsibility defined.	2173
mistake in charge, defendant held, when	2163
practice as, in civil actions....	2158
punishment, court and not jury to fix	2172
questions of law, court to decide	2158
rights of accused—See accused, this title	
separate for joint offenses....	2161
special verdict on acquittal of insane person	2175
state's evidence, accused may give when	2162

CRIMINAL LAW (Cont'd).

subpoena for state's witnesses..	2136
time of trial.....	2312
venue corrected, how.....	2164
verdict against a portion of those charged, when.....	2169
degree of offense, any inferior to charge may be found...	2167
form of	2172
offenses included in that charged	2168
reconsideration, when	2170
rendition of	2171
special, in issue of insanity..	2175
in case of first degree murder	2392
specify degree or attempt, when	2263
witnesses, competency	2147
attendance, compulsory	2148
defendant as	2148
immunity in bribery, etc., cases	2149, 2150
instructions where defendant does not offer himself.....	2148
Undertakings included in term bond	2303
Uniform flag law—See Flags	
Unlawful assemblages, penalty...	2550
destruction of property by....	2552
masked and disguised persons..	2553
meetings to advocate anarchy..	2566, 2567
owner of premises permitting unlawful assemblage of masked persons	2554
refusal to disperse after warning	2551
Unwholesome substances, deposit on highway	2537
Vagrants, proceedings against....	1968, 1969
who are	2688
Value, ascertainment in larceny..	2606
Variance, dismissal for, effect...	2316
ownership of property, effect..	2076
Vehicles, intoxication of those in charge	2527
Venereal diseases, advertising cures prohibited	2462
prima facie evidence of.....	2462-1
Venue, accessories tried where...	2017, 2262
change of, proceedings to obtain	2018, 2019
consent of parties.....	2020
recognizances on granting...	2021
criminal sending of letter.....	2274
duel outside of state.....	2422
homicide	2016
kidnaping	2412
libel	2428, 2429
offense committed in one county in two or more counties....	2012, 2013
in one, property taken to another	2015

INDEX—VOL. I.

[References are to Sections.]

CRIMINAL LAW (Cont'd).

mortal wound in one, death in another county.....	2016
near county boundary.....	2014
wrong county, corrected how...	2164
Verdict—See trial, this title	
Verification of informations.....	2051
Vineyard, malicious injury to....	2659
War, levying, what constitutes...	2318
Warehousemen, mixing goods, penalty	2645
receipts in duplicate, when misdemeanor	2646
cancellation on delivery of property	2647
fictitious, penalty	2644
refusal to issue, penalty.....	2643
Water-meters and appliances, tampering with	2657
pipes, malicious injury to.....	2656
supply, pollution of.....	2542
impure, penalty for furnishing	2543
Weapons, deadly and dangerous..	2517
aiming or discharging at persons	2559
airgun, discharging a misdemeanor, when	2559
carrying dangerous	2517
concealing dangerous	2517
spring-guns, setting, penalties.	2518
throwing deadly missile in public place	2559
use of firearms by minors, penalty	2560
Weights and measures, use of false	2637
Wife, abandonment and failure to support, penalty	2444
duress of husband no defense..	2255
Will, penalty for withholding....	1379
Witness, abortion, testimony compulsory	2451
acceptance of bribe.....	2324
attendance, prevention of, penalty	2363
right of accused to compel..	2148, 2307
bribery of	2323
commitment for perjury.....	2359
competency	2147
of person guilty of bribery...	2330
compulsory testimony in gaming cases	2480
convicts, competency and credibility	2290
criminal anarchy, self-crimination not to excuse.....	2568
defendant as	2148
dueling, self-incrimination no excuse to participants.....	2423
fees, allowance of.....	498
immunity	2149, 2150
incompetency, no defense in perjury	2355
incriminating testimony not used against, when.....	2291
perjury in giving, punishable	2291

CRIMINAL LAW (Cont'd).

indorsement on indictment and information	2043, 2050
instructions to jury respecting. to testify before legislative committee or legislature...	2148
right of accused to face.....	2338
testimony not known to be true, effect	2306
Woman—See female, this title	2357
home and clinic—See Women's Home and Clinic	
Words and phrases defined.....	2303
Working prisoners in county jail.	2279
Writing defined	2303

CRIMINAL ANARCHY—See Criminal Law

CROPS

Lien (see Liens).....	1188-1190
Malicious injury to.....	2659
Right to, on redemption.....	600, 602

CRUELTY

Ground for divorce.....	982
-------------------------	-----

CURTESY

Tenancy by, abolished.....	1343
----------------------------	------

DAMAGES

Allowance on appeal, when.....	1738
Assessment, jury may on default.	411
accounting, reference when necessary	411
defendant may demand.....	251
Attachment in actions for, when.	648
Death by wrongful act.....	183
amount recoverable.....	183-1
beneficiaries of action.....	183-1
construction of act.....	183-2, 183-3
Dissolution of injunction, when awarded	736, 737
Ejectment, what recoverable....	796, 799, 800
Eloignement or injury to logs, etc.	1181
Embezzlement of effects of deceased person.....	1471
Eminent domain	895, 913, 926
Excessive or inadequate, ground for new trial.....	399
Executor's or custodian's neglect to produce will.....	1379
Exemplary, for malicious attachment	654
Failure of officer to execute process in justice's court, etc....	1776
Forcible entry and detainer, what recoverable	827
Habitual drunkard, injuries by, who liable.....	1713
Injuries to persons or property by boats, lien on.....	1182
Nuisance, action for.....	943
Personalty, detention of.....	434
Property taken or damaged—See Eminent Domain	

INDEX—VOL. I.

[References are to Sections.]

DAMAGES (Cont'd).	
Seduction	186
Trespass, willful injury, trees, etc., treble allowed	939
Usurpation of office, claim for... action for, when may be had..	1037 1042
Venue, actions for injury or de- tention of personalty	204
Waste, treble allowed.....	938
Witnesses, injuries arising from nonattendance	1220, 1902

DAMS

Malicious injury to.....	2658
--------------------------	------

DANCE-HALLS—See Criminal Law

DAY LABOR—See Labor

DEAD BODIES

Burial or cremation required....	2490
Interference with, penalty.....	2492
Opening grave to steal body, etc.	2491
Receiving body wrongfully disin- terred	2491
Violation of sepulture, penalty...	2913

DEATH

Action for wrongful.....	183
beneficiaries of action.....	183-1
damages recoverable.....	183-1
construction, gender.....	183-2
Appeal not affected.....	1743
Attorney's, effect of.....	135
Effect on limitation of actions...	170
Ground for vacation of judgment, when	464
objection by petition and affi- davit ..	467
Wrongful, action for.....	183

DEATH PENALTY

For first degree murder.....	2392
------------------------------	------

DEBTOR AND CREDITOR — See Absconding Debtors; Assign- ment for Benefit of Creditors

Creditor right to administration..	1431
------------------------------------	------

DECEDENTS' ESTATES—See Des- cent and Distribution; Execu- tors and Administrators; Pro- bate Code; Wills

DECENCY

Offenses against, out of state, when punishable here.....	2254
--	------

DECISIONS

Of superior court, limit of time in giving	39
filing, when rendered out of county where heard	42

DECLARATION OF INDEPEND- ENCE

Textpage	1
--------------------	---

DECORATION DAY

Legal holiday	61
---------------------	----

DECREEES—See Judgment

DEEDS—See also Real Property

Certified copies as evidence.1260,	1261
Execution by commissioner to con- vey real estate.....606-	611
specific performance of contract of decedent.....1561,	1562
Forgery of, penalty.....	2816
Form and record in assignment for benefit of creditors.....	1088
Information to annul.....1047,	1048
Larceny of, penalty.....	2800
Sheriff's, on execution or foreclos- ure	603, 604

DEFAULT—See Judgment

DEFENDANTS—See Parties to Ac- tions

DEFENSE

Facts constituting to be set up by answer	264, 271
--	----------

DEFICIENCY—See Mortgages

DELAY

Ground for discharge of accused.....2311,	2312
---	------

DELINQUENT CHILD

Definition of.....	1987-1
--------------------	--------

DELINQUENT CHILDREN AND JUVENILE COURTS

Act, all minors under eighteen subject to.....1987-1	
liberal construction required	1987-14
Actions, how commenced.....	1987-5
Age limit of commitment.....	1987-10
Associations, children may be awarded to	1987-9
Board of visitation, appointment	1987-18
duties, to visit institutions for children	1987-18
expenses of	1987-18
Bond of custodian.....	1987-17
Child, awarded to individual or as- sociation	1987-9
parent compelled to support...	1987-8
Children to be kept separate from adult convicts	1987-11
Commitments, limitation of.....	1987-10
made to citizen or institution.	1987-8
revocation of.....	1987-8
Contempts, failure to produce child	1987-6
Convictions not to be entered against child.....	1987-10
County to pay expenses, when....	1987-8
Criminal charge, child may be tried on	1987-12
Custodian to give bond, when..	1987-17

INDEX—VOL. I.

[References are to Sections.]

DELINQUENT CHILDREN AND JUVENILE COURTS (Cont'd).

Custody of child may be revoked	1987-8
temporary	1987-2
Delinquency, contributing to, penalty	1987-17
"Delinquent child" defined	1987-1
Delinquent children wards of the state	1987-1
Detention rooms to be provided	1987-13
Establishment of	1987-2
Families, children awarded to	1987-9
Fees not required in proceedings before	1987-16
Further proceedings may be had at any time	1987-10
Hearings, notice of, how given	1987-6
private	1987-10
Jail sentences not to be given	1987-11
Judgments of conviction not to be entered	1987-10
Jurisdiction of court continues after award or commitment	1987-9
original, in superior court	1987-2
Justice court cases transferred to juvenile court	1987-12
"Juvenile court sessions"	1987-2
"Juvenile record" to be kept	1987-2
Minors, control of	1987-1
Orders may be changed at any time	1987-15
Orphans and neglected children— See Orphans	
Parents, compelled to support child	1987-8
preference in control of children	1987-14
Penalties, contributing to delinquency of child	1987-17
suspended, bond required	1987-17
Petitions to court to take charge of child	1987-5
Probation officers, appointment of	1987-3
expenses of	1987-4
investigation of family history of child	1987-3
powers of	1987-3
report to be private	1987-10
Process, how served	1987-7
Records may be destroyed	1987-10
Special sessions	1987-2
State Training School, discharge therefrom	1986a
Summons, publication	1987-7
Superior courts to be	1987-2
Truants, juvenile courts to handle	1987-1

DEMURRER—See Pleading

DENTISTS

Practicing without license, penalty	2544
---	------

DEPOSITIONS

Amendments, how made	1244
Attendance of witnesses compulsory, when	1235, 1240

DEPOSITIONS (Cont'd).

power of superior court to enforce	1236-1238
Before whom taken in state	1233
out of the state	1239
Cases in which may be taken	1231
Commission to take, how issued	1240
interrogatories, service and settlement	1240
Committing magistrates may take	1962
Complete, when deemed, in perjury	2356
Court commissioners may take	85
Criminal actions, when permissible	2306
Incorporation in record, how	390
Judges and judicial officers may take	59, 60
Jury not to take out	351
Justices' courts, taking and use on trial	1907-1909
Narrative form permissible	1244
Notice of taking	1233
time of may be shortened by court	1234
to nonresident by publication	1241
Objections to evidence, how noted	1244
Perpetuation of testimony— application for order	1249
hearing of	1250
notice of	1250
venue of	1249
commission to take testimony	1251
manner of taking, on interrogatories	1252
objections, when may be made	1253
order for examination, when	1251
return and filing	1253
use on trial	1253
Probate of wills, when	1381
Return, how made	1243
Subpoena to witness	1235
Taking and certifying	1242
Time of taking	1232
Trial de novo on appeal, use of	1248
Use allowed on hearing for specific performance of decedent's contract	1564
before grand jury	1962
in another action, when	1246, 1247
on trial	1244, 1245
Witnesses, attendance before notaries, etc., superior court may enforce	1236-1238

DEPOSITS IN COURT

Moneys deposited, loan of	747
Order for making, when	745
how enforced	746

DEPUTIES

Clerks of supreme and superior courts may appoint	78
Prosecuting attorney may appoint	115
duties and powers of	78

DESCENT AND DISTRIBUTION—

See Probate Law; Wills	
Advancements, how considered	1348

INDEX—VOL. I.

[References are to Sections.]

DESCENT AND DISTRIBUTION

(Cont'd).

amount of, as effecting share..	1349
death of decedent to whom made	1353
effect on distributive shares..	1349, 1350
where widow and issue survive	1365
realty advancements, effect on share	1350
refund of, not required...	1349, 1350
value, how determined.....	1352
what deemed to be.....	1351
Allowance to widow.....	1364
effect of advancements on.....	1365
Brothers and sisters, when to share estate	1341, 1364
Children's share on decease of parent	1341, 1342, 1364
Community property	1342
Debts against estates barred, when	1368
liability of existing estates....	1371
Descent, rule as to adopted child	1699
Distribution of separate personal property	1364
Escheated estates—See Escheats	1356-1363
Estate set apart to family as exempt	1473
Final report, hearing on.....	1533
Foreign wills	1392
"Heirs" construed.....	1369
step children as heirs.....	1356-1
act retroactive	1356-2
Homestead	561
Illegitimate child, rights of.....	1345
property of, how descends....	1346
Inheritance by right of representation	1355
Issue of decedent defined.....	1354
Joint tenants deemed tenants in common	1344
Kindred, computation of degrees	1347
Next of kin, when entitled to share estate	1341
computation of degrees of kindred	1347
Parents, when property of children descends to..	1341, 1346, 1364
Posthumous children, inheritance by	1355
Real estate defined.....	1354
rights of heirs and devisees in rule of descent	1341, 1343
Report, final hearing on.....	1533
Step children as heirs.....	1356-1
act retroactive	1356-2
Survivorship between joint tenants abolished	1344
Title to realty vests in heirs and devisees, when	1366
community realty, how vests on dissolution	1370
confirmation of title, although no administration	1367

DESCENT AND DISTRIBUTION

(Cont'd).

Widow's share in husband's separate estate	1341
in community property.....	1342
in separate personalty.....	1364, 1365
Widower's share in wife's separate real estate.....	1341
in community property.....	1342
in separate personal property..	1364

DESERTION—See Divorce

DEVISE—See Wills

DISABILITIES—See Husband and Wife; Infants; Insane Persons

Action not to abate, when.....	193
Availability under statute of limitations	174
Cumulative disabilities, rule as to	175
Ground for demurrer, when.....	259
Limitation after removal, actions of adverse possession	790
Persons under, time for contesting settlement of estate.....	1566
Suspension of statute of limitations for	158, 169

DISBARMENT—See Attorneys

DISCHARGE

Of accused on dismissal of prosecution	2313
--	------

DISCOVERY

Adverse party may be examined	1225
interrogatories	1226
service and answers.....	1227
notwithstanding filing of interrogatories	1228
rebuttal	1229
refusal to testify, penalty.....	1230
Inspection of books and papers, demand	1262
Physical examination in personal injury cases	1230-1
Supplementary proceedings for—See Execution	

DISCRETION OF COURT

Appointment of receivers.....	741
Bail, amount of.....	2310
Change of venue in criminal actions	2019, 2020
Commitment to state training school and state reformatory	2276, 2277
Indeterminate sentence, when imposed	2281
Suspension of sentence, when...	2280

DISEASES—See Health (animal)

Advertising treatment of certain	2462
----------------------------------	------

DISMISSAL AND NONSUIT

Actions	320, 321
indefinite pleadings.....	286

INDEX—VOL. I.

[References are to Sections.]

DISMISSAL AND NONSUIT (Cont'd).

Appeal from orders discontinuing action	1716
time of taking.....	1718
Delay in bringing accused to trial	2312
Failure to prosecute criminal charge	2311
Judgment of, when granted.....	408
Nonsuit, granted when.....	408
judgment of, effect.....	410
Supplemental proceedings, discontinuance	627

DISORDERLY CONDUCT

As contempt of court.....	1049
In presence of legislature, penalty	2337
Indecent language or behavior..	2721½

DISORDERLY HOUSES—See Criminal Law

DIVORCE

Absolute, when	988-1
Act not retroactive.....	995-1
Advertising to procure, penalty..	2463
Alimony, provision for temporary	988
Annulment of marriage, when...	983
Appeal, interlocutory order.....	988
trial de novo.....	996
Attachment, to enforce order.....	995-2
Both parties deemed applying, when	987
Children—See Modification, infra	
pending action.....	988
provision for minor.....	989
Cross-complaint by defendant....	986
Decree, duty of court in rendering effects of dissolution of marriage	990
filing records	995-4
final, when	988-1
interlocutory	988
alimony provisions for.....	988
Defense by prosecuting attorney, when	995
Grounds for.....	982
Interlocutory orders.....	988
Jurisdiction of superior court....	15
Jury trials dispensed with.....	997
Modification as to children, application	995-3
certified copy of.....	995-5
hearing	995-4
jurisdiction	995-3
venue	995-2
Name of wife changed.....	994
Nonsupport, when a bar.....	982-1
Parties applying.....	987
Practice governing civil actions applies	997
Proof required before decree.....	985
Property of parties, disposition of	989
Prosecuting attorney, to be served duty	995
Records, filed.....	995-4
Residents only may maintain action	984

DIVORCE (Cont'd).

Summons by publication, when...	228
Trial	996

DOCKETS

Justice of peace, duty to keep and entries	1770
--	------

DOCKS

Malicious injury to.....	2656
--------------------------	------

DOMESTIC RELATIONS—See Husband and Wife

DOWER

Tenancy by, abolished.....	1343
----------------------------	------

DRAINS AND SEWERS

Malicious injury to.....	2656
--------------------------	------

DRUNKARDS—See Criminal Law

Drunkenness, ground for divorce, when	982
no defense to crime.....	2258
persons may be adjudged as... certificate of convictions by justice of peace.....	1708
complaint, who may make... allegations requisite.....	1709
fees and costs.....	1711
injury committed while intoxicated, who liable.....	1713
list to be posted in drinking houses	1714
order adjudging one an habitual drunkard.....	1710
vacation of proceedings and showing	1715
selling liquor to, penalty....	1712
summons and hearing.....	1710
Trainmen, boatmen, etc., penalty for intoxication.....	2527
Witness, intoxicated persons incompetent	1213

DUELING—See Criminal Law

DURESS

Defense in criminal cases, when. wife cannot claim, because of husband's presence.....	2256
	2255

DWELLING HOUSE

Definition	2303
Search without warrant, penalty.	2240-1

EDUCATION

doors of school houses to swing outward	2525
escheats inure to permanent school fund	1362
funds, fines and forfeitures paid to, when.....	966
School districts—	
actions by and against.....	950- 954
on official bonds.....	958- 962
appeals by, bond not required..	1721
appropriation of lands by...	906- 920

INDEX—VOL. I.

[References are to Sections.]

EDUCATION (Cont'd).

- garnishment of..... 680-1
- law graduates admitted to practice 139-9

EJECTMENT—See also Quieting Title

- Action against tenant, effect on landlord 794
- heirs, devisees and assigns, same rights as their predecessors.. 787
- quieting title 785
- unlawful detainer, pleadings... 835
- proof required of plaintiff... 836
- Adverse claimants under donation law, priorities 808
- Alienation pending action, effect. 803
- Appearance and answer by landlord 792
- Damages recoverable 796
- Evidence admissible..... 794
- Expiration of plaintiff's right to possession 800
- Improvement, recovery for by occupying claimant 797
- Judgment on counterclaim..... 799
- effect 806
- vacated, when 806
- effect on possession..... 807
- Legal owner, who deemed to be.. 808
- 788-790, 808
- Liberal construction of statute... 791
- Limitation on action for..... 786
- Mortgagee cannot maintain..... 804
- New trial, when default obtained on service by publication.... 806
- no effect on possession..... 807
- Pleadings, what to contain....793, 794
- Possessory action for land, who may bring785, 809
- Substitution of landlord for tenant 792
- judgment, effect of..... 794
- Superior title prevails..... 793
- Survey and admeasurement, order for801, 802
- Tenants in common, proof necessary to recover against cotenants 805
- Unoccupied and vacant lands.... 789
- Value of improvements and taxes paid as counterclaim..... 797
- Verdict, what jury shall find..795, 798

ELECTIONS

- Legal holiday..... 61

ELECTRICITY

- Injuries to transmission lines.... 2656
- Interference with appliance, penalty 2657

ELECTRIC LIGHT AND POWER COMPANIES

- Right of eminent domain extended to 934
- entry upon lands for survey... 935
- procedure for appropriation... 936

EMBEZZLEMENT — See Criminal Law

- Estates of decedents, civil liability 1471
- citation to recover property.... 1472

EMBLEMS

- Anarchistic and seditious, prohibited2563-7
- Of secret societies, falsely wearing 2626

EMBRACERY

- Improperly influencing juror, arbitrator or referee..... 2325

EMINENT DOMAIN

- Authority to exercise right
 - aerial transportation landings. 905-1
 - corporations, when and how... 921
 - counties, county purpose..... 901, 903 905
 - military purposes 900-1
 - publication of notice in, when authorized 239
 - railways, appropriation of right of way through canyons, passes, etc. 933
 - school districts 906

Procedure—

- appeal, time for taking..... 931
- construction work not stayed.
 - when 932
 - effect of.....931, 932
 - waiver of..... 931
- attorney-general, duties..... 900-1
- corporations, adjournments.... 924
- claimants may procure money, how 930
- conflicting claims, how determined 930
- damages, assessed how..... 926
- appeal, effect on payment.. 929
- paid, how..... 929
- judgment on appropriation.. 927
- against state lands, how made effective..... 928
- damages 926
- necessity for appropriation, determination 925
- notice, contents and service.. 922
- service, where state is defendant 923
- petition, requisites of..... 921
- trial, how conducted..... 926
- counties, authorization to condemn lands 901
- county purpose, what is..... 905
- indebtedness contracted, how treated 904
- levy of tax to pay cost..... 902
- procedure 903
- right extended to..... 903
- electric power companies, right extended to 934
- procedure for appropriation.. 936

INDEX—VOL. I.

[References are to Sections.]

EMINENT DOMAIN (Cont'd).

right of entry on lands for survey	935
prosecuting attorney, duties....	900-1
publication of notice in, when authorized	239
railways, appropriation of right of way through canyons, passes, etc.	933
school districts, adjournments..	909
appeal, time for taking.....	918
effect of	919
waiver of	918
authorized to condemn lands. compensation to be for full value	906
costs, liability for.....	913
fees to county clerk only on appeals	917
judgment for damages and appropriation	920
jury, impaneling and qualifications	916
view of premises by.....	911
waiver	912
notice, contents and service..	915
parties, how designated.....	908
petition	920
public necessity, determination of	907
trial, how conducted.....	910
verdict, number of jurors required	912
state, adjournments	914
appeal, time for taking.....	893
effect of	899
waiver of	899
award and costs, payment...	900
claimants, payment of.....	897
conflicting claims, how determined	897
damages, how assessed.....	895
appeal, effect upon payment	896
how paid	896
judgment of appropriation... for damages	896
jury, how called.....	895
notice, contents and service..	894
petition, requisites of.....	892
public necessity, determination	891
trial, how conducted.....	894
	895

EMPLOYEES—See Labor

Liens of—See Liens	
Railway, neglect of duties.....	2529
Refusal to labor, endangering life	2533
Wages of—See Labor	

ENABLING ACT

Textpage	30
--------------------	----

ENGINEERS

Acting as. when unable to read, penalty	2526
Employment of illiterate, penalty.	2526

ENGINEERS (Cont'd).

Failure to ring bell or sound whistle at crossings.....	2528
Intoxicated on duty, penalty.....	2527
Locomotive, exempt from jury duty	103
Willful omission of duty, penalty.	2529

ENGINES

Spark-arresters to be supplied....	2524
Traction, on highway, failure to stop for team.....	2719

EQUITY

Forms of action abolished.....	153
of pleading abolished.....	255
Jurisdiction of superior court....	15
Reference of cases of equitable cognizance	370
Triable by court without jury....	318

ERROR—See Appeal and Error

Grounds for new trial.....	399
Harmless disregarded	307
reviewable on appeal.....	387
by court committing.....	387

ESCAPE—See Criminal Law

Limitation of action against sheriff	161
Officer may command assistance to retake	2085

ESCHEATS

Act retroactive.....	1356-2
Attorney-general, duties.....	1363
Estates of decedents escheat, when	1356, 1356-3
administration of	1357
sale of personal property....	1358
settlement and accounting...	1360
supervision of tax commission	1359
distributed and unclaimed....	1605
payment into treasury.....	1360
school fund, receivers.....	1356-3
Permanent school fund, inures to.	1362
Prosecuting attorneys, duties....	1363
Real property, sale and management	1362
Recovery by action.....	1045
Retroactive act.....	1356-2
Tax commission, powers and duties	1359
record of escheated property and proceedings on.....	1361

ESTATES—See Executors and Administrators; Probate Code

Absentees—See Absentees	
For life, created by will, reversion	1410
Infants—See Probate Code	
Insane wards—See Guardian and ward; Probate Code	
Partition, contingent and vested, protection of.....	871

INDEX—VOL. I.

[References are to Sections.]

ESTATES OF DECEDENTS—See
Descent and Distribution; Ex-
ecutors and Administrators;
Probate Code; Wills

ESTRAYS—See Animals

EVICTIION

Of execution purchaser..... 592

EVIDENCE—See Criminal Law;
Depositions; Witnesses

Abortion, self-incrimination no
excuse 2451
Admissions to avoid continuance. 322
Adultery, proof of marriage..... 2153
Advertising, treatment of sexual
diseases 2462-1
Arbitration, rules of..... 427
Arrest in civil actions, proof re-
quired 750
Bigamy, proof marriage..... 2153
Certified copy, letters of adminis-
tration 1384
Challenge to, judgment on..... 340
Conditions precedent, perform-
ance 288
Confession in criminal cases..... 2151
Conspiracy, overt acts unneces-
sary 2383
Criminal cases, same rules as in
civil 2152
Depositions (which see).....1231- 1248
specific performance of deced-
ent's contract..... 1564
Destruction of, penalty..... 2362
Detention of documents, etc. 2359
Documentary—
books and papers, copy of by
party 1262
inspection of 1262
order for inspection, penalty
for disobedience 1262
court records, authenticated
how 1254
deeds, bonds and mortgages,
certified copies as..... 1260
foreign judgments, effect as....
. 1255, 1256
foreign laws, printed copies as.. 1259
ordinances of cities, copies as..1260½
public records of executive of-
ficers 1257
recorded instruments, certified
copies as 1260
seal, affixing by impression.... 1258
statutes of other states, printed
copies as 1259
tax deeds on sales to county... 1261
writing, when read with proof
of genuineness 1263
Failure of proof..... 301
False, penalty for offering..... 2358
Gaming, testimony of player..... 2480
Incest, proof of marriage..... 2153
Incorporation in record of written 390
Insufficiency as ground for new
trial 399

EVIDENCE (Cont'd).

Intent in maiming..... 2407
Judgment, when jurisdiction
shown 287
Judicial notice of private statutes
matters of, not to be stated in
indictments 2067
ordinances of municipalities... 291
Libel and slander, applicability of
defamatory matter 292
mitigating circumstances, ad-
missibility 293
Newly discovered evidence,
ground for new trial..... 399
affidavits showing 403
Perpetuation of testimony...1249- 1253
Pleadings not deemed proof on
trial 283
not to be used in criminal cases 282
of innocence..... 2308
Receiving stolen property..... 2154
Referees, admission or rejection
before 375
report to contain rejected..... 375
Slander of female, corroboration
necessary 2434
State's, discharge of accused to
give 2162
Testimony of witness on former
trial, admissibility 1247
Wills, establishment of..... 1376
certified copies, admissibility.. 1384
record of as..... 1384
contest of, burden of proof.... 1387
Written instruments and accounts
inadmissible, unless verified. 284

EXAMINATION

Parties—See Parties
Preliminary—See Criminal Law..
. 1949- 1966

EXAMINERS—State Board Law—
See Attorneys

EXCEPTIONS—See also Exceptions,
Bill of

Actions and proceedings affected
by statute 397
Arbitration 424, 425
Award of arbitrators..... 424
Charge to jury, manner of taking
. 339, 384
Construction of act..... 397
Criminal prosecutions, how taken 2186
Decisions and rulings subject to.. 382
Definition of 381
Entry of in minutes..... 385
Form of taking and noting..... 386
Review on appeal..... 387
Taken when..... 382
Taking on trial..... 339
Trial by court, manner of taking.
by referees, rejection of evi-
dence 375
findings and conclusion..... 383

INDEX—VOL. I.

[References are to Sections.]

EXCEPTIONS, BILL OF—See Ex- ceptions

Amendments to	389
Bill, what constitutes.....	388
Brief, limitation on filing ex- tended, when	394
Certificate, form and execution..	391
Certification upon change or death of judge	392
Certiorari, may be filed in.....	1007
Consolidated cases, how certified.	396
Depositions, etc., how incorpo- rated	390
Enlargement of time for filing...	393
Filing, time of.....	393
Irregularities, effect of.....	393
Mandamus to compel certification	391
Record, what deemed part of....	395
Return of copy to appellant.....	394
Statement of facts, settling and certifying	388, 389

EXECUTION

Adverse claims to property levied upon—	
affidavit and bond of claimant.	573
costs, how taxed.....	577
judgment	577
parties, how designated.....	576
return of officer.....	575
sureties, justification of.....	574
trial	575
Arrest on	516
Assignee entitled to.....	519
Contribution among joint debtors	593
subrogation to rights of judg- ment creditor	593
Countermanded, when	1727
County to which issued.....	514, 516
Criminal cases, for fine and costs.	2201
stay of, by recognizance...2204,	2205
Decedent's estate, not allowed against	1489
Deed, when execution purchaser to have	597
Deficiency on mortgage fore- closure	1123
notice of sale.....	1124
Docket, public record.....	444
entries in, specified.....	448
Enforcement of judgment by....	512
Eviction of purchaser, recovery..	592
Executor, etc., entitled to.....	519
Exemptions from—See Exemp- tions	528-572
homesteads—See Homesteads..	528-562, 563-572
Forcible entry and detainer.....	827
Franchises subject to.....	520
Garnishee in justice's court sub- ject to	1836, 1837
Garnishment proceedings.694, 695,	698
Homestead subject to, when.....	533
Imprisonment on	517
Issuance authorized	510
against the person, to what county	516

EXECUTION (Cont'd).

limitation on	510
Judgment confessed without ac- tion	419
satisfaction of, entry on docket	454, 455
Justices' courts—See Justice of the Peace.....	1867-1889
by whom served.....	1762
Kinds of	511
Levy, entry of.....	448
franchises	521
generally	578
homestead, proceedings to sub- ject—See Homesteads....	537-551
joint realty	579
joint personalty	580
sale under	580
notice of sale, how given.....	582
newspapers, in what pub- lished	582
principal's before surety's prop- erty	977
realty, entry in book of levies.	499
retention of property by debtor	581
writ authorizing	513
Mandamus, judgment for dam- ages and costs.....	1024
Moneys collected on, disposition of	515
Personal property, mortgagor's in- terest subject to sale.....	1115
Property subject to.....	518, 520
Redemption—See Sales, infra	
Sales, bill of sale of personalty...	586
certificate of	584
conducted how	583
possession during redemption period	602
postponement, when	585
real property, allotment by acre- age	588, 589
absolute when leasehold less than two years.....	584
confirmation of sale.....	591
form and manner of.....	587
proceedings, disposition of...	591
resale, when had.....	591
return by sheriff.....	590
striking off to highest bidder	590
subject to redemption.....	584
redemption, by whom.....	594
certificate of, issuance and record	597
limitation on	595
payments required.....	595
procedure for.....	599
rents and profits, when credit successive, provisions for.596,	598
payments on.....	598
rents and profits during redemp- tion period	600
farms, homesteads and mort- gaged premises	602
restraining waste pending re- demption	601
sheriff's deed, execution of....	603

INDEX—VOL. I.

[References are to Sections.]

EXECUTION (Cont'd).

entry on book of levies and indorsement	604
Satisfaction of claim admitted just	744
Sheriff's duty on receiving.....	515
Stay, time allowed.....	522
after issuance of writ, balance of stay available	526
bond required.....	523
filed with clerk.....	527
judgment against sureties...	524
sureties, qualification and justification	525
in cases of forfeited recognizance	2232
Supplementary proceedings, applicable to transcripts from justice of peace.....	635
application of money or property	622
balance, how disposed of.....	623
attendance of debtor.....	631
clerk's record of orders.....	646
continuance before other judge	634
costs to judgment creditor....	628
judgment debtor.....	629
court commissioner to hear and determine	85
courts where may be instituted determination by court commissioner	636
discovery of property, order for adjournment of proceedings..	85
answer, how made.....	615
corporation, answer of.....	617
examined before whom.....	617
order to deliver money or property to sheriff or receiver	616
parties as witnesses.....	620
payment to sheriff by third person	617
discharge of indebtedness..	619
referee, evidence certified by fees	616
oath	639
service of order.....	618
sheriff's duty as to money or property received.....	625
dismissal or discontinuance....	622
disobedience of order constitutes contempt.....	627
exemptions	630
joint debtors, proceedings	637
judgment debtor, order for examination	633
arrest of debtor, when.....	613
vacated, how.....	613
bond for attendance.....	614
warrant, service of.....	613
jury dispensed with.....	626
limitation governing proceedings	638
orders, how served.....	613
receiver, appointment.....	625
extending receivership, when	640
notice to other creditors.....	642
number limited.....	641
order, where filed.....	642
	643

EXECUTION (Cont'd).

record of.....	646
property vests in, when.....	644
title of receiver, extended by relation	645
service of orders and warrants	625, 626
testimony, no privileges allowed	632
immunity from criminal action	632
transfer of property may be enjoined	624
Supreme court, issuance by, effect	1741
Suspended by motion for new trial	431
Wages of employees preferred claims	1206
Writ against property, how executed	578
county, to which may be issued	514
form and contents.....	513
officer, to whom directed...513,	514
returnable when.....	515

EXECUTORS AND ADMINISTRATORS

Accounts and payment of debts, accountability for whole estate	1525
payment of debts, order for.	1541
attorney's fees, allowance for..	1528
citations to.....	1444
compensation of executor, etc., provision for.....	1528
debts and expenses, order of payment	1541
due estate, not liable for....	1527
not due, deposit to cover....	1533
disputed claims, deposit to cover	1549
first report, time and contents..	1529
expenses necessary in management, allowance.....	1526
failure to account, revocation of letters	1479
final account, exceptions to....	1533
adjournment of hearings.....	1533
guardian ad litem to represent infant	1534
• hearing	1533
rendition compelled, how.1444,	1448
settlement, conclusiveness of	1533
notice of.....	1532
when rendered.....	1531
funeral expenses, preference in payment	1541
insolvent estates, preferred claims	1544
judgment establishes claim only	1488
judgments, preference in payment	1541, 1542
last sickness, preference in payment	1541
monument, erection of.....	1545
mortgages, preference in payment	1541, 1542
notice of final settlement	1532
payment of debts, order for....	1541

INDEX—VOL. I.

[References are to Sections.]

EXECUTORS AND ADMINISTRATORS (Cont'd).

personal liability to creditors after decree	1546
purchase of claims by executor, etc., prohibited	1527
taxes, preference in payment..	1541
vouchers to be filed.....	1540
unnecessary, when.....	1540
wages, preference in payment..	1541
worthless debts, not responsible for	1527
Actions, abatement and survival..	967
compromise of.....	1522
continuance of, against deceased	1486
conversion of estate.....	1519
deceased, liability continues...	1520
failure of executors to act.....	1466
fraudulent conveyances by decedent	1523
heir, etc., for share of estate and rents, etc.....	1366
limitation, against sureties....	1450
minor, against.....	1577
right to maintain.....	1518
several representatives regarded as one.....	968
sureties, limitations.....	1450
what causes survive to and against	967
wrongful death of decedent...	183
Acts of portion of executors valid, when	1446
Administration dispensed with by will	1462
claim by creditors.....	1491
creditors, notice to, when to be given	1462, 1490
inventories, when to be filed...	1462
letters may issue, when.....	1462
order of distribution.....	1462
powers of executors.....	1463
right to possession.....	1464
solvent estates, sale of property	1462
Administrators with will annexed, authority and powers of.....	1425
letters to	1426
form of.....	1430
Administrators de bonis non, duties and liabilities.....	1447
Allowance to widow and children	1473-1476
preference over other charges, except	1441
Appointment, claims against executor not discharged by.....	1467
portion of executors named, validity of acts.....	1446
Appraisement	1465
appraisers, appointment.....	1465
oath and duties of.....	1466
Arrest and attachment when subject	973
Assignment for widow's and children's support.....	1473
Bank or trust company may act..	1457
Bequest to, when void.....	1468

EXECUTORS AND ADMINISTRATORS (Cont'd).

Bonds—	
actions on, successive recoveries allowed	1443
prior executor's.....	1521
pleading legal effect sufficient	1443
additional court may order 1437,	1440
amount of.....	1437
defects not to affect.....	1443
dispensed with, when will so provides	1439
former executors, action on....	1521
increase	1437
new, court may require on own motion	1440
discharges former sureties...	1440
recording and filing.....	1442
reduction	1437
requisites of.....	1443
sureties, court to determine sufficiency	1438
additional required, when 1437,	1440
citation for.....	1444
citation	1438
cost of.....	1438
justification of.....	1438
qualifications	1441
waiver, by will.....	1439
Chambers, hearings in.....	1445
Change of executor or administrator, notice of.....	1444
Chargeable with whole estate....	1525
Citation to require additional security	1444
hearing and order on.....	1444
revocation of letters for non-compliance	1444
to recover concealed property..	1472
Citations and notices.....	1373, 1375
Claims against estates—	
action on, limitation.....	1482
before, presentation necessary	1484
advancing maturity of.....	1548
affidavit of claimant.....	1478
allowance and rejection.....	1479
debts of estate.....	1480
executor's or administrator's claim	1490
partial allowance, endorsement, costs.....	1487
refused when barred by statute	1483
barred, when.....	1483, 1485
allowance refused.....	1483
bequest discharged, when.....	1468
clerk to keep record.....	1372
contingent	1549
costs	1487
executors or administrator's how allowed.....	1490
failure to act on.....	1479
filed in court, when.....	1479
judge's claim, to whom referred	1481
judgment for, effect.....	1489
against deceased, collected how	1489

INDEX—VOL. I.

[References are to Sections.]

EXECUTORS AND ADMINISTRATION (Cont'd).

liability of representatives.....	1467
limitation on presentment.....	1477
on actions.....	1482
vacancy in administration	
suspends statute	1485
notice to creditors, publication	1477
copy and affidavit to be filed	1478
omitted, when.....	1478
partnerships	1458
payment, order of.....1205,	1541
pending actions, presentation as	1486
preferences in payment....1205,	1541
presentation, limitation on.....	1477
necessary before suit.....	1484
pro rata among.....	1544
purchase of, prohibited.....	1527
permission to.....	1527
report on claims.....	1529
notice of, not necessary.....	1530
statements of, when required of	
executor	1529
time, filing	1477
presentation	1485
suspension of.....	1485
unpaid, actions on.....	1547
verification	1478
wages, preferred in payment..	
.....1205,	1541
Compensation	1528
Contracts of decedents, specific	
performance—	
application	1558
conveyance, execution by execu-	
tor, etc., when.....	1561
form and effect of.....	1561
recording in county auditor's	
office, effect of.....	1562
decree for conveyance.....	1562
equivalent to conveyance,	
when	1561
record of, effect.....	1562
deposition, use of on hearings..	1564
enforcement against executors,	
etc.	1563
petition and notice.....	1559
hearing	1560
notice	1559
representatives of obligee may	
bring proceedings in case of	
his death.....	1563
Contribution, action on unpaid	
claims	1547
beneficiaries, subject to.....	1508
Corporations, not entitled to let-	
ters	1457
Costs against estate, liability for	489
bond hearing	1438
court to assess.....	1389
will contests.....	1389
Creditors, right to administration	1431
notice to.....	1477
Death or removal.....1423,	1424
action against sureties, limita-	
tion	1450

EXECUTORS AND ADMINISTRATION (Cont'd).

Debts, contribution.....	1507
discharge by bequest.....	1468
order of payment.....	1541
sales to pay.....	1506
Decree of final discharge.....	1533
Devisees, liability.....	1507
notice to.....	1434
Discharge of debt by will invalid	
against creditors.....	1467
Discovery of concealed property,	
proceeding	1472
will revokes letters of adminis-	
tration	1421
Disputed claims	1549
Distributees, contribution.....	1413
Distribution of estates—	
advancements	1557
application for payment of	
legacies	1551
decree for, extent of.....	1554
conditions of.....	1554
bond in	1554
costs	1555
notice, how given.....	1552
payment prior to settlement,	
when	1554
bond for indemnity.....	1554
enforcement	1556
resistance and counter appli-	
cation	1553
decree of	1533
hearing on.....	1533
minor, guardian to appear for..	1534
nonresident, agent of.....	1535
ordered, when	1533
payment on indemnity bond,	
when enforced.....	1556
petition for.....	1531
property set apart, how distrib-	
uted	1554
unclaimed portion, to escheate.	1539
Divorce, effect on will.....	1399
Embezzlement of estate, penalty..	1471
discovery of.....	1472
Encumbrances, effect on will.....	1401
Escheats, administration of..1357-	1360
Execution in name of, on showing	
death	519
Executor de son tort, no liability	
as	971
of executor, limit of powers...	972
Exempt property to be set apart	
to widow.....	1473
Expenses of.....	1540
Failure to produce will.....	1379
Family—See Support, infra	
Fraudulent conveyances by de-	
cedent	1523
Guardians, appointment and du-	
ties—See Guardian and Ward	
Heirs, contribution.....	1412
notices to.....	1434
shares of.....	1402

INDEX—VOL. I.

[References are to Sections.]

EXECUTORS AND ADMINISTRATORS (Cont'd).

Homestead exemption, right of widow	1474
Insane persons—See Guardian and Ward	
Inventory	1462, 1465
additional, when required.....	1470
contradicted, when may be....	970
penalty for not returning.....	1469
signing and verifying by executor, etc.	1465
Judge's claim, allowance.....	1481
Judgment against, not evidence of assets	969
rank as claim.....	1578
treated as allowed claim.....	1378
Jurisdiction and powers of superior court	1371
place of	1377
records to be kept.....	1372
Justice of peace has no jurisdiction	45
Labor, preferences in payment... ..	1205, 1541
Legacy, to discharge debt.....	1468
Letters of administration, after final settlement, when.....	1428
annulment	1422
application, how made.....	1380, 1432
notice of hearing.....	1433, 1434
certified copies as evidence....	1426
clerk to sign.....	1426
corporations, not entitled to...	1457
creditors, right of, when.....	1431
de bonis non, application for evidence, effect	1447
form of.....	1428
husband or wife, right to..	1429
next of kin, entitled to, when.	1431
notice of application for letters	1419, 1431
.	1433, 1434
partners, entitled to.....	1458
persons entitled to.....	1431
petition for, hearing on.....	1433
recording	1427
revocation by discovery of will	1421
failure to make inventory...	1469
on order of court, when.....	1445
subsequent to distribution.....	1428
venue for granting.....	1376
with will annexed, when granted	1417, 1430
form of	1429
Letters testamentary—See letters of administrations, this title	
disqualification of executor, letters with will annexed granted to another.....	1424
execution of.....	1429
form of.....	1429
granted to whom.....	1431
issued when.....	1417
objections to granting.....	1418
recording of	1427
certified copies as evidence..	1428

EXECUTORS AND ADMINISTRATORS (Cont'd).

revocation by setting aside of will	1388
on order of court, when.....	1444
venue for grant of letters..	1376, 1377
Liability of devisee for debts....	1507
of executor.....	1524
on allowed claims.....	1546
Liens, foreclosure of.....	1489
judgments are not, except.....	1578
specific property subject to....	1542
Life estates, effect of.....	1410
Limitations, actions for mismanagement of estate.....	161
actions, new, after reversal....	173
realty sold by executor, etc...	158
rejected claims.....	164
surviving actions.....	170
Loss from depreciation, executor not to suffer.....	1525
Lost probate records, how restored	1390
Marriage, clerk's record of.....	1372
will revoked by.....	1399
Minors—See Guardian and Ward	
support of.....	1475
Monument, expenses of.....	1545
Mortgage of property.....	1492-1516
redemption	1513
to pay legacy.....	1505
Naming of, not to discharge debt.	1467
Noncupative will—See Wills	
Nonintervention—See administration dispensed with, supra	
Nonresident, agent to appear for	1535
bond of agent.....	1536
executor may be.....	1457
not entitled to letters.....	1457
Notice to creditors—See claims, supra	
persons interested	1434
Notices, how issued and served..	1373-1375
Oath of.....	1436
Parties, notices to.....	1434
Partition between devisees, etc.—	
advancements specified in decree	1557
agent for nonresident distributee	1535
bond and compensation of..	1535
liability on bond.....	1536
sale by, of unclaimed estate..	1537
claimant for share turned into county treasury, how paid...	1539
costs taxed to applicant.....	1555
decree what to contain.....	1557
rendered only on notice.....	1552
estates in common distributed..	1533
sale when.....	1533
value determined	1533
guardians for infants and insane, appointment before partition	1534
nonresidents, agents for, appointed before partition..	1535-1537
notice of petition for.....	1530, 1532
objections to report.....	1533
record of final establishment...	1600

INDEX—VOL. I.

[References are to Sections.]

EXECUTORS AND ADMINISTRATORS (Cont'd).

Partnership property—	
administration by general administrator	1458
additional bond required.....	1458
authority to operate business..	1458
custody and control of.....	1459
inventory of.....	1458
notice to creditors.....	1458
surviving partner may apply for administration	1458
bond of as administrator....	1458
exhibit by of assets and delivery of books and papers	1441
operate business.....	1460
powers, duties and liabilities	1459, 1460
purchase of interests.....	1459
Personal property, sale, order for	1493
Petition for administrator, hearing on.....	1433
Possession of estate, right of executor, etc.	1425, 1463
Powers, actions by and against..	1518
bond of predecessor, action on	1521
collection of debts.....	1517
compromise of debts.....	1522
fraudulent conveyances, action for recovery	1523
possession of estate.....	1518
torts of decedent, actions on..	1520
trespass, actions by and against executors, etc.	1519
waste, actions by and against executors, etc.	1519
Preferred claims, wages of employees.....	1205, 1541
Prior proceedings, validation of..	1592
Private sale of real property authorized	1499
order to set forth terms of sale	1499
petition and showing.....	1499
sale, appraisal.....	1500
confirmation and conveyance.	1501
objections to	1499
will directing.....	1516
manner of.....	1499, 1500
notice of.....	1499
order for conveyance.....	1502
resale on new bids.....	1502
return of sale.....	1500
will directing.....	1516
Process, how served.....	1374
Profit of, prohibited.....	1527
Promise to pay debts of estate, when liable.....	1524
Prosecuting attorney, minors represented	1571
Purchase of claims prohibited....	1527
Real property—See Sales, infra	
Redemption of mortgaged lands..	1513
Release of executor's etc., debt to estate not effected by appointment as.....	1467
removal, when court may order	1422, 1444

EXECUTORS AND ADMINISTRATORS (Cont'd).

Reports of.....	1529
final	1532
notice of.....	1530
Resignation of.....	1447
accounting and delivery to successor, powers cease, on.....	1448
authority of joint executors not curtailed by.....	1448
successor may sue for assets... action against sureties, limitation	1449, 1450
Revocation of letters.....	1444, 1445
Sales by, application for order...	1494
bids, increase of.....	1502
written, required.....	1499
confirmation, conclusive.....	1504
contract interest in lands.....	1509
assignment of.....	1512
bond to secure payments.....	1510, 1511
contribution among devisees and legatees	1508
legacies and devises subject to debts	1507
mortgaged property, sale of...	1530
order of court.....	1492
perishable property, when.....	1493
personal property, court may order	1492, 1493
mortgage	1493
pledge	1493
private sale of.....	1493
public sale, how made.....	1493
petition for order.....	1494
real property, appraised value. appropriation of estate to debts or legacies as provided by will	1500, 1505-1507
auction	1497
authority to sell or mortgage	1492
bids, increase.....	1502
confirmation, objections to... conclusive	1502, 1504
not necessary on sales under will, when.....	1516
order of	1503
when granted	1503
contract interest of deceased. assignment	1510, 1512
bond	1510, 1511
conveyances, execution and effect	1503
hearing of application.....	1494
increase of offer.....	1502
irregularities not to invalidate	1503
legacies paid by sale or mortgage	1505
mortgage, directed when.....	1495
irregularities not to vitiate	1496
notice of sale, contents.....	1497
shortening time.....	1499
order of sale or mortgage, when granted	1492
contents of.....	1496
directing sale.....	1496
part sold, when	1496

INDEX—VOL. I.

[References are to Sections.]

EXECUTORS AND ADMINISTRATORS (Cont'd).

petition	1494
notice of	1494
not jurisdictional	1504
private—See private sale, this title	
purposes of	1494
reappraisement	1500
redemption of lands mortgaged	1513
sale to redeem other lands	1514
sale subject to mortgage..	1515
resale, when may be ordered	1501
return of sale	1501
approval or disapproval...	1501
when may be sold or mortgaged	1492
where, when, how made.....	1497
adjournment of, notice 1497,	1498
whole or part of, real estate, when	1496
without order of court, when	1516
will directing	1516
Setoff may be interposed against actions by	268
effect of judgment against executor, etc.	269
may be set up in actions against	270
Setting aside will revokes letters testamentary	1388
Settlement without intervention of court—See administration dispensed with, supra.....	1462
Special administrator, accounting by	1456
appointed, when	1451
bond	1452
creditors have no right of action against	1455
duties	1453
powers	1449
powers cease, when	1454
report of	1456
liability of	1455
report of	1456
termination	1454
Spouse, not a relative	1454
surviving, to administer community property	1419
Stolen property, recovery	1472
Subsequent administration	1550
Sureties, limitations of actions against	1450
Succeeding, may sue for assets...	1449
Suit in own name	180
compromise of	1522
Summary administrations, when..	1451
Support of family, allowance for	1473-1475
additional to homestead	1474
homestead	1474
lieu of exemption	1473
minor children	1475
separate estate	1474
Suretyship rights and liabilities extended to	981

EXECUTORS AND ADMINISTRATORS (Cont'd).

Surviving executor, powers	1446
spouse, support of	1474
Testator—See Wills	
Title of heir, etc., to realty vests without administration	1366
confirmation of titles	1367
Trust company may act as	1457
Validation of irregular sale of realty	1693, 1695
Venue	1376
Wards—See Guardian and Ward	
Waste, actions for	1519
Wills, rights and liabilities under—See Wills	

EXEMPTION

Allowance and setting apart of exempt property for support of family	1473-1475
Amounts and kinds classified	563
Claim proceedings to establish... appraisal of property	572
Debtor in assignment for benefit of creditors entitled to	1102
claim and contest of	1103
Garnishment	680-2, 703
Homestead of what consists	528, 529, 552
from forced sale	532
probate homestead	1473, 1474
selected, when	529
from what property	530, 531
Householder, who is	565
Material for construction of buildings	1144
Moneys derived from sale of homestead	549
Necessaries of family	564
Property exempt specified	563
attorneys' libraries and office furniture	563 (8)
boats	563 (10, 11)
clergymen's libraries, stationery, etc.	563 (8)
farmer, stock, utensils and seed	563 (5)
firearms	563 (9)
household goods, libraries and pictures	563 (2, 3)
householder, stock feed and provisions	563 (4)
insurance money, fire, when....	568
life and accident	569
libraries	563 (2, 7, 8)
lightering equipment	563 (11)
loggers' equipment	563 (13)
mechanics, tools of their trades, etc.	563 (6)
pension money	566, 567
physicians' libraries and instruments	563 (7)
selection of, how	563 (3)
stock, feed and provisions	563 (4, 14)
support of family	1474

INDEX—VOL. I.

[References are to Sections.]

EXEMPTION (Cont'd).

teamsters' equipment	563 (12)
wearing apparel	563 (1)
wife's separate property.....	570
Separate property of wife.....	570
Supplemental proceedings not to affect	637
Taxation—See Taxation	
Wages and actual necessities, in garnishment	680-2, 703
claim of employee on levy against master	1206
none against	564
provisions apply to justices of peace and superior courts...	703
Waiver, how effected	571

EXHIBITIONS—See Theaters and Shows

EXPLOSIVES—See Criminal Law

EX POST FACTO LAW

Penal Code not to apply to prior offenses	2294
---	------

EXPRESS COMPANY

Service on whom.....	226
----------------------	-----

EXTORTION—See Criminal Law

EXTRADITION — See Fugitives from Justice

FALSE ADVERTISING—See Criminal Law

FALSE CHARGES

Actionable, when.....	294
-----------------------	-----

FALSE IMPRISONMENT

Costs limited	477
Justice of peace has no jurisdiction	45
Limitation on civil action.....	160

FALSE PERSONATION — See Criminal Law

FALSE PRETENSES—See Criminal Law

Attachment grounded on debt incurred under.....	649
---	-----

FALSE REPRESENTATIONS—See Criminal Law; Fraud

FALSE SWEARING—See Criminal Law (perjury)

FEES

Admission to practice law....	120, 122
Advancement on demand.....	505
for notice by publication.....	504
Allowance as costs—See costs....	
.....474-476, 481,	483
Attorneys' appeal to supreme court	1744
defense of pauper criminals...	2305

FEES (Cont'd).

garnishment in justice court..	1843
justice's court	1862
not allowed, as witness.....	502
Clerk of superior court, schedule of	497
filing abstract of verdict....	431-2
of supreme court, schedule of..	497
County auditor, recording loggers' lien claim	1170
Court commissioners	85
Court reporters' additional.....	42-4
Extorting illegal, penalty.....	2612
Folio charges	500
certificates included in computation	500
filing of paper to include certificate	500
Jurors, mileage in criminal actions	498
Jury in justice's court.....	1849
Justice of the peace, schedule of limited to schedule.....	1864, 1866
salaried officer, fees allowed...	1865
Juvenile offenders, non chargeable against	1897-16
Mileage, computation on plural services	501
jurors in criminal action.....	498
traveling expenses in lieu, when witnesses	497, 498
may demand in advance....	507
Official notices, advancement for publication	504
services, fees due in advance..	506
Public officers as witnesses.....	499
Referees, amount allowed to....	483
in supplemental proceedings...	639
Schedule of fees for court officers, etc	497
due in advance of service.....	506
Service of writ of garnishment..	687
process in justice's court having salaried constable	1760
Sheriffs, schedule of.....	497
in proceedings against juvenile offenders	1982
Tender of before service of officer	506
Witnesses	497, 498
advance payment, when.....	507
may demand upon service.....	507
public officer.....	499
tender to	1215

FELONIES—See Criminal Law

Wrongful death from, damages..	183
--------------------------------	-----

FERRIES

Tolls, extortion of illegal, penalty	2715
--------------------------------------	------

FILIATION PROCEEDINGS

Act cumulative.....	1979
Action, abatement, when.1979-7, 1979-8	
docketing in superior court...	1975
judgment of discharge.....	1977
limitation of action.....	1979-6
trial	1976

INDEX—VOL. I.

[References are to Sections.]

FILIATION PROCEEDINGS (Cont'd).

Bond for appearance.....	1971
for discharge.....	1973
for support.....	1978
Child, custody	1979-9
Commitment of accused....	1971, 1979-2
Complaints	1970
Contempt of Court.....	1979-2, 1979-4
Criminal proceedings not affected.	1979
Defaults	1979-4
Denial of charge.....	1977
Discharge on bond.....	1973
Hearings	1971, 1979-2
Execution	1979-1
Judgment, default in payment ..	1979-4
bond for instalment payments.	1978
discharge from	1977
disposition of money.....	1979-3
execution on	1979-1
support of child.....	1978
Justice of the peace, complaints	
before	1970
hearings, action on	1971
mother's testimony taken in	
writing	1974
recognizance of defendant....	1973
Limitations	1979-6
Mother's testimony.....	1974
Prosecuting attorney, duties.	1972, 1979-2
Support of child, judgment for..	1978
inability of father, hearings...	1979-2
Title of proceedings.....	1972
Transcript filed.....	1975
Trial	1976

FINDINGS

Deemed verdict, when.....	368
Judgment on	367
Manner of stating.....	367
Setting aside	368

FINES AND PENALTIES — See Criminal Law; Forfeitures

Action for, by whom recoverable.	963
Amount of—	
contempt	1050, 2273
contempt before justice of peace	1892
juror in justice's court, failure	
to appear	1856
on judgment for.....	964
Disposition of	966, 2189
Judgment, collusive, no bar to	
other actions	965
Lien on realty when.....	2188
Municipal, jurisdiction of superior court	15
Neglect to pay into treasury....	2189
Restriction on power of justice of peace to impose.....	46
Selling liquor to habitual drunkard	1712
Wills, failure of custodian to produce	1380
Witness disobeying subpoena.	1220, 1235

FIREARMS—See Criminal Law

FIREMEN

Exempt as jurors.....	103
-----------------------	-----

FIRES

Apparatus for extinguishment, interference with	2519, 2656
Burning slashings without permit.	2522
Doors of public buildings to swing outward	2525
Locomotives, spark-arresters to be used on.....	2524
Negligently setting or leaving...	2523
Obstructing firemen	2520
Smoking where prohibition posted	2521
Wilfully setting or refusing to extinguish	2523

FLAGS

Anarchistic and seditious standards	2563-7
application of act.....	2563-11
possession unlawful	2563-8
searches and seizures authorized	2563-10
violations of act, penalty.....	2563-9
Desecration	2675-3
Uniform flag law—	
advertising, unlawful use....	2675-2
application of act.....	2675-4
cited, how	2675-7
construction	2675-6
definitions	2675-1
violations, penalty	2675-5

FOLIO

Defined	500
---------------	-----

FOOD

Poisoning food	2516
----------------------	------

FORCIBLE ENTRY AND DETAINER

Amendments in furtherance of justice	828
pleadings to conform to proof..	826
Appeal from judgment.....	831
bond of defendant.....	831
stay of proceedings on.....	832
suspends writ of restitution....	833
Appearance and pleading by defendant	823
Complaint, form and contents....	817
Damages and rent recoverable....	827
Default judgment.....	822
Defendants, who may be joined..	837
Definitions	810-812
Entry and detainer, when unlawful	834
Forfeiture, relief of tenant.....	830
Issues, trial and verdict.....	836
Judgment and execution.....	827
binds subtenants	816
Jurisdiction of superior court...	15
Jury, how formed	824
Notice, service of.....	814
Parties to actions.....	816
Pleadings in action for possession	835

INDEX—VOL. I.

[References are to Sections.]

FORCIBLE ENTRY AND DETAINER (Cont'd).

Practice governed by general civil procedure	829
Proof required of plaintiff	825, 836
Restitution, issuance of writ	819
bond of plaintiff	819
of defendant	820
modification	821
service and execution	820
Subtenants, effect of entry after action	816
Summons, issuance of	817
form and service	818
Tenancy upon agricultural lands, holding over	813
Trial by jury	824
Unlawful detainer defined	812
agricultural lands, effect of holding over	813
use of force, penalty	2558
Venue	815

FORECLOSURE—See Chattel Mortgages; Liens; Mechanics' Liens; Mortgages

FORESTS AND FOREST FIRES

Locomotives, spark-arresters to be used on	2524
Penalties, burning slashings without permit	2522

FORFEITURES

Abolished in case of fugitive from justice	2288
in cases of suicide	2288
Action for, by whom recoverable, venue	963
Arbitrator, failure to attend	423
Deodands abolished	2288
Disposition of forfeitures	966
Enforcement by quo warranto, when	1034
Fines—See Fines and Penalties	
Forcible entry and detainer, relief against	830
Judgment for, amount of recovery collusive, no bar to other actions	964, 965
Limitation on action for	159, 160
no suspension for personal disability	169
Penalties—See Fines and Penalties	
Property forfeited to state, recovery of	1045
Quo warranto, judgment of	1043
Recognizances, actions on	2231-2236

FORGERY—See Criminal Law

FORMS

Deposition, certificate of	1242
Garnishment, writ of	685
Indictment	2056
Justice's courts—See Justice of the Peace (forms)	

FORMS (Cont'd).

Letters testamentary	1429
administration	1435
with will annexed	1430
Logging lien claim	1168
Mechanic's lien claim	1134
Notice of claim for labor, etc., against bond of contractor on public works	1161
on lien on chattel	1155
Oaths—See Oaths	
Pleading, code provisions govern	255
ancient abolished	2022
Summons	223
by publication	233
forcible entry	818
for personal service	223
form	223

FORNICATION

Action for falsely charging	294
---------------------------------------	-----

FOURTH OF JULY

Legal holiday	61
-------------------------	----

FRANCHISES

Conflicting claims, tried on one information	1034
Sale under execution or foreclosure	520, 521
Usurpation of, prosecuted by quo warranto	1034
judgment of ouster	1043

FRAUD—See Criminal Law; Frauds, Statute of

Attachment may be based on	648
Ground for vacation of judgment objection by petition and affidavit	464, 467
Jurisdiction of justice of peace	44
Limitation on actions for relief from	159
Removal of property may be restrained by injunction	719

FRAUDULENT CONVEYANCES

Action by administrator, etc., to set aside decedent's	1523
Criminal liability	2631
Ground for attachment	648, 649
Knowingly receiving, penalty	2632

FRIENDLESS CHILDREN — See Delinquent Children

Protection of—See Orphans . . . 1700-1707

FRUIT

Malicious injury to	2659
-------------------------------	------

FUGITIVES FROM JUSTICE

Agent to demand, appointment	2241
application for, investigation	2241
Commitment, when	2244, 2245
Costs and charges, liability of complainant	2246
Demand upon governor for delivery	2242

INDEX—VOL. I.

[References are to Sections.]

FUGITIVES FROM JUSTICE

(Cont'd).

Discharge, when	2245
Examination by court.....	2244
Expenses of foreign government, payment by state.....	2252
Recognizance required, when.....	2244, 2245
Rewards for apprehension....	2247, 2251
Warrant for, issuance by court..	2243

FUNERAL EXPENSES

Preferred claim against estate of decedent	1541
---	------

GAMBLER, COMMON—See Criminal Law

GAMBLING—See Criminal Law

GAME

Fishing, trespass on lands in- closed, or on which notices are posted	2665
Trespassing on lands for.....	2665

GAMING—See Criminal Law

GARNISHMENT

Answer of garnishee, controvert- ible by both parties	700, 701
service and filing.....	690
sufficiency as against defendant	705
Bond	681
Constable, in attachment.....	664
Contempt, attachment of gar- nishee for	696
Corporations, subjection of stock	697-699
Costs and attorney fees.....	704
Debtor (judgment) of defendant, liability	664
Decree for delivery of effects....	695
Defense against claim of defend- ant	705
Discharge of garnishee.....	691
Execution, disposition of proceeds	694, 695
Executor, in attachment.....	664
Exemption of wages and actual necessaries	703
Grounds for issuance	680
Judgment by default.....	692
against garnishee, effect.....	693
debtor of defendant, liability..	664
disposition of proceeds.....	694, 695
Justice's courts	1807-1846
special provisions govern	706
summoning on execution when sufficient property of defend- ant not found.....	1886
Public corporations subject to..	680-1
order against, for audit and payment	680-2
Receiver appointed, when.....	741
Sale of effects.....	695
shares of stocks.....	697-699
Sheriff, in attachment.....	664
Trial of issues.....	702

GARNISHMENT (Cont'd).

Writ, application for.....	682
affidavit supporting	682
bond to discharge writ.....	689
corporations or joint stock com- panies, answer required.....	684
date and attestation.....	686
delivery, to whom.....	686
form of	685
issuance, when and how.....	683
service and return of.....	687
affidavit, when not by officer	687
effect of service.....	688
fees, when	687

GAS

Interference with appliances, pen- alty	2657
Malicious injury to pipes or mains	2656

GENDER

Construction of words importing	148, 1208, 1416, 2303
--	-----------------------

GOVERNOR

Commutation of sentence may be granted	2223
Pardons may be granted.....	2223
Power to assign superior judges to other counties	27
Reprieves may be granted.....	2223
Requisition on for fugitives from justice, proceedings.....	2242
Rewards for fugitives, may offer	2247

GRADE CROSSINGS

Warnings to be placed on.....	2664-3
-------------------------------	--------

GRAFTING—See Criminal Law

GRAND JURY

Acts not invalid, when.....	103
Challenges to panel, when allowed	2025
individual jurors.....	2026
timeliness of objection.....	103
Charging and advice by court....	2031
Clerk	2030
Complainant to take no part.....	2035
Contempt, when guilty of.....	2046
Costs against complainant, when	2226
Defined	91
Disclosure of depositions returned, penalty	2379
of transactions, penalty.....	2378
Dismissal of charge by, effect...	2048
Disqualification of member, effect	103
Drawn from jury list, how.....	94
Duties	2033, 2037
Evidence, hearing and production of	2038
Foreman, appointment and powers	2030
Indictments found not to be dis- closed	2039
how presented	2045
indorsements on—See Indict- ment and Information...2042-	2044
"not a true bill," proceedings regarding	2047

INDEX—VOL. I.

[References are to Sections.]

GRAND JURY (Cont'd).

number necessary to find.....	2042
presentment defined.....	2049
secrecy as to.....	2046
Juror acting after challenge al-	
lowed, penalty.....	2373
discharged, panel to be filled..	2028
Malicious and frivolous prosecu-	
tions, costs	2036
Oath, form of.....	2029
Open venire, when.....	107, 110
Panel discharged, venire to by-	
standers	2027
Personal knowledge of offenses to	
be disclosed	2034
Proceedings secret.....	2040
Prosecuting attorney to attend..	2032
Qualification and drawing — See	
Jurors	94
Resummoned, when	2041

GRAND LARCENY—See Criminal Law (larceny)

GRASS

Malicious injury to.....	2659
--------------------------	------

GROSS MISDEMEANORS — See Criminal Law

GUARDIAN AND WARD—See also Probate Code

Accounts, semi-annual.....	1575
Actions by and against author-	
ized	180, 1576
adverse party not to testify,	
when	1211
claim, condition precedent....	1577
injury or death of ward.....	184
seduction of ward.....	185
Ad litem, appointment.....	187, 1581
confession of judgment for	
minor	414
in justices court.....	1771, 1772
Age of majority.....	1572
Appeals to supreme court.....	1591
Appointment of guardian for in-	
fant or insane.....	1567
banks and trust companies....	1457
nominated, by whom.....	1580
nonresident ward, guardian non-	
resident	1566
notice, service of.....	1568
parent asking for.....	1567
petition for, in case of minor	
and insane wards.....	1567
hearing	1567
notice, service	1568
publication of notice	1569
substitute notice	1570
prosecuting attorney appears	
for ward, when	1571
Banks and trust companies may	
act	1457
Bond of guardian, conditions....	1573
additional, when required.....	1573
provisions governing	1573, 1574
successive recoveries	1573

GUARDIAN AND WARD (Cont'd).

Claims, presentation and rejection	
necessary prior to suit.....	1577
Compensation and expenses of	
guardian	1586
Compromise of claims by guardian	1576
Consent of ward, when.....	1567
Costs against infant plaintiff, lia-	
bility	488
Custody and tuition of ward.....	1575
Debts, payment	1575
Death, appointment of successor.	1579
Duties of guardian	1575
Education of ward.....	1575
expenses, allowance of.....	1586
Friendless children, commitment	
to custody of incorporated so-	
ciety	1702
convicted of crime, custody of	
society may be imposed....	1704
suspended sentence may be	
imposed on breaking of cus-	
tody	1704
costs, fees and expenses.....	1707
payment by county, when....	1707
county charges may be sur-	
rendered to incorporated so-	
ciety	1702
custody of child pending ap-	
pointment of guardian....	1701
taken by police officer with-	
out warrant, when	1703
habeas corpus, evidence on hear-	
ing	1706
incorporated societies may act	
as guardian of person.....	1700
investigation of neglect, duty of	
police	1703
surrender to incorporated so-	
ciety by parents	1700
to county commissioners,	
when	1701
Full age of males and females,	
what	1572
Habeas corpus, when entitled to..	1064
Incorporated society not to act as	
guardian of estate.....	1705
guardianship of person allowed	1700
Insane persons, ad litem, appoint-	
ment	188
person and estate, power of	
court over	1572
removal, when.....	1579
sale, lease or mortgage of real	
estate for debts or invest-	
ment	1582
Insane ward—	
witnesses, incompetent as.....	1213
Inventory to be filed.....	1575
Investments	1582
Judgments, to be presented and	
paid as other claims.....	1578
Jurisdiction and powers of supe-	
rior court.....	1589, 1590
Lease of property.....	1582
Liability of.....	1579
for waste.....	938

INDEX—VOL. I.

[References are to Sections.]

GUARDIAN AND WARD (Cont'd).

Limitation on actions for realty sold by	158
on claims.....	1588
Majority, age of.....	1572
Nonresident's property, removal from state	1587
Notice to creditors.....	1588
Order to show cause on conviction of juvenile offender.....	1981
Partition, consent of guardian... sales, not to be interested in.. share of wards payable to, when	884 873 882, 883
Payment of debts.....	1575
Powers of.....	1572
Preference given to in control of child	1987-14
Qualifications	1566
Real estate sales, irregularities not to invalidate	1585
prior sales validated.....	1592
Removal of guardian	1579
only for cause.....	1579
Sale of estate, under order of court, when.....	1582
conclusiveness	1585
confirmation	1584
conveyances, how made.....	1584
irregularities not affecting.....	1585
laws governing.....	1584
petition for, requisites.....	1583
provisions governing	1584
Suit in name of guardian	180
Summons served on, when.....	226
Surrender of property of estate to successor	1579
Testamentary guardian, powers and bond	1580
Trust company may act as guardian	1457
Ward, education of.....	1575
guardian may prosecute and defend for.....	1576

GUIDE-BOATS

Malicious injury to.....	2656
--------------------------	------

HABEAS CORPUS

Amendment of writ	1085
Application, contents and by whom made	1065
Bail, admission to.....	1076
may be used to secure.....	1077
Benefit of writ, who may have.. .. .	1063, 1064
Change of custody.....	1083
Custody of child surrendered to incorporated society, presumptions	1706
Delivery to sheriff, how made....	1068
Directed to whom.....	1067
Discharge for irregularities in charge or process, when ...	1076
Grantable by what courts or judges	1066
Guardians entitled to writ.....	1064

HABEAS CORPUS (Cont'd).

Hearing and determination.....	1074
on legal holidays.....	64
Husband entitled to writ.....	1064
Illegal restraint, arrest and hearing of person causing...1081,	1082
Immediate custody taken on affidavit, when	1080
Infants entitled to protection of	1064
Insane persons entitled to protection of.....	1064
Masters entitled to writ.....	1064
Ne exeat, issuance of writ in.....	782
Officer, not liable to civil action..	1079
Parents entitled to writ.....	1064
Pleadings, rules governing.....	1073
amendment of.....	1073
Restrictions on inquiry.....	1075
Return, form and contents.....	1072
immediate, required.....1071,	1085
proceedings on.....	1073
Service	1069, 1070, 1085
Sunday, issuance on.....	1084
Superior court may issue.....	15
power on nonjudicial days.....	15
Supreme court or judge, power to issue	1
Temporary orders.....	1083
Warrant to prevent removal of one illegally restrained.....	1080
commands and execution against person causing..1081,	1082
Witnesses, attendance compelled.	1078
Writs, issuance, service and return	1085

HALLS, PUBLIC

Doors to swing outward.....	2525
-----------------------------	------

HEAD OF FAMILY

Defined	553
---------------	-----

HEALTH

Matters injurious to, actionable as nuisance	943
Offenses against, out of state, when punishable	2254

HEIRS—See Descent and Distribution; Executors and Administrators; Probate Code

Action for damages for wrongful death, rights of.....	183-1
to quiet title against.....	785
Contribution among.....	1412
Limitations on action against executor, etc.	161
actions by, for recovery of land	787
new action after reversal.....	173
recovery of realty sold by executor	158
Notices to	1434
Production of pretended, penalty	2374
Suretyship rights and liabilities extended to	981
Unknown, actions against and service on.....229-	232

INDEX—VOL. I.

[References are to Sections.]

HIGHWAYS

Deposit of unwholesome substance on	2537
Disturbance on penalty.....	2534
Fast driving over bridge.....	2718
Glass, tacks, etc., thrown on, penalty	2720
Injuries to, penalty	2656
to mileposts and guide-posts...	2656
Mileposts, malicious injury to	2716, 2717
Motor vehicles—	
chauffeur, intoxication of.....	2527
malicious injury or removal, penalty	2659
removal of number, penalty...	2601-3
stolen, evidence of.....	2601-4
taking without owner's permission unlawful	2601-1
Obstruction an actionable nuisance	943
Public service commissions, signs ordered by.....	2664-3
Sign-boards, malicious injury to.. ..	2716, 2717
Traction engine meeting team...	2719
Warning signals to be placed on.	2664-3

HOLIDAYS, LEGAL

Adjournments of court to, effect	65
Columbus Day created.....	63-1
Courts closed	4, 18, 64
Days declared holidays.....	61-63
Habeas corpus on.....	1084
Magistrates may act on.....	64
Monday to be when falls on Sunday	61-1
Sessions of court, how affected by Sunday	65
Superior court not open, except..	61
Supreme court not open on.....	18
Writs issuable on, by superior court	4
	15

HOMESTEAD

Abandonment	535
declaration of, when effectual	536
Alienation in case of insanity authorized	554
notice of application	555
petition, requisites	556
validity of sale or encumbrance	557
Conveyed, how.....	534
Declaration of selection essential contents	558
recording	559
Defined	560
Descent of, upon death.....	528, 529
Encumbered, how.....	561
Estates, setting aside to.....	534
Execution sale, appraisement under	1473
petition for.....	537
filing of.....	538
hearing and appointment of appraisers	539
notice of hearing.....	541
oath of appraisers.....	540
report of appraisers.....	542
	544

HOMESTEAD (Cont'd).

view of premises.....	543
sale, when	546
bids at sale.....	547
compensation of appraisers..	550
costs of proceeding.....	551
division of property, when..	545
proceeds, application of.....	548
protection of claimant's portion	549
Exemption from forced sale.....	532
debts from which no exemption	533
Head of family defined.....	553
Liabe for certain classes of liens	533
Moneys derived from sale protected	549
paid claimant on sale of, exempt	549
Possession during redemption period, without accounting for use	602
Probate exemption.....	1473
Selected from what property.....	530, 531
any time before sale.....	529
Setting aside of estate.....	1473
Subsequent, exempt when.....	562
Value exempt.....	552
Widow may claim after death of husband	1473
Wife may sue alone to claim or protect	181

HOMICIDE—See Criminal Law

HORSE-RACING — See Criminal Law

HORTICULTURE

Lien for labor on orchards.....	1130-1
---------------------------------	--------

HOTELS

Frauds on, punishment.....	2625
Liability for loss by guest, how avoided	1203
Lien, baggage	1201
notice of sale for.....	1202
sale to satisfy lien.....	1201, 1202

HOUSEHOLDER

Defined	565
Exemptions entitled to.....	563

HOUSE OF ILL FAME—See Criminal Law (disorderly houses); Prostitution

HUSBAND AND WIFE—See Descent and Distribution; Divorce

Abandonment, penalty.....	2444
Actions by and against.....	181, 182
Administration, survivor's right.. ..	1419, 1431
Adultery, prosecution for, when..	2457
Community property, descent....	1342
homestead, selected from.....	530
descent of.....	561
insane spouse—See Probate Code	
mechanics' liens, subject all interests	1145

INDEX—VOL. I.

[References are to Sections.]

HUSBAND AND WIFE (Cont'd).

realty, title vests how on dis-	1370
solution	1342
subject to what charges.....	1342
testamentary disposition of one-	1342
half authorized	2255
Crime committed by wife, duress	2255
no defense	1343
Descent of community and sep-	1343
arate property	2444
Failure to support wife.....	1064
Habeas corpus, husband entitled	1064
to	534
Homestead, conveyed or encum-	1473
bered, how	181
in probate.....	182
Joinder in actions, when.....	1145
Mechanics' liens, notice of claim.	1145
Separate real property, descent of	1343
.....	531
wife's, homestead in	570
exemption from execution...	2255
Wife, duress of husband no de-	181
fense to crime.....	181
in own name.....	182
joinder with husband, when...	182
separate defense, when.....	194
survival to, for personal in-	194
juries to husband.....	1214
Witness for and against one an-	1214
other, when	

IDIOTS—See Guardian and Ward;
Insane Persons; Probate Law

ILLEGITIMATE CHILDREN—See
Bastards

ILL FAME—See Criminal Law
(prostitution)

IMMUNITY

From jury service.....	332
------------------------	-----

IMPEACHMENT

Power unaffected by enactment of	2297
Penal Code.....	

IMPOST

Jurisdiction of superior court....	15
------------------------------------	----

IMPOTENCY

Ground for divorce.....	982
-------------------------	-----

IMPRISONMENT—See Arrest; Ar-
rest and Bail; Criminal Law

Contempt, offender liable when...	1059
Ground for divorce.....	982
Restriction on imposition by jus-	46
tice of peace.....	

INCEST—See Criminal Law

Falsely charging, action for.....	294
-----------------------------------	-----

INCORRIGIBLES—See Delinquent
Children and Juvenile Courts

Discharge from state training	1986
school	

INDECENCY

Public, penalty.....	2721½
----------------------	-------

INDEX

Clerk's record of judgments.....	446
----------------------------------	-----

INDIANS

Witnesses, competency.....	2147
----------------------------	------

INDICTMENT AND INFORMA- TION—See also Grand Jury

Animals, sufficiency of descrip-	2062
tion	
Arrest under not subject to ha-	1075
bear corpus	2057
Certainty in allegations required.	2059
Charging but one crime required.	2059
one form only.....	1060
Contempt, liability of offender...	2055
Contents of.....	2066
Defects, what deemed immaterial.	2303
Definitions	2074
Embezzlement, how pleaded.....	2074
False pretenses, descriptions of	2074
money, etc.	2054
First pleading by indictment or	2055
information	2071
contents	2045
Forgery, misdescription, when im-	2043
material	2042
Indictment, custody and inspec-	2056
tion	2043
defendant entitled to copy.....	2042
finding, number of jurors neces-	2056
sary	2043
form of.....	2044
indorsement of witness' names.	2047
when found at instance of	2048
private prosecutor.....	2046
"not a true bill," indorsement	2042
and filing, when	2050
finding and filing effects a dis-	2052
charge	2053
public record, when	2051
secrecy to be preserved.....	2068
signature of foreman.....	2067
Information, filing and indorse-	2074
ment	2070
commitment or recognizance of	2075
defendant held to answer...	2076
duty of prosecuting attorney as	2076
to examining offenses and fil-	2072
ing	2061
verification	
Judgment, how pleaded.....	
Judicial notice, matters of, need	
not be stated.....	
Larceny of money, how pleaded..	
Libel, how pleaded	
Obscene literature, etc., how	
pleaded	
Ownership of property, how	
pleaded	
variance, when	
Perjury, how pleaded.....	
Person injured, sufficiency of alle-	
gation	

INDEX—VOL. I.

[References are to Sections.]

INDICTMENT AND INFORMATION (Cont'd).

Presumptions of law not to be stated	2067
Private statute, how pleaded.....	2069
Prosecution by.....	2023, 2024
Setting aside, grounds for...	2099-2101
Several charged, conviction or acquittal of one or more.....	2073
Statutory definition of crime, how followed	2064
Sufficiency of allegation.....	2065
Time of offense, how alleged.....	2060
True name inserted, how and when	2058
Variance as to ownership, when immaterial	2076, 2156
Dismissal on ground of, no bar.	2316
Words and phrases, how construed	2063

INDIGENTS—See Paupers

INDORSEMENT

On indictments—See Indictment and Information	2042-2044
---	-----------

INFAMOUS CRIMES—See Criminal Law (felonies)

Ground for divorce, when.....	982
-------------------------------	-----

INFANTICIDE—See Criminal Law (abortion)

INFANTS—See Adoption; Guardian and Ward; Parent and Child; Probate Code

Admission or sending to disorderly house	2445, 2446
Adoption of—See Adoption..	1696-1700
Adverse parties incompetent as witnesses, when.....	1211
Age, determination of.....	2257
majority	1572
responsibility	2257
Appear in actions by guardian ad litem	187
Begging, employment as beggars, unlawful	2446
Billiard and pool rooms, admission unlawful, when.....	2445
Cigarettes, sale or gift to, unlawful	2445, 2696, 2701
smoking, unlawful	2700
Confession of judgment by.....	414
when by guardian.....	414
Costs against, responsibility of guardian	488
Crimes against children.....	2445-2447
Delinquent act controlling — See Delinquent Children and Juvenile Courts	1997
Delinquent, commitment to state training school.....	1980-1986, 2276
commitment to state reformatory, when	2277
Employment as messengers to disorderly houses, unlawful....	2446
at labor below certain ages, when unlawful	2447

INFANTS (Cont'd).

Exhibitions by, in immoral or dangerous shows, unlawful.....	2446
Firearms, sale to, when unlawful use of, when misdemeanor.....	2445, 2560
Friendless and neglected children, guardianship of.....	1700-1707
Gaming, unlawful to admit.....	2445
Guardian — See Guardian and Ward	
Habeas corpus, entitled to writ...	1064
Intoxicating liquors, unlawful to sell to	2445
penalty	2693
place of sale, admission unlawful	2445
Judgment against, vacated, when petition and affidavit.....	464, 467
Juvenile courts have control of— See Delinquent Children and Juvenile Courts	1987-1
Juvenile offenders, commitment to state training school....	1980-1986
guardian ad litem, for, when appointed	1981
Kidnaping, penalty—See Criminal Law	
Legal age.....	1572
Limitation of actions, suspended when	158, 169
Majority, age of.....	1572
Next friend, appointment in justice's court.....	1771, 1772
Obscene literature, etc., exhibiting or permitting sale by, unlawful	2459
Opium-houses, admission to, unlawful	2445
Orphans and neglected children— See Orphans.....	1700
Partition, compensation for inequality, when may make....	881
consent by guardian, when....	884
share payable to guardian, when	882
Prohibited from certain places..	2445
Responsibility for crime.....	2257
age, how may be determined..	2257
Rights as against claims under color of title	790
Sale of cigarettes to, civil liability to parent	2699
Substitution of one for another, penalty	2375
Summons, how served on.....	226
Tobacco, sale to, penalty.....	2445
Witnesses, incompetent when under ten years.....	1213

INFORMATION — See Indictment and Information; Quo Warranto

INJUNCTION

Additional conditions imposed in tax cases	957
Affidavits on hearing	723
Appeal, when remains in force... to United States supreme court, effect	1723, 1724

INDEX—VOL. I.

[References are to Sections.]

INJUNCTION (Cont'd).

Application may be heard on legal holiday	64
Attachment for contempt.....	732
arrest and indemnity.....	733
bond for appearance.....	734
Bond	725, 726
bail, in contempt for disobeying order	734
Chattel mortgages, against foreclosure, when	1110
Damages upon dissolution of stay for debt	736
for waste and rents.....	737
Dissolution of modification, motion for	735
damages, when awarded....	736, 737
suspension by motion to reinstate	738
Emergency, temporary grant until notice	722
Grant of restraining order, by whom	718
time of granting	721
Grounds for granting.....	719, 720
Jurisdiction of superior court....	15
issuable on nonjudicial days...	15
Limitations of actions, suspended by	172
Malicious erection of structures..	720
Mandatory	720
Moneys collected on enjoined judgment	731
Notice of application excuses service of writ.....	730
necessary, except in emergency	722
Order, binding when and on whom	729
disobedience of, contempt.....	732
Power of judge same as court...	739
Proceedings to vacate judgment..	471
Reinstatement of dissolved order	738
motion and hearing.....	738
Restraining orders, in emergency cases	722
waste on public land by opposing claimant	941
Stay of proceedings.....	728
dissolution, award of damages	736, 737
Supplemental proceedings, enjoining transfers	624
service of order.....	625
Tax cases, tender necessary.....	955
Temporary	719
appeal from order, when.....	1716
time of taking.....	1718
court commissioner may grant.	85
Terms and conditions of granting	724
Writ, copy of order sufficient ...	727

INNKEEPERS—See Hotels

INQUEST

Jury of, defined	93
------------------------	----

INSANE PERSONS—See Guardian and Ward; Probate Code

Adverse parties incompetent witnesses, when	1211
---	------

Rem. Wash. Code, Vol. I—83

INSANE PERSONS (Cont'd).

Alienation of homestead, how.	554— 557
Aliens removal from one institution	2284
Criminal insane, definitions.....	2173
acquittal, special verdict to be returned	2175
committed, when	2176
discharged, when	2176
plea of insanity, how and when	2174
Dementia, when ground for divorce ..	982
Guardians—See Guardian and Ward; Probate Code	
Habeas corpus, entitled to writ...	1064
Inquest before court commissioner	85
Judgment against, vacated when.	464
petition and affidavit.....	467
Limitation of actions suspended during liability	169
Partition, share payable to guardian, when	882
consent by guardian, when.....	884
Rights as against claims under color of title	790
Ward, claim against, how approved	1577
Witnesses, incompetent as.....	1213

INSOLVENCY—See Assignment for Benefit of Creditors

Decedent's estates, order of payment of claims.....	1541
Jurisdiction of superior court...	15
Laborer's claims entitled to preference	1153
Receiver appointed, when.....	741

INSTRUCTIONS—See Trial

Exceptions, how taken	384
-----------------------------	-----

INSURANCE

Proceeds exempt	568, 569
Process summons, service on whom	226

INTENT

To defraud, to whom applicable	2292, 2303
--------------------------------------	------------

INTEREST

Charging unlawful rate.....	2486
Judgment, contract or legal rate.	457

INTERPLEADER

Action of.....	199— 201
costs	200
Authorized, when.....	196, 198

INTERROGATORIES

Annexing to commission to take depositions	1240
Examination of parties to actions—See Discovery	1225— 1230
Perpetuating testimony	1252

INTERVENTION

Defined	202
Foreclosure of mechanics' liens...	1140
Practice in	203

INDEX—VOL. I.

[References are to Sections.]

INTESTATE — See Descent and Distribution; Executors and Administrators; Probate Code	
INTOXICATED PERSONS — See Criminal Law (drunkards)	
INTOXICATING LIQUORS	
Admission or employment of females in places where sold, prohibited	2689
Drinking in public conveyances..	2693
common carrier not to permit..	2694
Fraudulent prescription by physician	2510
Low wines, etc., compounded and sold as whisky, gin or brandy	2696
Minors not to be admitted where sold	2445
sale or gift to, penalty.....	2445
using, penalty	2445
Public conveyances, not to be drunk on	2693, 2694
sales of improperly aged liquors to convicts	2689
to drunkards	2689
to minors	2445
Saloons, obstructing view of.....	2495
unlawful to permit minors to enter, penalty	2445
INTOXICATION	
Offense and penalty	2527
INVENTORY —See Executors and Administrators	
Assignment for benefit of creditors ..	1088, 1089, 1096
Attached property	666
Guardian to make.....	1575
IRRIGATION	
Malicious injury to flumes and ditches	2657
Wrongful taking of water.....	2657
ISSUES —See Trial	
JOINDER OF ACTIONS	
Causes united, when	296
Improper, ground for demurrer..	259
JOINT CONTRACT	
Actions on, service and procedure	236
JOINT DEBTORS	
Answer of defendant.....	439
Issues, how tried.....	441
Pleadings, what constitute.....	440
Summons, after judgment	436
affidavit in support of.....	438
to contain what.....	437
Supplemental proceedings against Verdict, extent of.....	633, 441
JOINT TENANCY	
Liability for waste.....	938
Survivorship between, abolished.	1344

JUVENILE COURTS — See Delinquent Children and Juvenile Courts	
JUDGES	
Attorney in federal court to finish business after appointment..	127
Certification of statement of facts after removal	392
Claim of, against estate, referred to another.....	1481
Court commissioners, appointment by	83
Definition	2303
Disqualification justifying change of venue	209
Judicial officer, defined.....	54
disqualifications, waiver	54
minor courts, restrictions on language	2696-1
Oaths, power to administer.....	1264
Powers as distinguished from court	56
Probate powers.....	1371
Superior court, bias, disqualifies when	209-1
bonds of clerk to be approved by	70-72
duty to hold court in other counties, when	27, 28
powers	59
granting injunctions	718, 739
in chambers.....	1445
in counties comprising district	41
decisions rendered out of county where heard.....	42
probate	1371
practice of law prohibited.....	139-5
prejudice of, how shown.....	209-2
pro tempore, appointment, etc..	40
time for decision limited.....	39
visiting judge, effect of acts..	29
expenses, allowance and payment	30
Supreme court, assignment to departments	8
disqualification not to be waived, when	54
habeas corpus, power to issue writ	1
magistrates	51
powers of	59
powers of.....	59
Surety on executor's bond, not to act as.....	1441
Term applied to whom.....	2303
Vacancy not to affect proceedings	67
JUDGMENT —See Appeal and Error; Criminal Law; Justices of the Peace	
Action to recover personalty, nature of.....	434
Against decedent's estate, how collected	1480
executor on rejected claim, effect of.....	1483

INDEX—VOL. I.

[References are to Sections.]

JUDGMENT (Cont'd).

municipal corporations, counties, etc., manner of enforcing...	953
whom may be given.....	406
Agreed case	379, 380
Appeal, orders reviewable.....	1716
time of taking.....	1718
Arrest of, in criminal cases..	2183, 2184
Assessment of damages on de- fendant's demand	251
Assignment houses	946-1
Assignment of, recording..	447, 448
Attachment, favor of defendant, effect	670
award affirmed has force of...	430
judgment on	422
suspended, when.....	651
Certiorari	1007, 1009
Commitment upon process, when not subject to habeas corpus	1075
Conclusiveness against unknown parties served by publication	232, 239
in probate	1504
Confession of, corporations may..	414
enforcement of.....	415, 419
entry of	419
in action, given when.....	413
joint liability, how given on...	415
justice of the peace, jurisdiction	44
manner of making.....	416
minors may, when	414
municipal corporations may...	414
proceedings in court.....	419
state may, when	414
statement required	418
without action, authorized when	417
Contempt, sentence for.....	1057
award of damages bars action for injury	1058
Counterclaim in ejectment.....	799
Court may direct, when.....	340
Cumulative sentence in criminal cases	2285
Default against executor or admin- istrator, not evidence of as- sets	969
failure to answer.....	411
forcible entry and detainer....	822
garnishment	692
opening, allowed when no per- sonal service	235
power of court commissioners to enter	85
Defined	404
Dismissal, when granted	408
effect of	410
Disobedience as contempt of court	1049
Divorce, complete dissolution of marriage	990
requisites of decree	996
Ejectment, conclusiveness	806
conclusive against landlord, when	794
vacation of	806
Eminent domain..	895, 896, 916, 926, 927
Enforcement by attachment or se- questration	612

JUDGMENT (Cont'd).

by conveyance, commissioners for	605- 612
by execution	510, 512
by writ commanding perform- ance of act.....	512
refusal to obey, punished as contempt	512
logger's liens	1179
Entry, by whom and where.....	435
on verdict.....	431
time for.....	431
writing	431
Evidence of jurisdiction, when...	287
Existing liens, continued.....	456
Federal courts, entry of satisfac- tion	455
Fines and forfeitures, amount of recovery	964
collusive, no bar to other actions	965
Forcible entry and detainer.....	827
Foreign, effect as evidence..	1255, 1256
defenses to suits on.....	1256
pleaded, how.....	287
Forfeited recognizances, entry on	2231
vacated, when	2233
Garnishment, against garnishee..	693
in justice's court.....	1817, 1819, 1822, 1834, 1835
Interest, contract or legal rate..	457
Interlocutory orders in divorce...	988
Judgment-roll, what constitutes.	442
indorsement of	443
Justice of the peace, contempts..	1896
abstract, contents of.....	451
entry of abstract or transcript.	453
lien of judgment, how created	450
transcript, what to contain....	452
Lien, chattel, personal.....	1157-a
duration of.....	445
effect of appeal	458
expires, when.....	459
homestead, not to attach to...	562
initiation of	445
limitation	459
begins to run when, on appeal	458
revival	463
Limitation on actions upon.....	157
Lost or destroyed, how restored..	1271- 1277
Mandamus	1024
Mechanic's lien foreclosure, per- sonal liability on.....	1141
Merits, judgment on.....	409
Nonsuit, when granted.....	408
effect of	410
Obedience to, power of court to compel	52, 57
Official bonds, for one delinquency no bar to others.....	961
aggregate judgments, limit of.	962
Order defined	405
Pleaded, how	287
Pleadings, judgment on	278
Preference right of satisfaction out of estates of decedents..	1541
Proceedings under, may be en- joined	719

INDEX—VOL. I.

[References are to Sections.]

JUDGMENT (Cont'd).

against joint debtor served after	
.....436-	441
Quo warranto, on trial of right to	
office	1039
ouster, when made.....	1043
relator to take office under judg-	
ment, when	1040
Record by auditor, index of.....	446
in probate proceedings.....	1372
Relief from	303
Report of referee, affirmance by	
court	377
Reversal for harmless error denied	307
Revival, procedure.....462,	463
limitation of lien.....	463
pleading and proof.....462,	463
prohibited	460
exception from prohibition..	461
Satisfaction of, judicial officers	
may acknowledge.....59,	60
entry on execution docket..454,	455
how made against state.....	889
recording	447,
448	
Sentence in criminal cases...2187-	2224
cumulative, when	2285
indeterminate, when	2281
satisfaction before justice.....	1933
suspended, when	2280
Setoff or affirmative relief.....	433
force and effect.....269, 271½,	272
Setting aside, grounds.....	399
Several defendants, against.....	407
Special proceedings, determines	
what	1000
Specify what.....	435
Subrogation of sureties, etc.....	978
Superior court, by one of several	
judges, effect	29
Supreme court, enforcement of..	1741
effect of.....	14
power to execute.....	2
Sustaining demurrer to indict-	
ment, etc., when final.....	2106
no bar, when.....	2114
Transcript of supreme court, au-	
thority of	1751
Vacation, acquittal in criminal ac-	
tion, not subject to.....	472
denial of application, judgment	
on	473
grounds for.....303,	464
trial before deciding validity	
of defense	470
injunction on petition to vacate,	
when	471
motion to vacate.....	466
limitation on	466
new trial, petition for.....	465
limitation on application....	465
petition to vacate.....465,	467
limitation on petition	467
powers herein concurrent with	
other provisions	472
proceedings	468
relief from, when.....	303
valid cause of action or defense	
necessary	469

JUDICIAL NOTICE

Ordinances of cities and towns...	291
Private laws.....	289

JUDICIAL OFFICERS

Act as attorney, when.....	55
Adjournment of proceedings,	
power of	66
Arbitrators	426
Contempt, power to punish.. 57,	1050
committed in presence of, pun-	
ishment	1051
without the presence, proced-	
ure	1052
Court commissioners are	85
Defined	54
Disqualifications	54
Powers, generally	57
Referees	369- 377

JULY FOURTH

Legal holiday	61
---------------------	----

JURISDICTION—See Courts; Jus-

tice of Peace	
Acquisition in actions, when.....	238
Conferred, power of courts to	
make effective	69
Court commissioners, concurrent	
with superior court.....	85
Crimes on railway trains, boats	
etc.	2293
Criminal, over persons.....	2010
Excess of, acts reviewable by cer-	
tiorari	1002
restrained by writ of prohibition	1027
Justice of the peace—See Justice	
of Peace	
Juvenile court has exclusive, over	
children	1987-12
Probate, where estate in more	
than one county	1285
State courts not ousted by foreign,	
in criminal matters.....	2270
Superior court, appellate	17
original	15
probate powers	1278
Supreme court, original and appel-	
late	1
Want of, ground for demurrer...	259
waiver of, not permitted.....	263
Without, acts may be restrained	1027

JURORS—See Grand Jury; Jury

JURY—See Grand Jury

Additional jurors, when may be	
drawn	99, 2137-1
Admonitions to	345
Alternates, in criminal cases....	2137-1
Agreement of, proceedings.....	356
Bribery of	2320, 2322
Challenges, number and kind.....	324
bias, actual and implied....329-	331
exemption not cause of chal-	
lenge	98, 332
for cause	326- 331
general causes	327

INDEX—VOL. I.

[References are to Sections.]

JURY (Cont'd).

particular causes.....	329
previous service within one year	328
joinder in	324
order of taking	334
peremptory	325
how taken	333
timeliness of objection.....	103
trial of challenges	335-337
Contempt, what constitutes.....	1049
Criminal cases, number required.	2137
challenges, peremptory, number allowed	2138, 2139
for cause, when allowed.....	2141
for conscientious scruples as to capital punishment.....	2142
to panel, when allowed.....	2140
civil practice applicable.....	2137
justice of peace, either side may demand	1927
number of jurors in panel....	1927
oath to	2143
separation allowed, when.....	2159
view of place of crime.....	2160
waiver, when allowed.....	2144
Custody during trial.....	101
Damages assessed by, on default	411
Definition of	89, 2303
Deliberations of jury.....	349
communication with prohibited	349
entitled to pleadings and papers	351
expense of keeping.....	350
further instructions	352
Discharge after verdict	361
for illness	347
without verdict, when	353
effect on trial	354
Districts, boundaries.....	96
Drawing jurors, method of.....	96
in absence of judge, when.....	105
misconduct of officer, gross mis- demeanor	2327
Election of jury trial, notice, when	316
proceedings, how called....	894, 911
verdict, number required for..	914
view of premises.....	912
waiver of	915
Examination as witness.....	348
Excused from duty, who may be.	104
name replaced in box.....	100
Exemption from duty.....	95, 103
women, on request.....	96
Fee for, deposit and taxation.	316, 317
taxed to defendant on convic- tion	2227
Grand jury, defined—See Grand Jury	91
Impaneling	323
Inquest, jury of, defined.....	93
Instructions to	339, 352
may be given on legal holiday..	64
Irregularities in drawing not to invalidate	106
Issues of fact triable by, excep- tions	314, 315

JURY (Cont'd).

Juror, bribery of	2320
alternates	2137-1
acceptance of bribe.....	2322
defined	2303
excused from service.....	104
exemption from duty.....	95, 103
women, on request.....	96
felon, incompetent.....	95
influencing, gross misdemeanor.	2325
intimidating, penalty	2368
list of qualified persons, how prepared	96
yearly revision	96
mileage, verification necessary.	498
traveling expenses in lieu...	509
promising verdict, penalty.....	2326
qualifications of	94, 102
sheriff to summon.....	108
soliciting duty as.....	2328
summoning twice in one year prohibited	111
Justice's Court—See Justice of the Peace	1849-1856
Kinds of	90
Lists, how made up.....	96
Misconduct as ground for new trial	399
by officer in charge, gross mis- demeanor	2329
Number required for agreement..	358
reduction in number by consent.	323
Oath of	338
Open venire to issue, when.	99, 107-110
Panel, how and when to be drawn.	97
additional names, open venire..	99
incomplete, how filled.....	110
Penalty for soliciting place on...	2328
Petit jury, defined	92
summoned on order of superior court	97
Polling	359
Questions of fact decided by.....	343
Right of trial by guaranteed.....	369
Separate criminal trial.....	2161
Separation of	101
Sickness of juror, procedure.....	347
Soliciting jury duty, gross misde- meanor	2328
Talesmen, summoning of.....	323
Trial by, dispensed with in di- vorce	997
forcible entry and detainer....	824
Verdict, abstract of.....	431-2
action for specific personalty...	363
assessment of amount of dam- ages	366
on judgment on pleadings, when	366
correction of	360
entry, manner and affect.....	431-1
filing abstract of.....	431-2
general and special defined.....	362
lien of, termination.....	431-2
manner of giving.....	357
rendition, when	364
special controls general.....	365
time for entry of judgment on.	431

INDEX—VOL. I.

[References are to Sections.]

JURY (Cont'd).	
View of premises.....	344
Waiver, failure to deposit jury fee constitutes	316

JUSTICES OF THE PEACE

Acts of attorneys permitted, when	55
Actions by complaint and notice..	1759
by summons	1758
commenced, how	1755
Appeals authorized, when.....	1910
bond for	1911
dismissal for defective bond, when not allowed.....	1917
issues, how tried.....	1915
judgment against appellant and sureties	1918
notice of	1911
pleadings, same, unless other- wise ordered	1915
stay of proceedings.....	1911, 1912
discharge of defendant.....	1913
release of property levied on.	1913
superior court acquires jurisdic- tion, when	1914
transcript filed in superior court	1914
attachment to obtain or amend, when	1916
trials de novo by superior court	1914
Appearance, time for.....	1773
Arrest and bail, generally.....	748- 777
causes and proof for warrant..	1790
cash in lieu of bail.....	1957½
continuance, how obtained....	1795
detention in custody, duration..	1794
notice of arrest and indorse- ment of warrant.....	1793
warrant, bond for.....	1791
service of	1792
issuance of	1790
Attachment proceedings, extent of power	679
clerk of court in.....	679
writ must be served by an offi- cer	1762
Bail, cash in lieu of bond.....	1957½
Buying claim or offering induce- ment to bring suit before pen- alty	2371
Certifying habitual drunkard to superior court	1709
Certiorari, no power to grant.....	1002
Claim and delivery—See replevin, this title	
Claims department—See small claims, this title	
Compensation limited to schedule	1866
Complaint and notice, how served	1761, 1762
Contempts, commitment, warrant for	1897
hearing required	1893
judgment, form of.....	1896
offenses constituting	1891
provisions governing	1062
punishment	1892
summary arraignment, when...	1894
warrant, form of.....	1895

JUSTICES OF THE PEACE (Cont'd).

Continuance, grant on account of amendment, when	1788
Costs allowed	1860- 1862
on appeals	487
security required of nonresident	1777
Criminal action—	
appeal, bond of defendant.....	1919
fees not payable in advance.	1920
payment included in sen- tence	1920
notice of	1919
order binding defendant to keep peace appealable...	1922
failure to prosecute appeal, effect	1924
powers of superior court...	1923
recognizance forfeited, when.	1920
of witnesses	1921
transcript of record to supe- rior court	1921
arrest for offenses within view, procedure	1926
warrant issued, when.....	1925
bail—See arrest and bail, supra committing magistrate, when acts as	1927- 1928
continuance, when granted.....	1932
costs of, how taxed.....	1932
fine assessed only on evidence..	1931
forms, certificate of conviction	1935
commitment on sentence.....	1035
when defendant bound over	1935
execution of sentence.....	1935
search-warrant	1935
warrant for arrest.....	1935
to keep the peace.....	1935
judgment, rendition and satis- faction	1933
jury may be demanded by either side	1927
plea of guilty.....	1929
recognizance of defendant.....	1932
of witnesses	1932
stay of execution, how procured	1934
verdict, proceedings on.....	1928
witnesses to be summoned.....	1930
Depositions, authority to take....	1907
how taken and certified.....	1908
use of, on trial.....	1909
Docket, entries required.....	1770
Execution against the person, when	1885
against prevailing party for costs	1887
amount of debt, etc., indorsed on	1880
claim by third persons, proced- ure	1888, 1889
garnishees summoned and ex- amined, when	1886
issuance by another justice, on transfer of docket.....	1877
directed how, and date return- able	1879
on transcript to other county	1878
limitation on issuance.....	1876
renewal	1881

INDEX—VOL. I.

[References are to Sections.]

JUSTICES OF THE PEACE (Cont'd).

revocation on stay of judgment	1872
sale, notice of.....	1882
mode of, and return.....	1883
officer not to buy.....	1884
service must be by an officer..	1762
setoff of mutual judgments....	1873
execution for balance.....	1875
procedure, when judgments	
by different justices.....	1874
stay, time allowed.....	1867
bond for stay.....	1868, 1869
levy against property of prin-	
cipal or bail.....	1870
remedy of bail.....	1871
subrogation of bail, when....	1871
False return, etc., penalty for...	1776
Fees, schedule of.....	1864
allowance, when justice salaried	1865
Filiation proceeding jurisdiction..	1971
Forms—	
attachment, bond for.....	1890
bond to discharge.....	1890
writ of.....	1890
bond for arrest.....	1890
in attachment	1890
in replevin.....	1890
civil arrest, bond on.....	1890
warrant for	1890
claim bond to constable.....	1890
commitment on sentence.....	1935
where defendant bound over	1935
complaint and notice in justice's	
court	1759
conviction, certificate of.....	1935
execution on property.....	1890
against the body.....	1890
against principal and surety	
on stay bond.....	1890
garnishee summons in justice's	
court	1808
indemnity bond on claim of	
property	1890
judgment in contempt cases....	1896
replevin, bond in.....	1890
order in.....	1890
search-warrant	1935
sentence, execution of.....	1935
service by publication in jus-	
tice's court.....	1766
stay bond, justice's court.....	1869
subpoena	1890
summons in civil actions in jus-	
tice court.....	1758
for jurors in justice's court..	1852
warrant of arrest.....	1935
contempt cases	1895
to keep the peace.....	1935
writ of garnishment, justice's	
court	1826
Garnishment, action, when deemed	
commenced	1812
affidavit for	1807
appearance after default, when	
allowed	1821
costs, how taxed.....	1816-1818

JUSTICES OF THE PEACE (Cont'd)

default by garnishee, proceed-		1820
ings		1815
defendant may defend action..		1812
docket entry of action.....		1813
examination of garnishee, how		
conducted		1813
answers reduced to writing		
and filed		1813
exemptions allowed		703
final judgment against garnishee		1819
garnishee, judgment against,		
when		1817
liability to plaintiff.....		1811
indemnity for surrender of ne-		
gotiable paper.....		1819
judgment a bar to action by de-		
fendant		1822
provisions governing superior		
courts inapplicable		706
service on garnishee.....	1807,	1809
summons, form of.....		1808
trial on answer of garnishee...		1814
writ of, justice may issue.....		1823
affidavit to obtain.....		1824
answer of garnishee to be ver-		
ified		1832
unnecessary to plead de-		
fendant's defenses		1846
attachment of garnishee for		
contempt		1838
attorney's fees, allowance of.		1843
bank as garnishee, requisites		
of service		1829
bond to release garnishee...		1831
corporate shares of garnishee,		
sale and transfer on execu-		
tion	1839-	1841
costs, how taxed.....		1843
custody of surrendered prop-		
erty pending final judgment		1837
default by garnishee, judg-		
ment entered		1834
defendant may set up any ex-		
emption available, on gar-		
nishee's trial		1846
delivery to whom.....		1827
discharge of garnishee, when.		1833
effect of service.....		1830
execution against garnishee.		
.....	1836,	1837
form of writ.....		1826
garnishee's defense against		
defendant		1844
identity of defendant and gar-		
nishee's creditor, trial and		
determination		1845
issuance and contents.....		1825
judgment in		1834
against garnishee		1835
service and return.....	1825,	1828
surrender of property by gar-		
nishee		1837
trial on answer of garnishee		1842
General powers of.....		43
Guardian ad litem, appointment..		
.....	1171,	1772
Judgments, abstracts of.....		451

INDEX—VOL. I.

[References are to Sections.]

JUSTICES OF THE PEACE (Cont'd).

attorney's fees allowed as costs	1862
default, when	1858
evidence on	1858
vacation of	1858
dismissal without prejudice...	1857
for costs	1862
liens, how created	450
on realty, how secured...	445, 450
rendition on verdict, when....	1859
entry, time of, on trials by justice	1859
setoff allowed, to what extent.	1861
tender, judgment in case of....	1860
transcript, what to contain....	452
Jurisdiction, coextensive with county	47, 1757
civil, extent of	44
restrictions on	45
criminal cases	46
filiation proceedings	1971
libel and slander, none	45
when deemed acquired	1769
Language to be temperate	2696-1
Magistrates	51
Mandamus, no power to grant....	1014
Minors brought before, to be transferred to juvenile court	1987-12
Ne exeat, jurisdiction in	783
Next friend, appointment....	1771, 1772
Notice, form of, in actions by....	1759
Oaths, power to administer	1264
Office, where to be kept	48
not to office with attorney	49
Pleadings—	
account or instrument, how pleaded	1783
exhibition of original may be required	1783
allegations, when deemed admitted	1785
amendment	1786, 1788
time when may be allowed.	1788
composed of what	1779
denial of knowledge or belief, effect	1782
docketing and filing	1781
objections, grounds of	1786
oral or written	1780
form immaterial	1781
setoff, how pleaded	1789
time of	1778
variance, when immaterial....	1787
verification	1784
Preliminary examination of persons accused of crimes..	1949-1966
Process, by whom served....	1762, 1764
coextensive with county	48
service by person appointed...	1764
fees for	1764
proof of	1765
style of	1762
Prohibition, writ of, no power to grant	1028
Public peace, preservation, commitment to jail, when	1941
complaint of threatened offense	1937

JUSTICES OF THE PEACE (Cont'd).

costs, complainant to pay, when against defendant, how enforced	1942, 1943
discharge of defendant, when.	1942
on giving bond	1944
examination of accused	1938
transcript of testimony	1938
jurisdiction to preserve	1936
recognizance, discharge on....	1944
forfeited, remission of portion of penalty	1947
in case of apprehended danger	1940
surety may surrender principal	1948
transmission and filing in superior court	1945
without process, when	1946
warrant, when to issue	1939
Replevin, affidavit for	1797
buildings or inclosures, officer may break	1803
claim by third party, proceedings	1805, 1806
custody and delivery by officer	1804
exceptions to plaintiff's sureties	1800
immediate delivery, when may be claimed	1796
bond for	1799
execution of order	1799
order for	1798
redelivery bond	1801
sureties on, justification	1802
service on defendant	1799
writ must be served by an officer	1762
Residence confined to precinct..	47
Return of process, mode of	1763
Salaries—See cities, this title	
Stay of proceedings pending giving of security for costs	1777
Small claims department created.	1777-1
actions, how commenced	1777-2
filing fee	1777-3
attorneys unnecessary	1777-8
docket	1777-12
judgments, certification	1777-11
conclusive	1777-11
entry	1777-11
satisfaction	1777-10
jurisdiction	1777-1
notice, how served	1777-4
contents of	1777-6
pleadings not required	1777-9
records	1777-12
statement of claim	1777-5
verification	1777-7
witnesses	1777-8
Summons, form and requisites...	1758
service by publication, form of	1766
proof of	1767
written admission equivalent to proof	1768
service of	1758, 1762
Supplementary proceedings on judgments, how	635
title to land in issue transfer to superior court	1863

INDEX—VOL. I.

[References are to Sections.]

JUSTICES OF THE PEACE (Cont'd).

Trial of actions, continuance, limit allowed	1847
juror, penalty for failure to appear	1856
jury, demand for.....	1849
discharge for disagreement..	1855
failure to appear, penalty....	1856
fee for, advanced	1849
number and qualifications..	1849
oath of	1853
selection of	1851
summons, form and service..	1852
trial, time of holding.....	1850
justice tries cause unless jury demanded	1848
verdict, delivery of	1854
disagreement, discharge of jury	1855
Vagrants, proceedings against...	1968, 1969
Venue in certain cities.....	1756
change of, costs of.....	1774
grounds for allowance.....	1775
Witnesses, attachment for.....	1900
attendance may be compelled..	1215
power of superior court to compel	1236-1238
damages for nonattendance....	1902
depositions of.....	1907-1909
parties as witnesses, when.	1903, 1906
penalty for refusal to testify.	1905
testimony subject to rebuttal	1904
service and costs in attachment	1901
service, by whom	1899
subpoena, valid over what territory	1898
when may issue.....	1217

JUVENILE COURT — See Delinquent Children and Juvenile Courts

KIDNAPING—See Criminal Law

KIN—See Descent and Distribution

LABOR

Wages, exemption in garnishment	703
no exemption against.....	564
preferred payment out of decedent's estate.....	1205, 1541
claims on death or insolvency of master	1204, 1205
presentment of claim and action on	1206

LABOR DAY

Legal holiday	62
---------------------	----

LABORERS' LIENS—See Liens; Mechanics' Liens

LANDLORD AND TENANT—See Forcible Entry and Detainer; Waste

Abrogation of relation by forcible entry	810
--	-----

LANDLORD AND TENANT (Cont'd).

by forcible detainer.....	811
unlawful detainer.....	812
Lien of personalty for rent.....	1203-1
enforcement	1203-2
Lien on crops for rent.....	1188
claim, filing and verification...	1190
enforcement of claim.....	1190
priority of	1189
Notice to quit.....	812, 814
Partition, estate for years, when may be sold	867, 868
how set off.....	851
Rent, lien for.....	1203-1

LANDMARKS

Malicious injury to.....	2656
--------------------------	------

LARCENY—See Criminal Law

LAWS

Common law, how far prevails..	143
Construction of, to be liberal....	144
words importing number, gender and sex	148
Continuations of former laws, when	145
Foreign, printed copies as evidence	1259
Former laws abrogated.....	145
Lex loci contractus, applicability to limitations	178
Probate, see Probate Code	
Statutes—	
construction of	144
in pari materia.....	145
provisions of lien laws.....	1208
criminal code, rule of construction	2294, 2298
common law to supplement...	2299
continuation of prior acts....	2300
former laws repealed.....	2301
revival not effected by repeal	2302
foreign, admissible as evidence, how	1259
official codes and citation of... ..	151, 152, 152-5, 152-9
pleaded, how	289
in indictments, etc.	2069
private, how pleaded.....	289
repeal or amendment of penal, effect	2006
time, how computed	150
words, certain, how construed..	
.....	146-149

LAWYERS—See Attorneys

LEGACIES—See Wills

LEGAL HOLIDAYS—See Holidays, Legal

Legal newspaper—See Newspapers 253-1

LEGISLATION—See Laws; Legislature

INDEX—VOL. I.

[References are to Sections.]

LEGISLATURE

- Disturbing or disorderly conduct
in presence of 2337
- Intimidation of member, gross mis-
demeanor 2337
- Witness, penalty for refusal to tes-
tify before 2338

LETTERS—See Executors and Ad- ministrators

- Malicious concealment..... 2660
- Sending, complete when..... 2274
- Unlawful opening 2663

LEVY—See Attachment; Execution

LEWDNESS—See Criminal Law

- Places of, abated—See Prostitu-
tion 946-1

LIBEL AND SLANDER

- Answer in justification..... 293
- Costs limited 477
- Criminal libel—See Criminal Law
- Falsely charging certain crimes,
action 294
- Justice of peace has no jurisdic-
tion 45
- Limitation on civil action..... 160
- Pleaded, how 292
- answer 293

LIBRARIES

- Exemption of private from execu-
tion 563

LICENSES

- Aliens, to carry firearms.....2517-1
- Attorneys, to practice—See Attor-
neys

LIENS—See Execution; Judgment; Mechanics' Liens

- Attorneys, when exist..... 136
- Boats and vessels, enforcement of
.1183, 1186
- limitation on actions.....1182, 1185
- stevedoring services1184, 1187
- priority of demands for wages 1185
- subject to, when ...1182, 1184, 1187
- towage services entitled to..... 1187
- Chattels, discharge as against
third persons..... 1154
- attaches regardless of posses-
sion 1154
- attorney fees..... 1157a
- costs, fees..... 1157a
- enforcement, how 1157
- judgment for deficiency.....1157-a
- filing and entry in county aud-
itor's office..... 1158
- labor preferred to material....1157-a
- or material on..... 1154
- legal owner, who deemed to be 1156
- limitation on lien..... 1154
- action on 1157
- materials subsequent to labor.1157-a

LIENS (Cont'd).

- notice of claim, form of..... 1155
- time of filing..... 1155
- preferences, labor over material 1157-a
- over mortgages..... 1156
- rank declared..... 1157a
- priority of lien..... 1156
- rank to be fixed by court..... 1157a
- subject to, when..... 1154
- Construction of statutes relating
to1208, 1209
- Crops, subject to for labor or rent 1188
- claim, time and manner of mak-
ing 1190
- enforcement of 1190
- priorities 1189
- procedure under logging lien
laws 1190a
- Farm products 1190
- recording dispensed with, when 1190
- Fines, judgment for 2188
- Freight charges, sale for — See
warehouse charges, infra
- Innkeepers, hotels and boarding-
houses—See Hotels.....1201- 1203
- Judgment, how acquired and dura-
tion 445
- expiration 459
- revival, continuation of..... 463
- Laborer's liens on property and
franchises 1149
- foreclosure 1152
- limitation on 1152
- limitation on filing..... 1149
- orchards—See below, this title
- notice of claim, contents..... 1150
- filed where 1150
- service of.....1150, 1151
- priority of 1149
- receiver or assignee to pay,
when 1153
- Landlords' lien for rent.....1203-1
- enforcement1203-2
- limited to two months.....1203-1
- on crops—See crops, supra
- Livestock, for care and feeding.. 1197
- enforcement of1198, 1199
- action for 1200
- sale, how made..... 1199
- waiver of lien not accomplished
by delivery 1200
- Logging, attorneys' fees..... 1178
- claim for labor, etc., form of... 1168
- filed where, and when...1168, 1169
- recording and indexing..... 1170
- fees for recording..... 1170
- statement of1168, 1169
- costs, what allowed as..... 1178
- eloignment, etc., ground for
damages 1181
- enforcement of lien, jurisdiction
and procedure 1172
- against whole or part of logs
or lumber 1175
- amendment of pleadings..... 1174
- costs, allowance and security
for 1173
- pleadings of defendant..... 1174

INDEX—VOL. I.

[References are to Sections.]

LIENS (Cont'd).

sheriff as receiver, fees.....	1173
surrender of custody, when	1173
joinder of claimants.....	1178
limitation on claims.....1166,	1167
on action to enforce.....	1171
lumber defined.....	1163
material lienable.....1162,	1163
mistakes or errors in claim not to invalidate, except	1176
persons entitled to.....	1162
preferred claims.....	1165
priority of	1165, 1175
purchaser, liability of.....	1177
sale on judgment, manner of...	1179, 1180
proceeds, apportionment	1179
stumpage, owner's lien.....	1164
Mechanics—See Mechanics' Liens	
Orchards, labor liens on.....1131-1	
enforcement	1131-2
limitation of actions.....1131-3	
time for filing.....1131-2	
Partition, adjustment in actions for—See Partition	
Rent, property subject to lien for.1203-1	
Storage charges—See warehouse charges, infra.	
Verdicts, by filing abstract.....	431
subordinate to judgment.....	431-1
termination of.....	431-2
Warehouse charges and advances, lien for	1191
sale to satisfy.....1192,	1193
livestock or perishable prop- erty, when sold.....	1193
notice, how given.....	1196
proceeds, how applied.....	1194
special contract, effect of...	1195
Wharfage charges, sale for...1191-	1196

LIFE ESTATES

Creation by will, effect.....	1410
Partition, how set off.....	851
sale of interest.....	867
sum in gross to be paid...868,	869

LIGHTHOUSES

Malicious injury to.....	2665
--------------------------	------

LIMITATION OF ACTIONS

Absence or concealment, effect on	168
Against sureties of executors, etc.	1450
Appeal to supreme court.....	1718
from county commissioners....	164
from justices of the peace.1911,	1919
Assault and assault and battery..	160
Bar of statute, ground for demur- rer	259
removal by new promise.....	176
Claims against state, general pro- visions applicable	890
county, rejected by commission- ers	164
decedent's estates, barred when.	1483
presentment	1484
rejected, action on	164, 1547

LIMITATION OF ACTIONS (Cont'd)

special administration not to affect	1455
suspension of statute, when..	1485
insolvent estates.....	1097
wards, against	1577
Commencement after accrual lim- ited	155
Contest of will.....	1379
Contract in writing.....	157
not in writing.....	159
Counties governed by law of....	167
Criminal prosecutions.....	2005
computation where indictment set aside	2005
none in murder cases.....	2005
Damages for usurpation of office	1042
Default, opening, where no per- sonal service	235
Disability, when available.....	174
cumulative disabilities, rule as to	175
Executor, etc., for mismanagement of estate	161
False imprisonment.....	160
Foreign statutes, how applied...	178
Forfeiture or penalty to state....	160
Fraud, relief on ground of.....	159
Infants, time extended, when....	158
Judgment or decree	157
Laborers' lien foreclosure.....	1152
Libel and slander.....	160
Liens on boats and vessels...1182,	1185
chattels, enforcement of.....	1157
orchards, enforcement of.....1131-3	
Loggers' liens, enforcement of...	1171
Mechanics' liens, foreclosure.....	1138
Minors, time extended when.....	158
Municipal corporations governed by law	167
Mutual accounts	166
Objections raised by answer or de- murrer	155
Payments on debt, effect of.....	177
Penalty or forfeiture.....159,	160
provided by statute.....	163
Personal property, taking or in- juring	159
Real property, recovery of....156,	786
sold by executor, etc.	158
sold by guardian	158
title acquired under tax or exe- cution sale, or of record from state or United States.....	786
Relief not otherwise provided for	165
Removal of bar, what sufficient..	176
Rents and profits of realty.....	157
Seduction or breach of promise..	159
Sheriff, constable or coroner.....	159
for escape of civil prisoner...	161
State not restricted by provisions	167
Suspension of statute by absence or concealment	168
by death	170
by disability, personal.....	169
by judicial proceedings.....	172
by reversal of judgment.....	173
by war	171

INDEX—VOL. I.

[References are to Sections.]

LIMITATION OF ACTIONS (Cont'd).

Tax deeds, cancellation of.....	162
Use and occupation of realty.....	157
Vacation of judgment.....465-	467
Waste or trespass.....	159

LINCOLN'S BIRTHDAY

Legal holiday	63
---------------------	----

LIQUORS—See Intoxicating Liquors

LIS PENDENS

Actions affecting title to real prop- erty	243
cancellation of notice, when...	243
Filing necessary in actions against unknown heirs	232

LIVESTOCK

Lien for caring for—See Liens...	
.....1197-	1200
Sale for freight or storage charges	1192

LOCAL ACTIONS

Venue	204
-------------	-----

LODGES

Fraud in relation to	2696
----------------------------	------

LOGS AND LOGGING

Brands, penalty for defacing, etc.	2594
imitation of, penalty	2595
Equipment of loggers exempt from execution	563
Liens for labor and material—See Liens ... ..1162-	1181

**LOST BOUNDARY — See Bounda-
ries**

**LOST RECORDS, INSTRUMENTS
AND PAPERS**

Restoration of records—See Rec- ords	1270-
1277	
Wills, how established	1390

LOTTERIES—See Criminal Law

LUMBER—See Logs and Logging

LUNATICS—See Insane Persons

MACHINERY

Malicious injury to	2659
---------------------------	------

MAGISTRATES

Defined	50
Holidays, may act on	64
Justice of peace acts as, when...	
.....1927,	1928
Officers qualified to act as.....	51
Preliminary examination of per- sons accused of crimes..1949-	1966

MAJORITY

Age of	1572
--------------	------

MALFEASANCE

Disqualifies public officer	2289
Offenses and penalties	2569- 2571

**MALICIOUS MISCHIEF—See Crim-
inal Law**

MALICIOUS PROSECUTION

Cost limited	477
Justice of peace has no jurisdic- tion	45
Punishment	2369

MANDAMUS

Aid to supreme court's jurisdic- tion on appeal	1731
Answer, how made	1018
may be controverted	1020
Appeals	1033
Causes for granting	1014
Compel signature to bill of ex- ceptions	391, 392
Damages awarded when	1024
Defined as writ of mandate.....	1013
Disobedience, penalty for	1026
Grant of, by default prohibited.	1017
Hearing required, through no ap- pearance	1017
where no answer	1023
where issues of law, or immate- rial	1023
Issued by courts of record.....	1014
Notice of application	1017
Questions of fact, trial by jury, when	1019
certification of verdict	1022
new trial, motion, where made	1021
Return to writ.....1018,	1023
when returnable	1031
Rules of practice.....	1032
Service of writ.....	1025
Sheriff, to allow redemption.....	598
Superior court may issue writs...	15
Supreme court, original jurisdic- tion in	1
power to issue in aid of revisory jurisdiction	1
Writ, application for, based on af- fidavit	1015
alternative, form of.....	1016
peremptory, what must state..	1016

MANDATE—See Mandamus

**MANSLAUGHTER — See Criminal
Law**

**MARKS, BRANDS AND TRADE
NAMES**

Fraudulent labels in sale of silver- ware	2680- 2683
marking of gold articles.....	2684
Imitating, penalty	2595
Marked, stamped or branded de- fined	2685
Removing lawful brands, penalty	2594
Stock, brands, alteration, etc., pen- alty	2594
imitation, etc., penalty.....	2595

INDEX—VOL. I.

[References are to Sections.]

MARRIAGE —See Divorce; Husband and Wife	
Annulment, when decree may be had	983
Breach of promise, limitation on action for	159
Compelling under threat of defilement, penalty	2438
Dissolution, advertising for	2463
Limitation on, after divorce. 991, 992	
Lost record, restoration	1276
Proof of in criminal cases	2153
Records to be kept by clerk of superior court	1372
Subsequent, revokes will, when . .	1399
Unlawfully solemnizing	2671
MARRIED WOMEN —See Husband and Wife; Marriage	
MASTER AND SERVANT	
Habeas corpus, master entitled to	1064
Wages—See Labor	
MATERIALMEN	
Bonds of contractors to secure . .	1159
MATERIALS, LIEN FOR —See Mechanics' Liens	
MAYHEM —See Criminal Law	
MECHANICS' LIENS	
Agent of owner, who deemed to be	1129
Claim, assignment, action on	1136
filed in county auditor's office . .	1134
limit for filing	1134
form of	1134
itemized statement unnecessary	1134
joinder of claimants	1134
recording and indexing	1135
segregation of claims, when . . .	1137
statement of	1134
verification	1134
Construction liberal	1147
Contractor's liability, extent of . .	1139
Discharge not effected by delivery of promissory note	1143
Duplicate statements to owner . . .	1133
Exemption of materials from attachment or execution	1144
community interest subjected . .	1145
notice to husband or wife	1145
removal from land of subject property, when	1146
Existing rights preserved	1148
Foreclosure, attorneys' fees	1141
costs, what included in	1141
intervention by claimant's not joined	1140
joinder of claimants	1140
judgment, personal liability . . .	1141
limitation of action for foreclosure	1138
parties	1140
rank of liens	1141
Homestead not exempt against . .	533
Land subject to	1130
Lienable services	1129, 1131

MECHANICS' LIENS (Cont'd).	
Materials or supplies, duplicate statement to owner prerequisite to claim	1133
Notice—See claim, supra	1134
duplicate statement	1133
Owner, rights against contractor .	1139
Personal action not denied	1142
Persons entitled to	1129
Priority over subsequent encumbrances	1132
over prior unrecorded encumbrances	1132
Public works—	
bond to secure labor and materialmen	1159
conditions of, action on	1161
failure of public corporation to take, liability	1160
Railroad to take bond for protection of labor, material and provision men	1129
Services entitled to liens	1129, 1131
MEDICAL EXAMINATION	
Personal injury actions	1230-1
MEETINGS	
Disturbance of, penalty	2547
MEMORIAL DAY	
Legal holiday	61
MILEAGE —See Fees	
MILEPOSTS	
Private, erected by authority, penalty for injuring	2717
Public, malicious injury to	2656, 2716
MINES AND MINERALS	
Assays and samples, altering	2712, 2714
making false, penalty	2713, 2714
False pretenses in sales of	2711
Ores, changing or falsifying, penalty	2711, 2714
Robbery of sluice-boxes, etc., penalty	2703
MINISTER OF GOSPEL	
Competency as witness	1214
Exemption from jury duty	97
Privileged from testifying, when .	2147
MINORS —See Criminal Law (infants); Delinquent Children and Juvenile Courts; Guardian and Ward; Infants; Parent and Child; Probate Code	
Age of majority	1572
of responsibility	2257
MISCARRIAGE —See Criminal Law (abortion)	
MISDEMEANORS —See Criminal Law (fines and penalties)	

INDEX—VOL. I.

[References are to Sections.]

MISFEASANCE

Not punishable, when 2275

MISJOINDER—See Actions; Parties to Actions

MISPRISION—See Treason

MISTAKE

Ground for vacation of judgment, when 464
objection taken by motion.... 466
relief from, when granted..... 303

MONEY

Deposits in courts, custody and loans 747
in lieu of bail, in justice court.1795-1
in superior court..... 2089

MONTH

Construction of word 149

MONUMENTS—See Boundaries

Malicious injury to 2650

MORALITY

Offenses against out of state, when punishable here 2254

MORTGAGES—See Chattel Mortgages

Decedent's estate, sale of property to satisfy 1515
Ejectment not proper remedy.... 804
Executor's and Administrator's mortgage 1494
Evidence, certified copies as.... 1260
Foreclosure, action for, when authorized 1116
attorneys' fees allowed by court 475
concurrent remedies for same debt not maintainable 1125
deficiency, judgment for, when judgment for, similar to money judgment 1120
levy to satisfy 1123
execution to enforce decree... 1121
levy for deficiencies 1123
notice, publication of 1124
installments due before total debt, proceedings 1126
sale in parcels, when 1127
application of proceeds .. 1128
whole property to be sold, when 1128
judgment ordering sale 1118
satisfied before sale, how 1118
possession by debtor during redemption period 602
remedy confined to mortgaged property, when 1117
venue of 1116
Homestead subject to lien 533
Preference in payment out of decedent's estate 1541
Publication in actions of foreclosure, redemption or satisfaction 228

MORTGAGES (Cont'd).

Receiver in foreclosure proceedings. 741
Redemption by executor, etc., when 1513
from sale—See Execution
Removal of fixtures, etc., penalty 2709
Sales under foreclosure—See Execution

MOTION

Defined 405

MUNICIPAL CORPORATIONS

Actions by, when maintainable.. 950
against, when maintainable... 951
on official bonds—See Bonds, Official958, 962
Appeals by, bond not required... 1721
Contractors' bonds on public works 1159
Criminal jurisdiction of justices.. 46
Existence, how pleaded..... 290
Fire apparatus, malicious injury to 2656
Garnishment of 680-1
Injunction against collection of taxes, tender necessary..... 955
Judgments against, manner of enforcement 953
attachment of officer for refusal to satisfy 954
Limitation on actions by..... 167
Municipal judges are magistrates 51
Ordinances, how pleaded..... 291
record to be kept.....1260½
copies as evidence.....1260½
Pawnbrokers, regulation of—See Pawnbrokers2481- 2488
Pleadings, existence, how shown. 290
Public works, laborers, etc., to be secured by bond.....1159- 1161
Summons, service on whom..... 226
Verification of pleadings by..... 952

MURDER—See Criminal Law (homicide)

Death penalty for, abolished.... 2392

NAMES—See also Marks, Brands and Trade Names

Change of name, on adoption of child 1698
court commissioner may determine 85
female's, on divorce, when..... 994
proceedings for..... 998
Fictitious, defendant designated by 306
Indictment by wrong name..... 2058
true name to be declared and entered2096, 2097

NATURALIZATION

Superior courts have jurisdiction15, 16

NAVIGATION

Buoys and beacons, injuries to... 2656

INDEX—VOL. I.

[References are to Sections.]

NAVIGATION (Cont'd).

Docks, piling, etc., injuries to...	2656
Lighthouses, malicious injury to.	2655
Mooring boats, etc., to buoys and bridges	2656
Obstructing	2656

NECESSARIES

Exemption limited.....	564
------------------------	-----

NE EXEAT

Affidavit to obtain writ.....	778
Arrest, order of.....	779
bail or commitment on.....	780
discharge from, how.....	780
Bond of plaintiff.....	779
Bail, special by defendant.....	780
commitment for failure.....	780
liability of.....	780
surrender by surety.....	780
Discharge on securing performance	780
Habeas corpus, right to writ.....	782
Joint contractor, right to writ...	781
Justice of peace, proceedings before	783
Remedy, who may enforce.....	781
Surety, surrender of principal...	780
right to writ.....	781
Venue	784

NEGLECTED CHILDREN—See Delinquent Children and Juvenile Courts; Orphans

NEGLIGENCE

Definition	2303
Judgment taken through, relief..	303
Wrongful death, action for.....	183

NEGOTIABLE INSTRUMENTS

Actions on, parties where several liability	192
counterclaim or setoff, none against bona fide holder.....	191
Promissory note, does not discharge mechanics' lien.....	1143
Protest, false, penalty for making	2635

NEWSPAPERS—See Publications

Legal defined.....	253-1
• publication, affidavit of.....	253-7
what to contain.....	253-2
charges, basis for.....	253-4
fees paid in advance...253-7,	504
holidays, omission, effect....	253-6
notices required to be in....	253-1
selection for.....	253-5

NEW TRIAL

Affidavits, service and filing.....	402
use of	401
Appeal from order granting.....	1716
time of taking.....	1718
Criminal cases.....	2181, 2182
Damages, smallness not to authorize, when defined.....	398
Discharge of jury gives, when....	354

NEW TRIAL (Cont'd).

Ejectment, on default obtained on publication	806
Granted, when	399
for error in court's findings....	368
Grounds for after judgment.....	464
mistake of law by jury.....	2170
newly discovered, petition for..	465
specified, how.....	400
Motion for service.....	431
suspends judgment.....	431
Newly discovered evidence, affidavit showing	403
Notice and motion for.....	402

NEW YEAR'S DAY

Legal holiday.....	61
--------------------	----

NEXT FRIEND

Appointment in proceedings for adoption	1696
Of infant in justice's court..1771,	1772

NEXT OF KIN—See Descent and Distribution

Action for death.....183, et seq.	
for personal injuries survive to	194
Administration of decedent's estate right of.....	1431
False personation, penalty.....	2374

NOLLE PROSEQUI

How obtained.....	2314
-------------------	------

NONFEASANCE

Constitutes misdemeanor.....	2268
Not punishable, when.....	2275

NONJUDICIAL DAYS

Process, service on Sunday prohibited	2497
---	------

NONRESIDENTS

Actions by, statute of limitations applicable	178
Attachment against property, when	648
bond for, when unnecessary...	652
Attorneys, privilege of practicing in courts	139-4, 139-9
Costs, security for.....	495
judgment on cost bond.....	496
Exemption, not entitled to.....	571
Insane persons, estate of—See Guardian and Ward	
Notice of taking depositions, how given	1241
on proceedings against delinquent children	1992
Partition of decedent's estate....	1533
appointment of agents.....	1535
service in partition.....	842
Subject to criminal jurisdiction of state courts.....	2010
Summons, service of.....228, 233,	234
service by publication, action to quiet title	785

INDEX—VOL. I.

[References are to Sections.]

NONRESIDENTS (Cont'd).	
Verification of pleadings for.....	281
Ward's property removable from state, when	1587
NONSUIT —See Dismissal and Non-suit	
NONSUPPORT	
Divorce, stay of proceedings.....	982-1
NOTARIES PUBLIC	
Oaths, power to administer.....	1264
Witnesses, before, superior court may compel attendance..	1236-1238
NOTES AND BILLS — See Negotiable Instruments	
NOTICE —See Process; Publication	
Alienation of homestead in case of insanity	555
Amendment, in furtherance of justice	250
Appeals from justice's courts. 1911, to supreme court.....	1919
service, how made.....	1719
Appearance	1720
when no appearance, not entitled to	241
Application for appointment of guardians	241
for letters of administration...	1568
Appropriation of land....	1434
892, 908, 922	
Certiorari, may or may not be required	922
Depositions, taking of, publication to nonresident	1003
Execution for deficiency on mortgage foreclosure	1241
appraisal of homestead.....	1124
sale of franchises.....	540
521	
Executors and administrators, citations	1373
sales of realty.....	1497, 1499
Filing and service, extension of time	250
Final settlement by executor, etc.	1552
Forcible entry and detainer, service	814
Form and service.....	244
Guardians notice to creditors of ward	1588
Injunctions	722, 730
Justice's courts, execution sale...	1882
Legal, posted, removal or destruction	2656
Mandamus	1017
Manner of serving.....	245, 247
Partition	841
Pendency of action.....	243
Probate matters, by citation.....	1373
Publication, fees payable in advance	253-7, 504
in legal newspaper—See Newspapers	
Relief from defects in, limitation	250
Replevin, service of affidavit and bond	709

NOTICE (Cont'd).	
Sale under execution, how given.	582
baggage for innkeeper's lien...	1202
livestock to satisfy lien.....	1199
property for storage charges..	1196
Service in civil actions.....	242-248
by mail, when may be made. 242,	246
manner of making.....	247
on attorney, when required....	248
county clerk, when.....	248
party, when no attorney appears	248
Settlement of statement of facts	389
Specific performance decedent's contract	1558
Trial of issue	319
Weekly publication, when to be made	253, et seq.

NUISANCE

Abatement—	
actions to abate.....	943
bond by defendant.....	946
expense of abatement.....	946
judgment in	944
stay of warrant.....	946
warrant for	945
who may maintain.....	944
criminal cases.....	2503
mandatory injunction.....	720
stay of warrant.....	946
warrant for.....	945
Actionable, defined.....	943
Assignment houses, abatement, effect of order.....	946-5
dismissal of abatement proceedings, not favored.....	946-3
Houses of prostitution, abatement of—See Prostitution	946-1
Jurisdiction of superior court....	15
Maintainable by whom.....	944
Malicious erection of structures, abatement by injunction....	720
On leased premises, constitutes unlawful detainer	812
abatement authorized.....	2503
Public, defined	2500, 2501
explosives kept or transported unlawfully	2504, 2506
illuminating oils, sale of uninspected	2505
lottery is	2464
maintaining and permitting, penalty	2502
unwholesome substances deposited on highway or in water-course	2537

NUMBER

Construction of words importing	148, 2303
---------------------------------------	-----------

NUNCUPATIVE WILL—See Wills

OATHS—See Criminal Law (perjury)

Administration of, by whom....	1264
clerks of court may.....	77, 1264

INDEX—VOL. I.

[References are to Sections.]

OATHS (Cont'd).

courts, power of.....	52
commissioners may	85
forms, attorney	125
grand jury	2029
judge pro tempore.....	40
judges may.....	1264
judicial officers may.....	57
justices of the peace may.....	1264
notaries public may.....	1264
Affirmation—	
form and effect.....	1268, 1269
when allowed.....	1268
forms of.....	1265-1267
Appraisers, oath of.....	542
of estates, oath of.....	1466
Arbitrators, oath of.....	422
Attorney, oath of.....	139-12
Court commissioners, oath of....	88
Definition	2354
Executor or administrator, oath of	1436
Grand jury, oath of.....	2029
Judge pro tempore, oath of.....	40
Jury, civil actions.....	338
criminal cases, oath of.....	2143
in justice's court, oath of.....	1853
Perjury, irregular administration	
no defense	2853
Receivers, oath of.....	742
Referee, oath of.....	618
Witnesses, administered by arbit-	
trators	426

OBSCENE LITERATURE — See Criminal Law

OBSCENITY—See Criminal Law

OBSTRUCTING JUSTICE — See Criminal Law

OFFENSES—See Criminal Law

OFFICE AND OFFICERS — See Fees

Action against, defense of.....	890-1
expense of.....	890-2
Actions by, to recover fines and forfeitures—See Forfeitures.	
.....	963-966
Appointment to office, offering reward for, penalty.....	2332
Attachment for refusal to satisfy judgment	954
Auditing and paying claims falsely, penalty	2381
Bribe, asking or receiving.....	2321
Bribery of, penalty.....	2320
Bonds—See Bonds, official—	
action on.....	958-962
Certificates falsely making, penalty	2380
of acknowledgment, false, penalty	2584
Competency as witness when public interest involved.....	1214
Concealing or destroying accounts	2569
Contempt, acts constituting.....	1049

OFFICE AND OFFICERS (Cont'd).

Conviction of crime forfeits office	2289
disqualifies from afterward holding office.....	2289
Corruption in office, penalty.....	2334, 2335
Crimes by and against—See Criminal Law.....	2320-2384
Defense of actions against.....	890-1
Defined	147, 2303
Deputies, assistants, employees included	2303
Escape of prisoner, connivance in	2345
Exemption from jury duty.....	98, 103
Exercising judicial functions, acts subject to certiorari.....	1002
Extortion by, punishment.....	2612
Failure to pay over moneys received	2569
Falsification of accounts.....	2569
Fees, due in advance of service..	506
tender before service compelled	506
Homicide by, when justifiable....	2405
Impeachment, power preserved...	2297
Influencing, when constitutes grafting	2333
Intimidating, penalty.....	2368
Intrusion, wilful, into office, penalty	2336
Judges—See Judges	
Malfeasances not specified, penalty	2570
disqualify from holding office..	2289
Mileage, traveling expenses in lieu	509
Ministerial of courts, control.....	52
Misappropriation of public funds	2569, 2571
Misconduct in drawing jury.....	2327
when in charge of jury.....	2329
Nonfeasance, wilful, is misdemeanor	2268
Obstructing, penalty	2331, 2672
Official functions, grant to another, penalty	2335
Oppression in office, penalty.....	2611
Personation of public officer, penalty	2336, 2616
Quo warranto to enforce forfeiture of office.....	1034
ouster, when	1043
Records, falsifying, mutilating, etc., penalty	2348
Refusal to surrender office, penalty	2336
Removals from office, power preserved	2297
power unaffected by enactment of Penal Code	2297
Reports, false official, penalty....	2350
Resistance, penalty	2331, 2366
Subject to writ of mandate, when	1014
Subject to writ of prohibition...	1028
Taking personal property from custody	2340
Term construed, how.....	147, 2303
Treasurers, misappropriation of public funds	2571

INDEX—VOL. I.

[References are to Sections.]

OILS

Uninspected, possession and sale. 2505

OPIUM-HOUSES — See Criminal Law

OPPRESSION

By officers, punishment..... 2611

ORCHARDS

Liens on, for labor..... 1131-1

Malicious injury to..... 2659

ORDERS

Appealable, when 1716

time of taking appeals..... 1718

Defined 405

Service by telegraph..... 254

ORDINANCES

Copies as evidence.....1260½

Pleaded, how..... 291

ORGANIC ACT OF TERRITORY

Textpage 21

ORPHANS AND NEGLECTED CHILDREN

Adoption by societies..... 1700

consent of parents..... 1700

surrender to..... 1704

County charge..... 1702

expenses, payment..... 1707

Custody 1701

warrant for..... 1701

Fees, not charged..... 1707

Guardian, society not to act..... 1705

Habeas corpus..... 1705

hearing 1706

Neglect, investigation..... 1703

Offenses by..... 1704

Parents, rights of..... 1704

OYSTERS AND SHELL-FISH

Malicious injury to..... 2659

PANEL—See Jury

PAPERS—See Books and Papers; Records

PARDON

Governor invested with power... 2223

PARENT AND CHILD—See Delinquent Children; Guardian and Ward; Infants

Actions for death or injury of child 184

for death of parent..... 183-1

seduction of child..... 185

Administration of estate, survivor's right of..... 1419

Adoption, proceedings and effect (which see).....1696- 1699

Habeas corpus, when entitled to. 1064

Inheritance by and from...1341, 1364

PARENT AND CHILD (Cont'd).

illegitimate children, descent of property1345, 1346

Neglected and friendless children, guardianship of.....1700- 1707

Posthumous children considered living at death of parent.... 1355

Preference given to in control of child—See Delinquent Children and Juvenile Courts....1987-14

Release of parental rights to association 1700

Surrender of children to benevolent societies1700, 1704

Wills, failure to name child in.. 1402

PARTIES TO ACTIONS

Actions against executors or administrators 968

Amendment of pleadings or proceedings 303

Appeals, how designated..... 1717

joinder in 1720

substitution of representatives on death 1743

Appearance, what constitutes.... 241

Assignee of chose in action, may sue 191

Claim and delivery of property levied on 576

Conflicting claims to property.... 199

claimants, protection of interests 201

disclaimer and deposit of property 200

Contempt, what constitutes..... 1049

in proceedings for..... 1054

Contest of wills..... 1386

Control by courts.....52, 57

Criminal prosecutions.....2007, 2008

Defect of ground for demurrer... 259

disability of, ground for demurrer 259

Defendants, defined 154

allowance of costs to.....479, 480

demand for assessment of damages 251

failure to answer, judgment... 411

fictitious name designated by defendant 306

parties adverse to plaintiff..... 189

refusal to join as plaintiff to be defendant 189

several, judgment and procedure 407

summons, manner of service... 226

by publication, when conceals himself 228

personal service out of state 234

Designation of 154

Ejectment785, 792, 794, 809

Eminent domain by school district 920

Examination of adverse party... 1225

interrogatories, service....1226, 1227

answers to 1227

notwithstanding filing of interrogatories 1228

rebuttal 1229

INDEX—VOL. I.

[References are to Sections.]

PARTIES TO ACTIONS (Cont'd).

refusal to testify.....	1230
Executors, guardian, etc., may sue	180
actions against.....	968
Fictitious name of defendant....	306
Forcible entry and detainer..816,	837
Guardian ad litem, when.....187,	188
infant appears by, when.....	187
insane person appears by, when	188
Habeas corpus	1065, 1067
Husband and wife, when joinder	181
may join, when	182
Injury or death of child or ward	184
Interrogatories to adversary.1226-	1230
Intervention	202
Joinder of defendants severally	
liable, service and procedure	236
defendants jointly liable, serv-	
ice and procedure.....	236
not permitted, unless all affected	296
Judgments for and against...406,	407
Logger's liens, joinder in enforce-	
ment	1178
Mechanics' liens, joinder of claim-	
ants	1134
foreclosure	1140
Misconduct, ground for new trial	399
Multiplicity, one may sue for all,	
when	190
Necessary, who are.....	189
New parties, how brought in....	196
entitled to summons.....	197
Notice to, service.....245-	248
Nuisances	944
One or more may sue for all, when	190
Partition	839, 840, 844
Personal injuries, survive to wife,	
child or next of kin.....	194
Persons authorized by statute, in	
own name	180
severally liable, joinder of.....	192
Plaintiffs, defined	154
parties interested with, to be...	189
Purchase price of land.....	195
Quieting title	785, 809
Quo warranto	1034, 1035
Real parties in interest.....	179
actions by representatives, when	180
Receiver not to be chosen from.	741
Seduction of child or ward.....	185
of unmarried female.....	186
Setoff for and against executors,	
trustees, etc. ....267-	270
Special proceedings, designation	
of parties	999
Substitution and interpleader....	198
of successors, when.....	193
Suretyship, trial of.....	976
Survivors or representative may	
sue	183
Trustee of express trust may sue.	183
Unknown heirs.....229-	232
owners in eminent domain.....	239
Verification of pleadings by.....	281
Wife as separate party, when...	181
Witness, adverse party may be ex-	
amined as	1225

PARTITION

Allotments, how made.....	846
to unknown parties, how.....	845
Answer, what must show.....	843
Complaint to state all known in-	
terests	839
Continuance to determine rights..	863
Costs, expenses and fees of ref-	
erees	849
lien may be decreed on shares	885
Decree, conclusiveness.....847,	848
Estates for life or years, how set	
off	851
contingent and vested, protec-	
tion	871
Executor or administrator's.....	1533
Guardian may assent for ward...	884
not to be interested in purchase	873
Homestead, on execution sale,	
when	545
Inequality of, compensation for..	881
Infant's share, payable to guard-	
ian	882
Insane person's share payable to	
guardian	883
Investment of proceeds, when...	877
in name of clerk of court.....	878
interest, receipt and investment	880
Liens, adjustment.....	840
answer setting up claim.....	843
ascertained, how.....853,	854
creditors not parties, how	
brought in.....	852
holders may be made parties..	840
lienholders, notice to..... 855,	857
other securities, exhaustion of	860
referee's report on liens.....	856
confirmation, effect of.....	858
exceptions to	857
sale, distribution of proceeds.	859
Notice, to whom directed.....	841
service by publication, when..	842
Parties entitled to sue for.....	838
Referees, appointment of.....	845
duties	846
not to be interested in purchase	873
report of sale and filing of..846,	874
confirmation	847
conveyance on confirmation.	875
exceptions to	875
Rights of all parties to be tried..	844
Sales by auction.....	864
estates for life or years, when	
sold	867
deposit of sum in court, when	869
tenant entitled to gross sum.	868
in parcels, when	872
not delayed by adjustment of	
liens	861
order of, on referee's report...	850
proceeds, disposition of.....	862
purchase by party or lienholder,	
receipt for proceeds.....	876
terms of sale.....	865
on credit, securities to be	
taken	866
when partition impracticable..	845

INDEX—VOL. I.

[References are to Sections.]

PARTITION (Cont'd).

Securities taken in name of parties	879
Terms of sale to be made known	872
Unknown parties, notice to...841, allotment to, how made.....	842
provisions for protection	845
compensation for inequality, not to be adjudged against investment of share of proceeds	870
Unsatisfied liens—See liens, supra	881
	877

PARTNERSHIP

Administration of partnership estates—See Probate Law 1458—	1461
Receiver appointed when.....	741

PATENTS

Information to annul.....1047,	1048
--------------------------------	------

PAUPERS

Criminal cases, attorney's fee paid by county	2305
---	------

PAWNBROKERS

Cities, first class, pawnbrokers and second-hand dealers, regulation of	2481—2488
second class, pawnbrokers and second-hand dealers to report daily to police.....	2483
Defined	2487
Interest, rate allowed.....	2486
Penalties	2485
Record of transactions.....	2481
inspection by peace officers and prosecuting attorney	2482
Reports to chief of police.....	2483
Retention of property pledged..	2484
Sale of pledged property, limitation	2486

PAYMENT

Effect on running of statute of limitations	177
---	-----

PEACE

Armed associations unlawful....	2546
Assemblages, peaceful, disturbing	2547
Preservation of—See Justice of Peace	1936—1948

PEACE OFFICERS—See Constables; Sheriffs

Arrest of vagrants without warrant	1969
Search without warrant, penalty.2240—1	

PENAL CODE—See Criminal Law

PENALTIES—See Fines and Penalties; Forfeitures

Jurisdiction of justice of peace..	44
limitation on action for.159, 160,	163
no suspension for personal disability	169
Venue of actions for recovery...	205

PENSIONS

Moneys exempt	566, 567
---------------------	----------

PERISHABLE PROPERTY

Sale by assignee for benefit of creditors	1088
in attachment.....	662
in garnishment	695
special administrator may sell..	1453
Storage and freight charges, sale for	1192

PERJURY—See Criminal Law

Affirmative, same as false oath..	1269
Conviction renders witness incompetent	1212

PERPETUATING TESTIMONY

By depositions—See Depositions	1249—1253
--------------------------------------	-----------

PERSON

Authorized by statute, actions, costs	489
Grammatical construction of.....	146
Includes corporations and governments	2303

PERSONAL INJURIES

Joinder of husband and wife in actions for.....	182
Physical examination of plaintiffs	1230—1
Survival of action, to whom.....	194

PERSONAL PROPERTY — See Chattel Mortgages; Conditional Sales; Executions; Exemptions; Liens; Lost Property

Action for recovery, judgment... verdict	434 363
Conflicting claims to, action to determine	199—201
Damages for detention and injury	204
Defined	2303
Lien of judgment dates from levy of execution	458
Limitations on actions for taking or injuring	159
Replevin—See Replevin.....707—	717
Variance in claim of ownership..	302
Venue, actions affecting title or possession	204

PETIT JURY—See Jury

Acts not invalid, when.....	103
Defined	92
Disqualifications of member, effect	103
How drawn	96
Qualifications of.....	94
Rights of	101

PETIT LARCENY—See Criminal Law (larceny)

INDEX—VOL. I.

[References are to Sections.]

PHARMACY

Drugs, labeling, regulations.....	2507
poisons wilfully mingled with, penalty	2516
prescriptions may contain poi- sons	2508
containing narcotics	2509
fraudulent made and pre- vented	2510, 2511
wrongfully labeling, penalty.	2507

PHYSICAL DEFECTS

False representation prohibited...	1230-1
penalty	1230-1

PHYSICAL EXAMINATION

Plaintiffs in personal injury cases	1230-1
--	--------

PHYSICIANS AND SURGEONS

Competency as witness.....	1214
Exemptions on execution.....	563
from jury duty.....	103
Fraudulent prescriptions by, pen- alty	2510
Injurious prescription while intox- icated, penalty.....	2402
Intoxicated, administering drugs causing death, guilty of man- slaughter	2402
Narcotic drugs may be prescribed.	2509
Practicing without license, pen- alty	2544
Prescriptions fraudulently made and presented	2510, 2511
Privilege from testifying, when..	2147

PISTOLS

Sale to minors prohibited.....	2445
--------------------------------	------

PLACE OF TRIAL—See Venue

PLAINTIFFS—See Parties to Ac- tions

PLANTS

Malicious injury to.....	2659
--------------------------	------

PLEADING — See Indictment and Information

Accounts	284
Affirmative defense by answer...	264
Amended pleading must be com- plete	304
Amendments, court's power to make	303
failure of proof.....	301
harmless errors disregarded....	307
immaterial variance, effect of..	300
informal pleadings	305
in furtherance of justice....	250, 303
limitation of time for.....	250
new pleading required on, when	304
pleadings, when allowed.....	304
terms of	303
variance. when material....	299, 300
claim of ownership of per- sonalty	302

PLEADING (Cont'd).

Answer after judgment allowed, when	235
after limit expired.....	303
attachment	650
defects waived by failure to...	263
defenses, how stated.....	273
demurrer to part, answer to part	274
when to be taken.....	276
distrain of property.....	295
ejectment	835
failure, where complaint amended, effect	262
forcible entry and detainer....	823
foreign judgments, action on...	1256
garnishment	684, 690, 700, 701
in justice's court.....	1832
joint debtor, after judgment.	439, 440
judgment for want of.....	411
justification of libel or slander.	293
loggers' liens, enforcement of..	1174
material allegations admitted if not denied	297
objections, when to be taken by reply to	276, 277
setoff must be pleaded by.....	271
sham and frivolous stricken, when	275
what may consist of.....	264, 271
may be set forth in.....	273
when necessary to raise objec- tions to action.....	261
Bill of particulars.....	284
Bond of executor, action on, alle- gations	1448
official, action by private person	960
City or town, existence, how pleaded	290
Complaints, action deemed com- menced by filing.....	167, 220
action attacking validity of taxes	956
amendment, service of copy....	262
contents of	258
copy to be served with sum- mons, when	224
ejectment, complaint in.....	835
filing commences action....	167, 220
first pleading of plaintiff.....	257
insufficiency, ground of demur- rer	259
waiver of, not permitted.....	263
material allegations admitted, if not controverted.....	297
objections to, partly by demur- rer, partly by answer.....	274
when by answer	261
where and when to be raised.	263
waiver of defects by failure to object	263
Conditions precedent, how pleaded	288
Construction, liberal required....	285
Counterclaim in ejectment.....	798
may be set up by answer.....	264
Criminal actions, old forms abol- ished	2092

INDEX—VOL. I.

[References are to Sections.]

PLEADING (Cont'd).

practice and pleadings—See In-	
dictment and Information...	
.....	2098- 2129
Defendant's enumerated	256
Defenses may all be set forth in	
answer	273
separate statement of.....	273
Demurrers, general, allowed any	
time	263
grounds of	259
specification of grounds.....	260
time of filing, enlargement.....	303
to answer, when may be taken.	276
to part and answer to part..274,	276
to reply, when may be taken...	279
Denial of complaint by answer...	264
Dismissal for failure to amend...	286
Divorce	986, 987
Ejectment, what may be pleaded.	793
Eminent domain, petition.891, 907,	921
Errors, harmless disregarded.....	307
Falsely charging crime, action-	
able	294
Fictitious name, defendant desig-	
nated by, when.....	306
amendment on discovery of true	
name	306
Filing, order for.....	321
when to be made.....	321
Forcible entry and detainer, com-	
plaint	817
Forms of, abolished.....	255
Garnishment, issues effected, how.	702
in justice's court	1842, 1846
Habeas corpus, rules governing..	1073
Indefinite and uncertain, how cor-	
rected	286
Informal, striking out.....	305
amendment of	305
Intervention	203
Irrelevant and redundant matter,	
striking	286
Issues, kinds and raising.....309-	311
of law and fact in same action.	311
Joinder of causes.....	296
Joint debtor after judgment.....	440
Judgment for want of answer...	411
of court of special jurisdiction,	
how pleaded	287
Justices' courts	1778- 1789
Libel and slander, how pleaded.292,	293
Lost or destroyed, how substituted	1270
Material allegations admitted,	
when	297
defined	298
Municipal corporations, existence,	
how pleaded	290
New matter in answer, demurrer	
or reply	276
failure to plead to, judgment...	278
objections not taken deemed	
waived	263
reply setting up, to be consist-	
ent with complaint.....	277
deemed controverted without	
denial	297
demurred to	279

PLEADING (Cont'd).

Ordinances, how pleaded.....	291
Partition, essentials of complaint.	839
answer, what must show.....	843
Plaintiffs' enumerated	256
Pleading over, after disallowance	
of motion to strike.....	305
Pleas—See Criminal Law	
Private statutes, how pleaded....	289
Proof, not deemed to be.....	283
not to be used as, in criminal	
cases	282
Quo warranto	1036- 1038
Reply in denial of answer.....	276
allegation of new matter as de-	
fense to answer.....	277
contents of	277
demurrer to, when may be taken	279
failure to reply or demur, judg-	
ment	278
material allegations deemed con-	
troverted	297
required, when	276, 277
stricken, when	279
Separate statement of causes or	
defenses	305
Service of	220, 224, 254
Setoff, may be pleaded in answer.	
.....	264, 271
Sham and frivolous answers and	
replies stricken	275, 279
Subscription of	281
Sufficiency, rules to determine....	255
Supplemental, when allowed.....	308
Time for pleading, rules.....	280
enlargement, for answer or de-	
murrer	303
Title to real property, in actions	
of distraint	295
Variance, when material.....	299
failure of proof.....	301
immaterial	300
ownership of personalty.....	302
Verification of.....281,	282
adverse party not put to greater	
proof	283
agent or attorney may make...	281
by counties	952
by municipal corporations.....	952
by school districts.....	952
corporations, what to make for	281
in justices' courts.....	1784
parties to make, when.....	281
when may be omitted.....	282
Written instruments and accounts	284

PLEAS—See Criminal Law

POISONS

Sale by druggists, regulations....	2508
narcotic drugs.....2509,	2510

POLICE COURTS

No jurisdiction in certiorari, man-	
damus or prohibition	
.....1002, 1014,	1028

INDEX—VOL. I.

[References are to Sections.]

POLICE OFFICERS

- Duties as to neglected children.. 1703
- fees not to be collected..... 1707
- Exempt as jurors..... 98

POOLROOMS

- Minors not permitted in..... 2445

POOLSELLING—See Gaming

POOR—See Paupers

POSTHUMOUS CHILDREN

- Inheritance by..... 1355

PRACTICE—See Appeal and Error; Pleadings; Process; Trial

- Certiorari, mandamus, prohibition, rules of..... 1032
- Forcible entry and detainer, general provisions applicable... 829
- Rules of, supreme court may prescribe 13
- superior court shall establish.29, 36

PREJUDICE

- Ground for change of venue in criminal actions2018, 2019
- for challenge to grand juror... 2026
- for new trial, when..... 399

PRELIMINARY EXAMINATIONS

—See Criminal Law

PRESUMPTIONS—See Evidence

PRINCIPAL AND AGENT

- Agent may verify pleadings of principal 281
- Exemption not allowed agent against principal 564

PRINCIPAL AND SURETY—See Bail; Bonds; Recognizance

- Action against bail—See Arrest and Bail
- Actions against, principal's property to be first exhausted.... 977
- Contribution among sureties..... 979
- Official bonds, actions on.....958- 962
- surety not liable to aggregate judgments exceeding penalty 962
- Subrogation of surety..... 978
- on payment of execution..... 593
- Sureties, notice to creditor to institute action 974
- discharge, if obligee refuses to sue 975
- inapplicable against persons under legal disability..... 981
- must defend when..... 980
- trial of suretyship, when may be had..... 976
- Suretyship, determination of..... 976
- rights and liabilities extend to heirs, executors and administrators 981

PRINCIPALS

- Criminal offenses, who are..... 2260

PRISONERS—See Criminal Law; Habeas Corpus; Prisons

PRISONS AND REFORMATORIES

Prisoners—

- competency as witness....1212, 2290
- definition 2303
- escape and capture—See Criminal Law.....2341- 2346
- insane, confinement of..... 2283
- pardon, governor may grant.... 2223
- parole by prison board..... 2282
- rescue of, penalty..... 2339
- testimony of, how obtained 1223, 1224
- transfer from one institution to another 2278
- unauthorized communication with, penalty..... 2377
- working county prisoners..... 2279

State penitentiary—

- indeterminate sentence to..... 2194, 2195, 2281, 2282
- sentence to, form of..... 2208

State training school—

- commitment, juvenile offenders1980, 2276
- order of court..... 1980
- conviction of juvenile before justice, transfer of person and papers to superior court..... 1981
- discharge, effect of..... 1986
- examination and hearing..... 1983
- expense of commitment and release 1984
- order to guardian to show cause service and return..... 1981
- review by superior and supreme courts 1985
- sentence to, duration not to be fixed 2195
- termination by board of managers 2195
- term of confinement..... 1986
- warrant of commitment..... 1983
- certificate and directions.... 1984

Woman's reformatory—See Woman's Industrial Home and Clinic

PRIVILEGED COMMUNICATIONS

- Competency of witnesses..... 2147

PRIZE-FIGHTING—See Criminal Law

PROBATE—See Descent and Distribution; Executors and Administrators; Guardian and Ward; Probate Code; Wills

- Court commissioner, powers in... 85
- Superior court, jurisdiction of... 1371
- records to be kept..... 1372

INDEX—VOL. I.

[References are to Sections.]

PROBATE CODE

(Session Law Index; for elaboration, see Executors and Administrators; Guardian and Ward; Wills)

Actions—

bondsmen liable	1521
claims must be presented first..	1484
compromise of.....	1522
continuance of against deceased	1486
conversion, etc., of estate.....	1519
deceased, liability of continues.	1520
executors or administrators may maintain	1518
limitation of against sureties..	1450
when may be brought against minor	1577

Administration—

new, notice of.....	1491
petition for, how made.....	1432
revocation of, on finding will...	1421
when had	1376

Administrator—

appointment of, on refusal of executor to act.....	1417
appointment not to discharge claim against	1467
bank and trust companies may be	1457
bond of, court to fix.....	1437
claims not to be purchased by..	1527
compensation of	1528
de bonis non, appointment of..	1447
estate of liable for actions.....	1448
expenses of, how allowed.....	1540
liability of	1524
for allowed claims.....	1546
oath of	1436
powers and duties of.....	1517
powers of	1425
removal of, causes.....	1444
reports of.....	1529
restraint of	1391
surviving spouse entitled to, when	1419
temporary appointment of.....	1420
who entitled to.....	1457
whole estate charged to.....	1525
who to be appointed.....	1431
Advancements, decree to specify effect of.....	1557
Allowances, additional for family	1403
Appraisers, compensation of.....	1476
oath and duties of.....	1465
Attorney, compensation of.....	1466
trust company, restrictions on..	1528
Bequest, executor receiving, void, when	1457
	1468

Bond—

additional, court may order....	1437
amount of, court to fix.....	1437
clerk to keep record of.....	1442
form or recitals not to invalidate	1443
hearing on, costs.....	1438
new, court may order.....	1440

PROBATE CODE (Cont'd).

official, liability on.....	1521
requirements of, approval.....	1438
sureties on, persons disqualified	1441
will may excuse.....	1439
Books, record, clerk to keep.....	1372
Burial, monument authorized....	1545
Chambers, hearings in authorized.	1445
Children, not named, take full share	1402
Citations, how made.....	1373
time for	1375
Claimants, pro rata among.....	1544
Claims—	
affidavit of claimant.....	1478
action not to lie on unless presented	1484
advancing maturity of.....	1548
allowance in part.....	1487
allowance or rejection of.....	1479
allowed, are debts.....	1480
barred by statute not to be allowed	1483
clerk to keep record of.....	1372
contingent	1549
costs, refusal of.....	1487
executor's or administrator's procedure in	1490
failure to act on, court to order judge presenting another judge to hear.....	1479
judgment on establishes claim only	1481
judgment same as allowed claim	1488
liability of representatives on..	1489
new administration, procedure	1467
order of payment.....	1491
presentation necessary.....	1541
suit on, when brought.....	1484
time of filing.....	1482
time of presentation.....	1477
suspended, when.....	1485
unpaid, actions on.....	1485
when paid.....	1547
	1543
Clerk—	
letters to be signed by.....	1426
records to be kept by.....	1372
surety, disqualified.....	1441
Community property, surviving spouse to administer.....	1419
homestead out of.....	1474
Construction, number and gender disregarded	1416
Contest—	
burden of proof.....	1387
costs in.....	1389
notice of.....	1386
time for	1385
trial of	1388
Contracts, decedents'—	
conveyances, form of.....	1561
order enforcing	1562
purchaser, bond of.....	1511
sale of, order of assignment...	1512

INDEX—VOL. I.

[References are to Sections.]

PROBATE CODE (Cont'd).

Contribution, action for unpaid claim	1547
beneficiaries subject to.....	1508
Conveyances, form of.....	1561
estate to receive.....	1563
fraudulent, setting aside.....	1523
order for	1503
Corporations, not entitled to let- ters	1457
Costs—	
contests of will, how taxed....	1389
court to assess.....	1389
hearing on bond, how taxed....	1438
Court—	
hearing in chambers authorized	1445
orders issued by power of.....	1590
power of, to administer estates	1589
Debts—	
contribution to pay.....	1507
order of payment.....	1541
sales to meet.....	1506
Decceased—	
actions against to continue....	1520
actions, continuance of.....	1486
contracts of, enforcement, hear- ing	1560
performance	1558
conveyances of void, when.....	1523
Decree of distribution.....	1533
Devisee, death of, effect on will..	1404
Devisees, notice to.....	1434
liability for obligations of es- tate	1507
Disputed claim, procedure.....	1549
Distributees, contribution among, court to order.....	1413
Distribution—	
advance	1551
application for, decree.....	1554
bond in	1554
cost	1555
notice	1552
return of share.....	1556
decree of.....	1533
hearing on.....	1533
minor, guardian to appear for.	1534
nonresident, agent of.....	1535
petition for	1531
unclaimed portion, escheat of..	1539
sale of	1537
Divorce, effect on will.....	1399
Encumbrances not to affect will..	1401
Escheats, unclaimed portion of es- tate	1539
Estate—	
administrator to take charge of	1464
claims against.....	1477
debts against, allowed claims to be	1480
debts of, conveyances to defeat void	1523

PROBATE CODE (Cont'd).

expenses of, allowed.....	1526
inventory to be made of.....	1465
prior proceedings in, validated.	1592
redemptions, sales to effect.....	1514
settled without administration.	1462
where administered.....	1377
Executors—	
all property to be given over to bank and trust companies may be	1464
bequest to, void, when.....	1457
bond of, court to fix.....	1468
claims not to be purchased by community property not to be handled by	1437
compensation of	1527
death of, administrator to take charge	1419
disqualification, remainder to act	1528
estate of, liable for acts of....	1423
expenses of, how allowed.....	1424
inability of, administrator ap- pointed	1448
letters to	1540
liability of.....	1420
for allowed claims	1417
naming of not to discharge claim against	1524
nonintervention, powers of ...	1546
nonresident, must have local agent	1467
oath of.....	1463
objections to	1457
one or more may act.....	1436
powers and duties of.....	1418
removal of, causes for.....	1424
reports of.....	1517
restraint of	1444
who may be.....	1529
whole estate charged to.....	1391
will to be presented within 40 days	1457
	1525
	1379
Evidence—	
handwriting to be established.	1382
preservation of	1564
record to be received in.....	1383
Family—	
support of	1473
further allowances for.....	1476
separate property liable for..	1474
Final report, hearing on.....	1533
Foreclosures, procedure in.....	1489
Foreign wills, probate of.....	1392
Fraud against estate, liability on.	1471
judgment set aside for.....	1504
Gender, construction of.....	1416
Guardian—	
additional, bond of.....	1573
appointment without notice....	1567
ad litem, appointment of.....	1581
bank and trust companies may be	1457

INDEX—VOL. I.

[References are to Sections.]

PROBATE CODE (Cont'd).

bond and oath of.....	1573
claims passed upon by.....	1577
court to appoint.....	1565
death or removal of.....	1579
duty of.....	1575
expenses of allowed.....	1586
law applicable to.....	1584
liability of, enforcement.....	1579
petition for appointment.....	1567
hearing	1567
notice of	1568
publication of notice.....	1569
powers and duties of.....	1572, 1575
qualification of	1566
removal of property from state	1587
sale or lease of property by...	1582
validity of.....	1585
testamentary, appointment of.	1580
trust company may be.....	1457
Heirs—	
contribution among.....	1412
named take proportionate share	1402
notices to.....	1434
Homestead, selling off, value of..	1473
additional allowed	1474
Insane persons, guardians for...	1565
appointment, notice	1588
Inventory—	
additional required, when.....	1470
failure to return revokes letters	1469
time of making.....	1465
Judgments—	
confirmation of sale conclusive.	1504
effect of	1488
rank as claims.....	1578
treated as allowed claim.....	1489
Jurisdiction, court to retain.....	1378
place of	1377
Legacies—	
liability on to meet estate obli-	
gations	1507
sales to pay.....	1305
Legatees, notice to	1434
Letters—	
annulment of, court may order.	1422
application for	1380
notice to heirs.....	1434
clerk to sign.....	1426
evidence, effect in	1428
form of	1429
petition for, hearing on.....	1433
recording of	1427
revocation, failure to make in-	
ventory	1469
hearing on	1444
subsequent to distribution.....	1428
where issued.....	1376
Letters of administration—	
form of	1435
petition for	1432

PROBATE CODE (Cont'd).

powers of	1425
same as testamentary.....	1430
Letters, testamentary—	
administrator appointed, when.	1417
clerk to keep record of.....	1372
form of	1429
who to receive.....	1417
Liens—	
foreclosure of	1489
judgments are not, except.....	1578
specific property subject to....	1542
Life estates, effect of.....	1410
Limitation, actions against sure-	
ties	1450
Marriages, clerk to keep record of	1372
will revoked by.....	1399
Mentally incompetent persons,	
guardians for	1567
Minor—	
age of majority.....	1572
claims against, guardian to ex-	
amine	1577
consent for guardian.....	1567
guardian to appear for.....	1534
guardians for	1565
prosecuting attorney to repre-	
sent	1571
support of	1475
Monument, expenses of.....	1545
Mortgage, order authorizing.....	1495
property subject to.....	1492
Mortgaged property, sale of.....	1515
redemption	1513
Nonintervention wills—	
court to distribute under.....	1462
powers of executor under.....	1463
Nonresident—	
agent to appear for.....	1535
bond of	1536
executors may be.....	1457
liability	1538
not entitled to letters.....	1457
Notices—	
heirs, etc., to receive of applica-	
tion for letters.....	1434
how given.....	1373
persons interested to have,	
when	1434
request for, how made.....	1434
time of	1375
Nuncupative will, proof of.....	1407
Parties, notices to.....	1434
Partners, right to administer part-	
nership property	1458
survivor may purchase partner-	
ship	1459
Partnerships—	
general administrator to take	
charge of, when.....	1461

INDEX—VOL. I.

[References are to Sections.]

PROBATE CODE (Cont'd).

liabilities of, general administrator may question.....	1459
separate inventory of.....	1458
survivor may administer.....	1458
operate business	1460
Personal property, sale, order for	1493
Petition for administration, hearing	1433
Prior proceedings, validation of.	1592
Probate, application for.....	1380
annulment of, when.....	1388
Proceedings, restraint of.....	1391
Process, how served.....	1374
Proof—	
burden of, in contests.....	1387
commission to take.....	1381
handwriting to be established, when	1382
Property incumbered, distribution of	
recovery of, actions for.....	1518
sale or mortgage of.....	1493
Prosecuting attorney, minors represented by	1571
Real property—	
after acquired title, devise includes	1411
contracts in subject to sale....	1509
devisees, title of.....	1409
sale or mortgage of, hearing on	1494
Reports—	
final, notice of.....	1532
notice of	1530
Revocation, how made.....	1398
Sales—	
bids, increase in order.....	1502
confirmation conclusive.....	1504
contracts, confirmation of.....	1512
subject to, bond of purchaser	1510
how conducted	1497
interest in contracts subject to	1509
legacies paid by.....	1505
order directing	1496
personal property subject to...	1492
postponement of.....	1498
private, notice of.....	1499
price	1500
resale ordered	1502
return on approval.....	1501
will directing without court order	1516
Second will, destruction of does not revive prior.....	1405
Special administrators—	
appointment of	1451
bond of	1452
nonliability of	1455
powers and duties of.....	1453
powers of	1449
report of	1456
termination of authority.....	1454

PROBATE CODE (Cont'd).

Spouse, not a relative.....	1404
surviving, community property to administer.....	1419
Statute of limitation, claims rejected by	1483
Stealing from estate, liability on	1471
Stolen property, proceedings to discover	1472
Subsequent administration	1550
Suits, compounded or compromised	1522
Superior courts, jurisdiction of..	1371
Sureties, actions against, when brought	1450
Surviving executor or administrator continues to act.....	1446
Surviving spouse, support of.....	1474
Testator—	
contracts of to be binding on devisee	1400
intent to govern	1415
person signing name of must so state	1397
Trust companies, qualification of.	1457
Vendee, death of, conveyance to estate	1563
Venue	1376
Ward—	
claim against, how approved...	1577
estate, removal from state, procedure	1587
sale or lease of property of....	1582
petition for	1583
Waste, actions for.....	1519
"Will"	1414
annulment of	1388
clerk to keep record of.....	1372
construction, intent of testator.	1415
contest of	1385
discovery of, administration to cease	1421
establishment of, order of court	1380
foreign, how probated.....	1393
how made	1395
lost or destroyed, proof of.....	1390
nonintervention, executor of removed	1462
nuncupative, validity of.....	1406
person subscribing name of testator, must so state.....	1397
presentation within 30 days...	1379
proof of, commission to take testimony	1381
record of, evidence.....	1384
record of to be kept.....	1382
revocation of	1396
strict construction of.....	1396
subsequent, destruction of, not to revive prior.....	1405
title passing by.....	1411
where proved	1376
who may make.....	1394
Witness, devises to, void, exceptions	1408
handwriting of, to be proven...	1382

INDEX—VOL. I.

[References are to Sections.]

PROBATION OFFICERS

Juvenile courts to appoint—See
Delinquent Children and Ju-
venile Courts.....1987-3

PROCEDURE — See Actions and
other specific heads

PROCESS—See Execution; Injunc-
tion; Notice; Searches and Seiz-
ures

Actions against state, service of
complaint 887
Attachment, writ, service of..655- 659
Compulsory, for witnesses, right
of accused 2307
Disobedience, as contempt of
court 1049
Eminent domain, service on state 923
Garnishment, service..... 687
effect of service..... 688
Habeas corpus, service and return
.....1069, 1070, 1085
Justice's court, summons, service
and requisites in civil actions 1758
deputation to serve..... 1764
return of service..... 1764
garnishment, form 1808
service 1809
issued, where 48
proof of service, how made... 1765
publication, form of..... 1766
proof of1767, 1768
service by constable or sheriff,
when1760, 1762
writ of garnishment, service... 1828
Legislative committee, lost or de-
stroyed, how substituted.... 1270

Service by citizen—
certiorari, how made..... 1008
not governed by provisions as
to notice 249
on Sunday prohibited, excep-
tions 2497
quo warranto, how made..... 1038
telegraph, how effected by..... 254
time of, extension of..... 250
Summons, affidavit in support.... 438
appearance, what constitutes.. 241
corporations, how served.....2011-1
contents of.....221, 222, 437
copy of complaint to be served
with, when 224
defendants jointly liable, serv-
ice and procedure..... 236
severally liable, procedure... 236
defense authorized, when serv-
ice not personal..... 235
forcible entry and detainer, is-
suanee 817
form and service..... 818
form of..... 223
intervention 203
issuance of..... 221
joint debtor not served, how
brought in after judgment. 436

PROCESS (Cont'd).

jurisdiction of action, when
deemed to be acquired..... 238
manner of serving notices in-
applicable 249
new party brought in, entitled
to 197
personal service out of state.. 234
proof of service, what consti-
tutes 237
publications, authorized, when
.....228, 228-1, 230, 231
eminent domain proceedings. 239
form and manner..... 233
newspaper, made in what.233, 240
quieting title, absent defend-
ant 785
receipt of publisher, evidence
of payment 240
rights of defendant after ap-
pearance 241
service, by whom made..... 225
commencement of action.... 220
corporations, by serving secre-
tary of state..... 227
juvenile courts, how served.1987-7
manner of, specified..... 226
time, place and manner must
be shown 237
voluntary appearance, effect of 238
Superior court, coextensive with
state 32
to whom directed..... 35
Supreme court, style of..... 6
form of, supreme court may pre-
scribe 13
Writs—See Writs

PROHIBITION, WRIT OF

Alternative, form of..... 1029
Appeals 1033
Application based on affidavit... 1028
Defined 1027
Holidays, may be heard on..... 64
Issuable by courts of record.... 1028
against whom 1028
Limitation of actions suspended
by 172
Peremptory, what must state... 1029
Provisions relating to mandate ap-
ply 1030
Returnable, when..... 1031
Rules of practice..... 1032
Superior court may issue..... 15
issuable on nonjudicial days.. 15
Supreme court, power to issue... 1

PROMISSORY NOTES—See Nego-
tiable Instruments

PROPERTY — See Personal Prop-
erty; Real Property

Absentees—See Absentees.....1715-1
Definition 2303
Malicious injury to—See Criminal
Law

INDEX—VOL. I.

[References are to Sections.]

PROSECUTING ATTORNEY

Action on statute for penalty, limitations	163
Actions brought by state, etc.....	116
Appearance for minors and insane on application for guardians	1571
Assignment houses, duty to abate	946-2
Attendance on grand jury.....	2032
Contempt of court, prosecution by	1054
Cost bills, to be examined by.....	2228
County condemnations.....	900-1
Criminal cases, duties.....	2053
Definition of.....	113
Deputies, appointment of.....	115
Divorce cases, defend when.....	995
prosecutions for contempt, when	993
when disqualified to defend....	995
Duties, annulment of patents, etc.	1047
assistance to tax commissioner in	
escheats	1363
cigarette law, enforcement of..	2701
escheats and forfeited property, recovery of	1045
generally	116
preliminary examinations.....	2053
Forfeited recognizances, prosecution on	2234
Fugitive from justice, investigation of applications for.....	2241
requisitions for, report to governor	2242
Information, to file, to forfeit property to state.....	1045
Law examiners, to assist.....	139-17
Nolle prosequi, consent of court necessary	2314
Powers and duties generally.....	116
Probate, appearance in.....	1571
Quo warranto, prosecution by	1035, 1037
illegal corporation	1044
no liability for costs.....	1046
Special appointment, when.....	114

PROSTITUTION—See Criminal Law

Assignment houses—	
abatement, authorized	946-1
voluntary, owner of building to file bond.....	946-7
Abatement of, action, bond.....	946-7
liability not abated.....	946-7
Action, dismissals not favored....	946-3
Assessment, fine collected as tax.	946-8
Complaint, costs, paid by, when..	946-3
dismissal not favored.....	946-3
substitution of.....	946-3
who may make.....	946-2
Contempt, violation of injunction	946-4
Declared nuisances.....	946-1
Dismissal of action not to abate liability	946-7
Entering building deemed contempt	946-5
Evidence, general reputation sufficient	946-3
Fine, against building.....	946-8
same as tax lien.....	946-8

PROSTITUTION (Cont'd).

Frivolous actions, complainant to pay costs	946-3
Furniture to be sold.....	946-5
General reputation of place considered	946-3
Injunction against.....	946-2
violation, contempt, punishment	946-4
Minors not permitted in places of	2445
Musical instruments to be sold..	946-5
Order of abatement, effect of... ..	946-5
vacation of	946-7
Sales, proceeds, disposition of....	946-6

PUBLICATIONS—See Notice; Process

Advertisements, abortion, drugs or instruments to produce... ..	2460
affidavit for, charges.....	253-7
contents of	253-2
charges, basis for.....	253-4
divorce business, prohibited....	2463
evidence, use of certain words	
prima facie	2462-1
false, prohibitive	2622-1
holidays, omission of, effect... ..	253-6
legal newspaper.....	253-1
lottery business	2465- 2468
posting on public or private property, penalty	2708
selection of.....	253-5
United States flag, desecration by	2675
unlawful affixing to another's property	2659
venereal diseases, cure of, penalty	2462
Affidavit showing, on summons..	237
Detained accounts of bloodshed, lust and crime prohibited....	2461
Execution sales, how made.....	582
charges for notice.....	582
Fees payable in advance.....	504
Libelous, defined.....	2426
Newspapers, what employed for notices	582
designation for legal publication	240
legal, defined	253-1
affidavit for.....	253-7
contents of affidavit.....	253-2
holidays, omission.....	253-6
selection, how made.....	233, 253-5
weekly publication of notices, when to be made.....	253
Notice to guardian of delinquent children	1992
Service of summons by, when... ..	228, 230- 232
manner and form.....	233
personal service out of state equivalent to.....	234
Summons, designation of newspaper	240
in eminent domain, to unknown owners	239
Weekly, when to be made.....	253

INDEX—VOL. I.

[References are to Sections.]

PUBLIC LANDS

- Actions for trespass or waste au-
thorized to claimants ...941, 942
- Adverse possession inapplicable to
Commissioner of public lands—
appropriation of state lands,
record of..... 928
- escheated lands, list to be filed
in office 1360
- Eminent domain, procedure..... 891
- State or federal, wilful injury to
buildings or contents, penalty
... 2705, 2707

PUBLIC NUISANCE — See Nui-
sances

PUBLIC OFFICERS—See Officers

PUBLIC USES

See Eminent Domain.....894, 905

PUBLIC WORKS

- Aliens not to be employed on....2334-1
- accepting employment, unlawful.2334-2
- list of, furnished.....2334-3
- penalty2334-4
- Bonds of contractors on..... 1159
- action on, attorney's fees..... 1159
- supplies furnished subcontrac-
tors1159-1
- validation of certain bonds....1161-1
- Suppression of bids.....2333-1
- collusion in.....2333-2
- defenses2333-4
- penalty2333-3

PUNISHMENT—See Criminal Law;
Fines and Penalties; Forfeit-
ures

QUIETING TITLE

Action for —See Ejectment...785- 809

QUO WARRANTO

- Action to recover escheats or for-
feited property 1045
- Annulment of patent, deed or cer-
tificate 1047
- by whom filed..... 1047
- Causes of filing, information.... 1034
- Contents of information..... 1036
- Costs, who liable for..... 1046
- Damages, judgment of ouster no
bar to action for..... 1042
- Defendant to deliver over books
and papers 1040
- attachment or imprisonment to
enforce order..... 1041
- Judgment of ouster or forfeiture
against corporation..... 1043
- trial of right to office..... 1039
- relator to take office under,
when 1040
- Name of person entitled to office
to be stated..... 1037
- Pleadings and proceedings..... 1038
- Prosecution by whom..... 1035

QUO WARRANTO (Cont'd).

- Service and return 1038
- Superior court may issue writs.. 15
- Supreme court, original jurisdic-
tion of..... 1

RACES

Gambling on 2721

RAILROADS—See Carriers; Emi- nent Domain

- Appropriation of right of way
through passes, etc. 933
- Baggage, wilful injury to..... 2666
- Bond for protection of mechanics
and materialmen 1129
- Defined 2303
- Double track, walking on unlaw-
ful ... 2664-1
- Employees, neglect of duty by,
penalty 2529
- False signals or lights, penalty... 2654
- Freight and storage charges, lien
and sale—See Liens.....1191- 1196
- Intoxication of employees, penalty 2527
- Liens against property for labor,
etc.—See Liens.....1149- 1153
- Malicious interference endanger-
ing life 2650
- Obstructing movement of cars and
trains 2530

Penalties and offenses—

- baggage, wilful injury to..... 2666
- employees, intoxication, penalty 2527
- neglect of duties, penalty... 2529
- engineers, employment of illiter-
ate 2526
- failure to ring bell or sound
whistle 2528
- false signals or lights, penalty. 2654
- malicious injury to, penalty... 2650
- obstruction of trains, penalty.. 2530
- property, injuries to..... 2656
- throwing missiles or discharging
firearms at trains 2650
- train robbery, attempt, penalty 2651
- trespass on track..... 2664
- Property of, malicious injury to. 2656
- Robbery of train, attempt..... 2651
- Summons, service on whom..... 226
- Throwing missiles or discharging
firearms at trains..... 2650
- Trespass on railway track..... 2664
- prohibited2664-1

RAPE—See Criminal Law

REAL PROPERTY — See Bound- aries; Deeds; Descent and Dis- tribution; Ejectment; Escheat; Focible Entry and Detainer; Homestead; Husband and Wife; Mortgages; Partition

Actions involving title, jurisdic-
tion of superior court..... 15

INDEX—VOL. I.

[References are to Sections.]

REAL PROPERTY (Cont'd).

involving title, unknown heirs and claimants as parties..	229- 232
lis pendens to be filed.....	232
possession, recovery of, limitations	786- 788
legal owner, who deemed to be	788- 790
purchase price, recovery of, parties and judgment.....	195
quieting title	785
Conflicting claims, possessory actions in	809
Conveyance on order of court by commissioners	605- 612
Defined	2303
Devises of, estate conveyed by...	1410
after-acquired passes, when....	1411
Donation claimants, determination of, conflicting rights.....	808
Ejectment, judgment in.....	806
vacation, effect on possession..	807
Eminent domain, how exercised.	891
Forcible entry and detainer, proceedings in	814
Injuries to unsurveyed, action for	942
Justice of peace, no jurisdiction where title or lien involved..	45
Larceny of.....	2601
Lien of judgment.....	445- 450
Limitation on action for recovery rents and profits of.....	156
use and occupation	157
Lis pendens, notice of, filing and cancellation	243
Occupying claimants, right to recover for improvements .797-	799
Possession of, limitation on action	156
Publication of summons in actions involving	228, 231
Removal of fixtures, etc., from mortgaged property, penalty.	2769
Sale in probate matters—See Executors and Administrators	
Tenants in common, ejectment against cotenant.....	805
Title not to be determined by arbitration	420
Venue of actions affecting.....	204

RECEIVERS

Appeal from orders appointing or removing	1716
time of taking.....	1718
Appointment, in what cases.....	741
parties or attorney ineligible..	741
Attachment, appointment in.....	661
Bond	742
Claim admitted in part, order of satisfaction	744
Corporation, appointment in quo warranto	1044
Defined	740
Laborers' liens, priority.....	1153
Loggers' liens, enforcement of sheriff as	1173

RECEIVERS (Cont'd).

Oath	742
Powers	743
Sheriff disqualified in insolvency.	1101
Summons against corporate served on	226
Supplementary proceedings.....	622, 623, 640- 645

RECEIVING STOLEN GOODS—See Criminal Law

RECOGNIZANCES—See Bail; Criminal Law (bail)

Appearance of accused before justice of peace.....	1955
before superior court.....	1957
Cash in lieu of bond.....	2089
in justice court.....	1957½
Change of venue in criminal actions	2021
Forfeitures, actions on—See Criminal Law.....	1965, 2231- 2236
Fugitives from justice.....	2244, 2245
Mistake in charging offense.....	2163
Peace, proceedings to preserve... ..	1940, 2202, 2203
affrays in presence of magistrate	1946
discharge on giving bond.....	1944
enforcement of penalty, remission of part.....	1947
stay of execution for fine and costs	2204, 2205
where deposited.....	1945
Pending preliminary examination	1952
Prize-fights, prevention	2556
Taking, entering and forfeiture in criminal cases.....	2086- 2090
Witnesses	1959, 1960
commitment for failure to give minors or married women, how.	1962
Wrong county, defendant bound over to proper county.....	1961
	2164

RECORDS

Appeal, what part of.....	1729
County clerk, to keep what.....	75
Crimes relating to.....	2347- 2349
Evidence, when	1254- 1263
Final record in criminal cases, what included.....	2224
Homestead declaration	560
Judgments	444- 450
Lost or destroyed, action to restore, procedure	1272
appeal, time extended, when..	1274
costs, how taxed.....	1275, 1277
court proceedings, how replaced	1271
hearing and evidence.....	1273
marriage records.....	1276
probate records, restoration...	1276
substitution of copy, when....	1270
Probate, to be kept by clerk of superior court.....	1372

REDELIVERY BONDS—See Execution; Replevin

INDEX—VOL. I.

[References are to Sections.]

REDEMPTION—See Execution;
Mortgages

REFERENCE

Accounting on default.....	411
Agreement for, filing.....	318
Civil actions	369-377
Consent, with	369
without	370
Judgment on report of referees...	377
May be ordered, to whom.....	371
Partition, appointment of referees to ascertain liens.....	854
liens, notice to holders to ap- pear	855
report on liens	856
exceptions to	857
confirmation of report.....	858
sales at auction	864
referee not to be interested in	873
report of, contents and filing	874
conveyance on confirmation	875
exceptions to	875
Referees, acceptance of bribe, pen- alty	2322
appointment and powers.....	82
in partition proceedings..	845-847
bribery of, penalty.....	2320
challenges to	373
court commissioner may act as	85
fees of, amount allowed.....	483
influencing, penalty	2325
intimidating, penalty.....	2368
powers of	374
to subpoena witnesses.....	1217
promising decision, penalty...	2326
qualifications necessary.....	372
trial by	374
exceptions to findings and conclusions	383
Report, filing and proceedings on	376
contents of	375
setting aside, in whole or part..	377
Supplementary proceedings...616,	617
fees of.....	639
oath, unless expressly waived..	618

REGISTRATION

Of animals, fraud in.....	2593
Of trademark, fraud in.....	2599

RELIGIOUS ASSEMBLIES — See
Criminal Law

REMAINDERS

Reversion to heirs.....	1410
-------------------------	------

REMEDIES

Civil not displaced by criminal code	2295, 2296
---	------------

REMOVALS FROM OFFICE—See
Offices and Officers

RENT

Landlord's lien, on crop.....	1188
on personalty.....	1203-1

RENTS AND PROFITS—See Eject-
ment; Landlord and Tenant

Recovery in forcible entry and de- tainer	827
in injunction	737

REPLEVIN

Buildings may be broken open, when	714
Claim of third person.....	716
affidavit and bond of plaintiff against	716, 717
Concealed property, how taken...	714
Custody of property.....	715
Delivery, when may be claimed..	707
affidavit for	708
bond for	709
sureties, objection to.....	710
justification	710
service of affidavit and bond..	709
Justice's court, form of order...	1890
procedure	1796-1806
service of writ.....	1762
Redelivery bond.....	711
sureties, qualifications.....	713
justification	712
Return of sheriff.....	717

REPORTERS

Official for superior courts—See Court Reporters.....	42-1
--	------

REPRIEVES

Governor may grant.....	2223
-------------------------	------

REQUISITION—See Fugitives from
Justice

RESCUE

Contempt of court, when.....	1049
Officer may command assistance to retake	2085
Penalty in cases of.....	2339

RESIDENCE

Suits for divorce.....	984
Summons, service by copy at....	226

RESISTING OFFICER—See Crim-
inal Law

RESTITUTION

Issuance of writ on appeal, when.	1742
Suspended in forcible entry and detainer by appeal.....	833
Writs of, in forcible entry and detainer	819, 820
when grantable in ejectment..	807

REVERSIONS

Arises on devise for life, when..	1410
-----------------------------------	------

REVIEW—See Certiorari

Costs in revisory proceedings...	492
Court commissioner subject to, by superior court.....	86

INDEX—VOL. I.

[References are to Sections.]

REVIVAL OF JUDGMENTS

See Judgments459- 463

REVOCAION

Letters testamentary, etc.—See
Probate Code

Wills—See Probate Code....1398- 1401

REWARDS

Conflicting claims, how deter-
mined 2251
County commissioners may offer.. 2249
payment of..... 2250
Governor may offer..... 2247
payment by state 2248
Validation of warrants for..... 2252

RIOTS—See Criminal Law

ROBBERY—See Criminal Law

RULES OF COURT

Fixing time for pleading..... 280
Superior court may establish..29, 36
Supreme court may make concern-
ing appeals 1753
may prescribe 13

SALARIES—See Fees

SALES—See Attachment; Counties;
Execution; Executors and Ad-
ministrators; Guardian and
Ward; Garnishment; Partition;
Peddlers; Probate Code; Lost
Property

False advertising, prohibited...2262-1

SATISFACTION—See Chattel Mort-
gages; Mortgages

SEALS

Affixing without wafer or wax
valid 1258
Court commissioners, seal of..... 85
Superior courts, seals of..... 38
Supreme court, seal of..... 7

SEARCHES AND SEIZURES

Counterfeit coin and apparatus.. 2238
Gaming device..... 2238
issuance and directions...2237- 2239
Property seized, disposition of.... 2240
Seditious emblems.....2563-10
Warrants for property stolen or
embezzled 2237
contents 2239
dwelling, necessity2240-1
execution 2240
form of, issued by justice..... 1935

SEARCH-WARRANT—See Searches
and Seizures

SECRETARY OF STATE

Summons deposited with deemed
service against corporation,
when 227

Rem. Wash. Code, Vol. I—85

SEDITION

Displays posted to government..2563-7
Seditious emblems, seized.....2563-10

SEDUCTION—See Criminal Law

Action by parent or guardian... 185
by woman for own seduction.. 186
Attachment in action for..... 648
Costs, limited 477
Justice of peace has no jurisdic-
tion 45
Limitation on action against..... 159

SECRET SOCIETIES

Fraudulent use of name of, pen-
alty2696-1

SEIZURES—See Searches and Seiz-
ures

SENTENCE—See Criminal Law

Commencement, time of, where
appeal taken..... 1746
where no appeal taken..... 1746
Deduction of period of imprison-
ment pending appeal....1745, 1750
Suspension of 2280

SEPARATE PROPERTY—See Hus-
band and Wife

SEPULTURE — See Criminal Law
(dead bodies)

SEQUESTRATION

Enforcement of judgment by..... 612

SERVICE—See Notice; Process

SESSIONS

Courts, fixed on holiday, effect.. 65
Failure, not to affect proceedings 67
Superior courts, when and by
whom may be held.....27- 29
Supreme court, when and where
held 4

SETOFF AND COUNTERCLAIM

Counterclaim, answer may contain 264
default, judgment of plaintiff
for excess 411
definition and scope..... 265
dismissal of action by plaintiff
prohibited 408
ejectment, value of improve-
ments and taxes.....797- 799
judgment on default..... 411
pleaded against assigned debt
when 191
in answer, when 264
Defense of setoff, when allowed 266
actions against executors, trus-
tees, etc., setoff allowed.. 270
against trustee on a claim
against beneficiary..... 267
against executors, etc., claim
against deceased..... 268
effect of judgment..... 269

INDEX—VOL. I.

[References are to Sections.]

SETOFF AND COUNTERCLAIM

(Cont'd).

judgment, when setoff established	271½
in favor of defendant denied when	272
Dismissal of action by plaintiff prohibited	408
Judgment for	433
Justice's court, extent of allowance	1861
mutual judgments in	1873-1875
pleading and judgment	1789
Pleaded against assigned debt, when	191
in answer	264, 271
Right of not conferred nor defeated by assignment	266, 272
Value of improvements in ejectment	799

SEX—See Gender

Attorney, no bar to admission . . .	139-3
Construction of words importing	148

SHERIFFS

Bail not to be furnished by	765
lien money, deposit in court, liability for default	769
Contempt, what constitutes	1049
Disqualified as receiver or assignee	1101
Duty in attachment proceedings	655-659
Escape of prisoner on civil arrest bail given by sheriff	772
judgment, liability on official bond	773
Executions, duty to serve and make return	513-517
penalty for failure to pay over collections	515
Fees, maintenance of prisoner on civil arrest	757
mileage when plural service in same cause	501
proceedings for custody of friendless children	1707
schedule of	497
Garnishment of moneys in hand . . .	664
Habeas corpus, no liability for obeying orders	1079
service of writ on and by	1068, 1069
Jury summoned by open venire	107-110
Levy and sale on execution—See Execution	
Limitation on action against	159
for escape of prisoner	161
no suspension of statute because of personal disability	169
Mittimus, issuance and execution . . .	2207
Not to practice law	139-5
Orders as to prisoner condemned to death	2213
return of proceedings	2217
Prisoners in county jail to be employed	2279

SHERIFFS (Cont'd).

Process, directed to	35
in justice's court, service by	1766, 1762
return of	1763
Receiver in loggers' lien cases	1173
surrender of custody by, when	1173
Replevin, approval of bond in	709
buildings may be broken open, when	714
custody of property	715
liability for sureties before justification	710
return	717
personal property, delivery	586
Surety on executor's bond, not to be	1441
Summons served by	225
return of	237
Supplementary proceedings, liability for property delivered without execution	621
application of proceeds of execution	622, 623
payment or delivery to receiver, when	622
Telegraphic copies of orders or writs served by	254

SHIPS — See Boats and Vessels; Navigation

SIGNATURES

Definition	2303
Obtaining by false pretenses	2619

SIGN-BOARDS

Private, erected by authority, injury to	2717
Public, malicious injury to	2716

SILVERWARE

Fraud in sale of	2680-2683
----------------------------	-----------

SLANDER—See Libel and Slander

SODOMY—See Criminal Law

Action for falsely charging	294
---------------------------------------	-----

SOLDIERS AND SAILORS

Wills of	1406
--------------------	------

SPECIAL FINDINGS

Control general verdict	365
Court may order jury to make	364
Requests for	341

SPECIAL PROCEEDINGS

Judgment in, determines what	1000
Motion in	1000
Order in	1000
Parties in, how designated	999

SPECIFIC PERFORMANCE

Actions for purchase price of land	195
Contracts of decedent	1558-1564

INDEX—VOL. I.

[References are to Sections.]

STATE

Actions against, authorization of suit	886, 890-1
appeals, how taken.....	888
bond for costs	886
judgments, how satisfied.....	889
limitation on actions.....	890
service on, how made.....	887
trial, how conducted.....	888
venue of action.....	886
Actions by, no limitation on.....	167
on official bonds.....	958-962
Appeal in criminal prosecutions, when allowed	1716
bond not required.....	1721
Appropriation of lands by....	891-900
Confession of judgment by.....	414
Contractors on public works required to give bonds.....	1159
Costs in civil actions, liability....	491
Eminent domain against, service of process in	923
decree appropriating lands, how made effective.....	928
procedure	891
Included in term person.....	2303
Public works, laborers, etc., to be secured by bond—See Public Works	1159-1161
Treason against — See Criminal Law	2317-2319
Verification of pleadings, by whom	281
War, levying against, what amounts to	2318

STATE AUDITOR

Cost bills, auditing and crediting of	2229
Duties, licenses to aliens to carry firearms by	2517-1

STATE BOARD OF CONTROL

Indeterminate sentences, how and when determined	2282
--	------

STATE OFFICERS—See Office and Officers

STATE PENITENTIARY—See Prisons and Reformatories

STATE SCHOOL FOR GIRLS

Inmates, transfer	1992
-------------------------	------

STATE TRAINING SCHOOL—See Prisons and Reformatories

STATE TREASURER

Escheated estates, money of, to be paid into treasury.....	1360
--	------

STATEMENT OF FACTS—See Exceptions

STATUTE OF FRAUDS—See Frauds, Statute of

STATUTE OF LIMITATIONS—See Limitation of Actions

STATUTES—See Laws

STAY—See Execution; Supersedeas

STOLEN PROPERTY—See Criminal Law (receiving stolen goods)

STORAGE

Lien and sale for charges—See Liens	1191-1196
---	-----------

STRIKES

Penalty for endangering life by refusing to labor.....	2533
--	------

SUBORNATION—See Criminal Law (perjury)

SUBPOENA—See Witnesses

SUBROGATION

Payment by bail of stayed judgment in justice's court.....	1871
by one joint judgment debtor..	593
When inures to sureties or sheriff's compelled to pay judgments.	978

SUICIDE—See Criminal Law

SUMMONS—See Process

SUNDAY—See Criminal Law (holidays, legal)

Habeas corpus issued on.....	1084
Legal holiday	61

SUPERIOR COURT—See Courts

SUPERIOR COURT JUDGES—See Judges

SUPERSEDEAS—See Execution

Allowance on appeal from justice's court	1911, 1912
effect of	1913
Appeal does not stay proceedings. bond for stay, conditions and effect	1722, 1727
time of filing.....	1726
Appeal in contempt proceedings not to	1062
in forcible entry and detainer, effects	832
Criminal actions, appeal effects..	1745
Criminal execution before justice, how procured	1934
Injunction, release of errors necessary	728
dissolution, damages, when awarded	736
Justices' courts	1867-1872
Pending security for costs in justice's court	1777
Under writ of certiorari.....	1006

SUPPLEMENTAL PLEADINGS—See Pleadings

SUPPLEMENTARY PROCEEDINGS—See Execution

INDEX—VOL. I.

[References are to Sections.]

SUPREME COURT—See Courts

SUPREME COURT OF THE UNITED STATES

Appeal to, injunctions remain effective 1724

SUPREME COURT CLERK—See Clerk of Supreme Court

SUPREME COURT JUDGES—See Judges

SURETIES—See Bonds, Official; Principal and Surety

SURPRISE

Ground for new trial 399
Judgment, setting aside for 303

SURRENDER OF BAIL—See Arrest and Bail

SURVIVAL OF ACTIONS—See Actions (abatement)

TALESMEN—See Jury

TAXATION

Actions involving, jurisdiction of superior court 15
County levy to pay cost of condemnations 902
Credit to county on payment of cost bills 2229
Deeds, evidence 1261
Injunction against, tender necessary 955
complaint in 956
construction of statute 957
Limitation of actions affecting sales 162
Tax Commissioners, escheats, powers and duties relating to 1359
accounts of administrator filed with 1360
advice and assistance of attorney-general, duty to render . . 1363
records of property and proceedings 1361
Timber, removal prohibited before land tax is paid 2629-1

TAXATION OF COSTS—See Costs

TAX DEEDS

Evidence, certified copies as, what sufficient 1261
Limitation on action to cancel . . . 162

TEACHERS

Exempt from jury duty 98, 103

TELEGRAPHS AND TELEPHONES

Malicious injury to lines and apparatus, appliances, etc. 2656
Messages, interference with 2656

TELEGRAPHS AND TELEPHONES (Cont'd).

Service of writ or order by telegraph 254
Telegrams, tampering with 2660
divulging 2662
Opening sealed message 2663

TELEPHONES—See Telegraphs and Telephones

TENANCY IN COMMON

Ejectment against tenant, proof necessary 805
Liability for waste 938
Occupying claimant and legal owner, when 799
Partition between—See Partition
Survivorship abolished 1344

TENANTS—See Landlord and Tenant; Tenants in Common

TENDER

Costs allowed defendant 485, 486
Justice's court, judgment in case of 1860
Taxes, in actions to enjoin collection or sale 955

TESTAMENT—See Wills

TESTIMONY—See Depositions: Evidence; Witnesses

THANKSGIVING DAY

Legal holiday 61

THEATERS AND SHOWS

Children employed in immoral exhibitions 2446
in dangerous exhibitions, penalty 2446
Dangerous exhibitions prohibited . . 2535
Doors to swing outward 2525
Exhibitions of fighting animals prohibited 2982, 2983
Obscene performances, penalty . . . 2459
Sunday exhibitions prohibited . . . 2499

THREATS

Duty of magistrate on complaint of threatened offense 1937

THURSTON COUNTY

Actions against state, brought in . . 886

TIMBER

Malicious injury to 2659
Removal prohibited until taxes on land are paid 2629-1

TIME

Computation of 150, 252
Enlargement for answer or demurrer 303
for filing bill of exceptions 393
for filing briefs 394
Extension of, when allowed 256
Pleading, court to fix rules 280

INDEX—VOL. I.

[References are to Sections.]

TOBACCO

- Minor using, penalty..... 2445
- Sale or gifts to minors, penalty 2445

TOLLS

- Illegal demand, penalty..... 2715
- Jurisdiction of Superior Court.. 15

TORTS

- Falsely charging incest, fornication, adultery, whoredom or sodomy 294
- Jurisdiction of justice of peace... 44
- Libel and slander.....292, 293

TOY PISTOLS

- Sale to minors prohibited..... 2445

TRADE UNIONS

- Bribery of representative..... 2676
- Receipt of bribe by representative 2677

TRANSITORY ACTIONS

- Venue—See Venue.....205- 207

TREASON—See Criminal Law

TREASURERS—See County Treasurer; State Treasurer

TREATY WITH GREAT BRITAIN

- Textpage 4

TREBLE DAMAGES

- Wanton waste..... 938
- Wilful trespass..... 939

TREES

- Malicious injury to..... 2659

TRESPASS—See Criminal Law (malicious mischief)

- Casual, single damages..... 940
- Criminal responsibility..... 2665
- for injuring trees or shrubs... 939
- Hunting or fishing, lands inclosed or without permission..... 2665
- notice to be posted on unin-closed lands..... 2665
- Injury to unsurveyed lands..... 942
- Involuntary, single damages..... 940
- Limitation on actions for..... 159
- Owner defined..... 2665
- Posting advertisements on public or private property, penalty.. 2708
- Railway tracks, penalty....2664, 2664-1
- Warning against, sufficiency..... 2665
- Wilful, on public or private grounds, treble damages.... 939

TRIAL—See Depositions; Evidence; Exceptions; Venue; Witnesses

- Adjournment, pending delibera-tions of jury..... 355
- Agreed case, submission of..... 378
- judgment on.....379, 380

TRIAL (Cont'd).

- Arbitration and award.....420- 430
- Argument of counsel..... 339
- Challenges to jury.....324- 336
- Charging jury 339
- exceptions, when may be taken. 339
- Claim to property levied on, pro-ceedings573- 577
- Conducting, manner of..... 339
- Confession of judgment.....413- 419
- Continuance, motion for..... 322
- terms of..... 322
- Court, trial by, decision, how made 367
- dismissal, when granted..... 408
- findings deemed verdict..... 368
- issues against joint debtor served after judgment.... 441
- verdict, extent of..... 441
- judgment on findings, etc..... 367
- on verdict, entered when... 431
- nonsuit, granted when..... 408
- effect of..... 410
- order of procedure..... 368
- reference, consent by parties.. 369
- court may order, when..... 370
- ordered to whom..... 371
- Criminal cases ...2134-2154, 2158, 2165
- right of accused to speedy trial. 2312
- Decisions may be rendered any-where in state..... 42
- filing in county where pending, immediately 42
- Default, judgment on.....411, 412
- Defined 312
- on appeal to supreme court.... 1736
- Divorce proceedings.....996, 997
- Ejectment, issue of counterclaim 798
- Eminent domain, same as civil ac-tions895, 912, 926
- Exceptions381- 387
- bill of.....388- 397
- Forcible entry and detainer...824, 836
- precedence of other civil actions 824
- proof required of plaintiff..... 825
- Garnishment 702
- Hearings in county when pending 41
- Instructions, further to jury, when 352
- Issues defined..... 309
- completion of 319
- docket entries 319
- entry on calendar..... 319
- fact, arise when..... 311
- how tried 314
- jury may be demanded..... 369
- kinds of 309
- law, arise when..... 310
- how tried 313
- notice of trial..... 319
- other issues, how tried..... 315
- right of either party after no-tice 320
- Judgment directed, when..... 340
- taking and entry..... 443
-404-419, 431, 433- 443
- on verdict..... 431
- abstract of verdict..... 431-2

INDEX—VOL. I.

[References are to Sections.]

TRIAL (Cont'd).

entry, manner of.....	431-1
lien of verdict, termination..	431-2
Juror as witness.....	348
Jury trials, admonitions to.....	345
agreement of, proceedings on..	356
number required for.....	358
care of while deliberating.....	349
communications with, prohibited	349
disagreement or discharge, new	
trial	354
discharge, on challenge to evi-	
dence	340
without verdict	353
expense of keeping.....	350
further instructions to, when..	352
impaneling	323
number, reduction by consent.	323
oath of	338
papers, etc., entitled to, on de-	
liberation	351
polling, manner of.....	359
sickness of juror, proceedings on	347
talesmen, summoning of.....	323
verdict, manner of giving....	357
abstract of.....	431-2
entry	431
lien of.....	431-2
view by.....	344
waiving, manner of.....	316
Justices' courts.....	1847-1856
Mandamus, questions of fact to	
jury	1019
certification of verdict.....	1022
new trial, motion for.....	1021
New trial, errors warranting....	399
Opening statements of plaintiff	
and defendant	339
Pleadings, when to be filed.....	321
order to file.....	321
Postponement, costs as condition.	484
Proof, order of taking.....	339
Questions for decision of court..	342
for jury	343
Reference by agreement, filing	
and entry.....	318
trial by referees.....	372-377
Right to, after notice.....	320
Special findings, requests for....	341
court may require.....	364
Suretyship, determination of.....	976
Verdicts, action for specific per-	
sonalty	363
abstract of.....	431-2
assessment of amount of recov-	
ery	366
error in, ground for new trial.	399
disagreement, discharge of jury	353
discharge of jury, judgment	
directed, when	340
disqualification of juror, effect	
on	103
ejectment, what jury shall find	
.....	795, 798
entry of, manner and effect....	431-1
filing abstract.....	431-2
form for, recovery of specific	
personalty	363

TRIAL (Cont'd).

general, defined	362
rendition of	364
holidays, may be received on..	64
informal, correction of.....	360
joint debtor summoned after	
judgment	441
lien of, termination.....	431-2
manner of giving.....	357
number of jurors required for	
agreement	358
reception of	356, 361
setting aside, grounds.....	399
special, defined.....	362
controls, when	365
rendition of	364
written	361

TRIAL DE NOVO

On appeal.....	1736
----------------	------

TRUSTS

Absentees' estates, appointment..	1715-1
Actions by trustee of express	
trust	180
Trustees, appointment in action	
to quiet title	785
setoff may be interposed against	
actions by	267
may be set up in actions	
against	270
suit in own name, when.....	180

UNCLAIMED AND LOST PROP- ERTY—See Lost Property

UNDERTAKINGS—See Bail; Bonds; Recognizances

Included in term bond.....	2303
----------------------------	------

UNITED STATES

Judgments of courts in this state,	
lien	445
satisfaction, entry of.....	455
Lighthouses, injuries to.....	2655
Supreme court, appeal to, effect	
on injunctions	1724

UNKNOWN HEIRS

Actions against.....	229
Summons by publication, author-	
ity and effect—See Process.	
.....	230-232

UNKNOWN OWNERS

Summons in eminent domain by	
publication	239

UNKNOWN PARTIES—See Parti- tion

UNLAWFUL ASSEMBLAGES—See Criminal Law (riots; strikes)

UNLAWFUL DETAINER—See For- cible Entry and Detainer

INDEX—VOL. I.

[References are to Sections.]

USURPATION—See Quo Warranto

USURY—See Interest

VACATION OF JUDGMENTS—
See Judgments

VAGRANCY

Arrest without warrant..... 1969
Proceedings, what provisions govern 1968

VAGRANTS

Who are..... 2688

VARIANCE—See Indictment and Information; Pleading

VEHICLES—See Automobiles; Highways

Malicious injury or removal..... 2659
Removing numbers from.....2601-3

VENDOR AND PURCHASER

See Deeds; Fraudulent Conveyances
Action to vacate purchase, receiver 741
Homestead, free from judgment lien 562
Vendor's lien, homestead subject to 533

VENIRE—See Jury

VENUE, CIVIL ACTIONS

Actions triable in different places cannot be joined..... 296
Boundaries, action to establish lost 947
Charge of, on motion 209
counties to which change may be made 210
depositions admissible in court to which removed..... 1248
grounds authorizing 209
bias of judge..... 209-2
jurisdiction of court to which changed 215
new county created, changes authorized 211
number of changes limited..... 210
stipulation for change..... 216
transmission of record and papers 215-219
costs and fees of change.... 215
failure to transmit, may vacate order 217
when deemed complete..... 218
Chattel mortgages, foreclosure of 1104, 1111
Commencement in wrong county changed, how 208, 209
Corporations 206
Forcible entry and detainer..... 815
Forfeiture, actions for..... 966
Justice of peace, actions before 1756, 1757

VENUE, CIVIL ACTIONS (Cont'd).

change of1774, 1775
wrongful, waiver or objection.. 1857
Letters granted in what county..
.....1376- 1378
Mandamus, trial of questions of fact in 1019
Mortgages, foreclosure of..... 1116
Ne exeat 784
Perpetuation of testimony, application filed, where..... 1249
Probate of wills, in what county
.....1376- 1378
Public officer, against..... 205
Real property, actions relating to proceedings affecting, local.... 204
Recovery of penalty or forfeiture, local 205
Residence of defendant determines, when 207
Specific personal property, title or possession of, local..... 204
State, actions against..... 886
Supplementary proceedings..... 636
Wrong county, how changed..208, 209

VENUE, CRIMINAL ACTIONS—
See Criminal Law

VERDICT—See Trial; Criminal Law

VERIFICATION—See Pleading

Accounts and written instruments, copies of 284
Information in criminal actions.. 2051
Mechanics' lien claim..... 1134

VESSELS

Removing numbers from motor...2601-3

WAGERS—See Criminal Law (gaming)

WAGES—See Labor; Liens

Exemption from garnishment.... 680-2

WAR

Levying, what constitutes..... 2318
Limitation on actions by aliens suspended 171

WARDS—See Guardian and Ward; Probate Code

WAREHOUSEMEN

Lien for advance and storage charges 1191
sale to satisfy.....1192, 1193
livestock or perishable property, when sold..... 1193
notice, how given 1196
proceeds, how applied 1194
special contract, effect of... 1195
Penalties, duplicate receipts, when misdemeanor 2646
fictitious receipts, penalty for issuing 2644

INDEX—VOL. I.

[References are to Sections.]

WAREHOUSEMEN (Cont'd).
 mixing goods fraudulently, penalty 2645
 refusal to give, penalty..... 2643

WARRANTS—See Arrest; Coroners; Process; Searches and Seizures; Sheriffs
 Death penalty, warrant for..2210, 2211
 Fugitive from justice.....2242, 2243
 Justice of peace, warrant for arrest, form 1935
 Search-warrant, form 1935
 dwelling, necessity.....2240-1
 issuance and execution....2237- 2240
 Surety of peace, form of warrant 1935

WASHINGTON'S BIRTHDAY
 Legal holiday..... 61

WASTE
 Actionable as other torts..... 937
 Administrator, etc., action by and against 1518
 Damages for 938
 in ejectment 799
 on dissolution of injunction... 737
 Eviction for 938
 Forfeiture of estate of tenant... 938
 Injunction against, on public land 941
 Leased premises, constitutes unlawful detainer 812
 Limitation on actions for..... 159
 Maintainable against whom..... 938
 Occupant under execution sale.. 601
 Tenant or guardian committing, liability 938

WATER COMPANIES
 Impure water, penalty for furnishing 2543
 Interference with appliances.... 2657
 Malicious injury to pipes and mains 2656

WATERS AND WATERCOURSES
 Closing channel an actionable nuisance 943
 Dams and reservoirs, injury to... 2658
 Malicious injury of dikes, etc.... 2656
 injury to flumes and ditches... 2656
 Obstructing, penalty..... 2656
 Placing dead animals in..... 2537
 Polluting water supply, penalty.. 2542
 Waterworks companies furnishing impure water, penalty..... 2543

WAYS—See Eminent Domain

WEAPONS—See Criminal Law

WEIGHTS AND MEASURES
 Use of false, penalty..... 2637

WHARVES AND WHARFAGE
 Lien on boats and vessels..... 1182

WHARVES AND WHARFAGE (Cont'd).
 Malicious injury to docks, quays, etc. 2656
 Wharfage charges, lien and sale for1191- 1196

WHOREDOM
 Action for falsely charging..... 294

WIDOW
 Action for death of husband, when 183

WIFE—See Husband and Wife

WILLS—See Descent and Distribution; Executors and Administrators; Probate Code
 Absentees, probate of.....1715-7
 Advancements by testator, decree to specify 1557
 effect of 1403
 After-acquired lands pass, when. 1411
 Annulment 1388
 Applications for probate or letters 1432
 Appropriation of estate to pay debts as provided by....1505, 1506
 Beneficiaries, false personation of, penalty 2374
 Bequest, not to discharge debt, when 1468
 Certificate of probate or rejection 1380
 Children of testator, effect of not naming in 1402
 Construction of, intent to govern. 1415
 words importing number and gender 1416
 Contest of validity..... 1385
 annulment of probate, effect... 1388
 executor not liable for previous acts 1388
 costs, how taxed..... 1389
 evidence admissible, burden of proof 1387
 interested parties to be cited.. 1386
 nonappearance, effect of..... 1385
 Contribution among legatees and devisees 1508
 enforcement by court..... 1508
 Death of devisee before testator, effect 1404
 Debts, not discharged by bequest, when 1468
 Defined 1414
 Deposit and custody of..... 1379
 Devises, who may make..... 1394
 for life, reversion of remainder of land, estate conveyed by... 1410
 to witnesses void, when..... 1408
 Devises and legatees, contribution among 1508
 liability for debts..... 1507
 Dispensing with intervention of courts, effect..... 1462
 Evidence, admissible, burden of proof 1387

INDEX—VOL. I.

[References are to Sections.]

WILLS (Cont'd).

Execution of, who may make....	1394
signer of testator's name must	
subscribe as witness.....	1397
witnesses to will.....	1395
writing and signing.....	1395
Executor's acceptance or renun-	
ciation, how	1417
debt, not discharged when.....	1468
liability for neglect to probate	1379
Failure to produce, damages and	
penalty	1379
Foreign, how proved.....	1392
proceedings after probate.....	1393
Jurisdiction and powers of supe-	
rior court	1371
records to be kept.....	1372
Legacies, sale or mortgage of land	
to pay	1505
of debt or demand, void when.	1468
Legatees and devisees may be sub-	
jected to debts.....	1507
Loss by execution sale, refunding	
of shares	1412
enforcement of contribution for	1413
Lost or destroyed, how established	1390
decree, what must show.....	1390
Mortgage to pay legacies.....	1507
Nonintervention wills	1462
inventory	1462
notice to creditors.....	1462
order of distribution.....	1462
powers of executors.....	1463
removal of executor.....	1462
right to possession.....	1464
solvents' estates, sales.....	1462
Nuncupative, when valid.....	1406
of mariner or soldier, good....	1406
proof, how and when to be made	1407
Probated in what county....	1376-1377
Production by executor named,	
when	1379
Proof where one witness dead, in-	
sane or absent	1382
where all witnesses dead, etc...	1382
Recording	1383
Records, admissible in evidence..	1384
Refunding legacies, when required	1412
enforcement by court.....	1413
Revival of canceled will not ef-	
fected by revocation later..	1405
Revocation of written, how ef-	
fected	1398
contract to convey estate does	
not revoke	1400
encumbrance or charge does not	
effect	1401
failure to name child, effect of	1402
second will, when revives first..	1405
subsequent marriage revokes,	
when	1399
Sale to pay legacies.....	1505
Setting aside of, revokes letters.	1388
Term construed	1414
Testimony reduced to writing and	
certified	1380
Title to realty vests in devisee,	
when	1409, 1411

WILLS (Cont'd).

Witnesses—

devises to, when void.....	1408
handwriting to be proved.....	1382
testimony by deposition, when.	1381
when may take devise.....	1408

WITNESSES — See Criminal Law (perjury); Depositions; Evidence

Abortion, testimony compulsory.	2451
Acceptance of bribe, penalty....	2324
Attachment for	1221
how directed and executed....	1222
Attendance compelled, when.....	1215
before arbitrators compulsory..	426
notaries, etc., on taking depo-	
sitions, superior court may	
compel	1236-1238
court commissioner may compel	85
judicial officers may compel....	57
power of court to compel.....	52
prevention of, penalty.....	2363
right of accused to compel....	2307
Attorney not allowed fees as....	502
Bribery of, penalty.....	2323
Competency, attorney, when in-	
competent	1214
bribery, person guilty of.....	2330
compulsory	2291
convicts	2290
criminal anarchy, self-crimina-	
tion not to excuse.....	2568
dueling, self incrimination, ef-	
fect	2423
husband and wife, when.....	1214
infants under ten years incom-	
petent	1213
insane or demented persons in-	
competent	1213
interest not to disqualify.....	1211
excludes testimony, when....	1211
intoxicated persons at time of	
trial incompetent	1213
minister of gospel, when incom-	
petent	1214
perjury conviction of, disquali-	
fies	1212
commitment for.....	2359
persons disqualified.....	1214
physician or surgeon.....	1214
public officer.....	1214
who may testify.....	1210
Contempt, what constitutes.....	1049
Convicts, competency and credi-	
bility	2290
deposition of	1223
order for production to take tes-	
timony	1223
affidavit necessary	1224
Credibility, effect of interest....	1211
conviction of crime affects....	1212
Criminal prosecutions—	
accused as witness.....	2148
instructions by court.....	2148

INDEX—VOL. I.

[References are to Sections.]

WITNESSES (Cont'd).

attendance compelled	2148
detention in custody.....	2148
per diem allowance.....	2148
indorsement of names on indictment	2043
indorsement on informations...	2050
recognizances of witnesses.....	2148
Deceased, certified testimony admissible	1247
Eminent domain, nonattendance and perjury, penalties...895,	926
Fees and mileage, amount.....	497
allowance dependent on reporting	498
may demand in advance.....	507
must be reported to clerk.....	482
public officers, no allowance, except	499
Gaming, competency of player or better	2480
Habeas corpus, attendance compelled	1078
Incompetent, who are.....	1213
Incriminating testimony, compulsory, not to be used.....	2291
perjury in giving, punishable..	2291
Interrogatories to adversary, filing of	1226
answers, service and filing of..	1227
rebuttal	1229
refusal of party to testify, penalty	1230
service of	1227
Juror as	348
Justices' courts.....1898-	1906
Legislative investigations, refusal to testify, penalty.....	2338
Liability for nonattendance.....	1220
Mileage, traveling expenses in lieu	509
Oath of, form.....1265-	1268
administration by arbitrators.	426
Parties may be examined as.....	1225
notwithstanding filing of interrogatories	1228
rebuttal	1229
refusal to testify, penalty....	1230
Perjury, incompetency no defense	2355
Perpetuation of testimony—See Evidence	1249-1253
Person present without subpoena required to testify.....	1219
Recognizance for appearance.1959-	1961
action on.....	1965
commitment for failure to give	1962
Right to meet face to face.....	2306
Subpoena issued when.....	1217
books and documents, how obtained	1216
duces tecum.....	1216
issued by whom.....	1217
service of	1218
proof, how made.....	1218
Supplementary proceedings, no excuse from testifying.....	632
immunity from criminal prosecution	632

WITNESSES (Cont'd).

Tender of fees in civil cases, when demandable	1215
Testimony by deposition.....1231-	1248
before legislature, refusal to give	2338
Wills, execution of.....1379-	1382
devises under.....	1408
WOMEN—See Criminal Law; Husband and Wife; Labor	
Abduction for prostitution or sexual intercourse.....	2439
Attorney, may act as.....	128
Compelling marriage or defilement	2438
Corrupt, corruptly.....	2303
Employing in saloons, etc., penalty	2689
Exempt from jury duty, how....	95
from jury list.....	96
Indecent assault on.....	2442
Intoxicating liquors, sale to....	2689
Placing in house of prostitution.	2440
Seduction, may sue for	186
marriage as defense.....	2441
penalty	2441
Sexual crimes against.....2435-	2442
Slander of, penalty.....	2433
corroboration necessary.....	2434

WOMEN'S INDUSTRIAL HOME AND CLINIC

Appropriation	2003
Board of directors, appointment and pay	1989
management of institution.....	1993
Buildings, construction plans and contracts	1991
Children of inmates.....	2002
Commitments, term of confinement	1996
Discharge of inmates.....	2001
Escapes, arrest and discipline....	1999
Establishment of home.....	1988
Officers, appointment and compensation	1993
Opening of institution.....	1991
Parole and discharge.....	1997
violation, rearrest.....	1998
Partial invalidity.....	2004
Persons committed.....	1996
Physical examinations.....	1996
Physician	1995
Reports, annual.....	1993
Sentences	1996
indicted, indictment.....	2303
Site, acquisition.....	1990
Superintendent, bond and compensation	1994
deputies and clerks.....	1995
duties	1995
Transfers to other state institutions	2000
from state school for girls.....	1992

WOODS AND FORESTS—See Forests and Forest Fires

INDEX—VOL. I.

[References are to Sections.]

WORDS AND PHRASES

Accessory after the fact.....	2008
Actual bias	329
Attorney	118
Boat	2303
Bond	2303
Break	2303
Bribe	2321-4
Building	2303
Certiorari	1001
Challenge for cause.....	326
peremptory challenge	325
Construction, when used in in- dictments, etc.	2063
Counsel	118
Counterclaim	265
Credit	2601-2
Criminally insane	2173
Daytime	2303
Delinquent child.....	1987-1
Dependent child	1987-1
Dwelling house	2303
Enter	2303
Exception	381
Folio	500
Forcible detainer	811
Forcible entry	810
Gender	148, 1208, 1416, 2303
Grand jury.....	91
Head of a family.....	553
Heirs	1369
Homestead	528
Householder	565
Implied bias.....	330
Information	2303
Intervention	202
"Issue" of decedent	1354
Issues	309
Judge	2303
Judgment	404
Judicial officer	54
Juror	2303
Jury, grand jury, petit jury.89, 91, of inquest	92 93
Knowingly	2303
Legal owner	788
Lumber	1163
Magistrate	50
Malice, maliciously.....	2303
Mandamus	1013
Material allegations	298
Mental irresponsibility	2173
Month	149
Motion	405
Neglect, negligence.....	2303
New trial	398

WORDS AND PHRASES (Cont'd).

Night-time	2303
Nuisance	943
Number	148, 1208
Officer	147, 2303
Owner	2303
Person	146, 1208, 2011, 2303
Personal property.....	2303
Petit jury	92
Presentment	2049
Prison, prisoner.....	2303
Prohibition	1027
Property	2303
Prosecuting attorney.....	113
Public officer.....	2303
Public use.....	905
Railway, railroad.....	2303
Real estate.....	1354
Real property.....	2303
Receiver	740
Referee	82
Representatives	462 (4)
Signature	2303
Set on fire.....	2575
Sex	148
Sheriff	679
Subsequent purchaser or encum- brancer	243
Trial	312
Trustee of express trust.....	180
Unlawful detainer.....	812
Vagrants	1967
Verdict, general and special.....	362
Will	1414
Writing	1208, 2303

WORK AND LABOR—See Labor

WORSHIP

Disturbing, penalty.....	2498, 2499
--------------------------	------------

WRIT OF RESTITUTION — See Restitution

WRITS—See Attachment; Certio- rari; Execution; Garnishment; Habeas Corpus; Mandamus; Process; Prohibition

Service by telegraph.....	254
---------------------------	-----

WRITTEN INSTRUMENTS—See Frauds, Statute of

Certified copies as evidence.....	1260
Evidence of, without proof of gen- uineness, when	1263
Pleaded, how.....	284